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¹Died March 4, 1899.

²Appointed March 23, 1899, to succeed Henry C. Miller, deceased.

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ELLIS v. STATE.

(Supreme Court of Alabama. Feb. 11, 1899.)

ASSAULT WITH INTENT TO MURDER—PREVIOUS DIFFICULTY—MALICE—INSTRUCTIONS—EVIDENCE—REASONABLE DOUBT—CONSPIRACY.

1. On a prosecution for assault with intent to murder, evidence of a previous difficulty with the person assaulted, tending to show malice of the accused in making the assault, is competent.

2. An accused, on cross-examination of a witness who testifies that he saw two sets of men's tracks in a field where a previous difficulty was shown by the prosecution to have occurred, may show the size and shape of the tracks, in rebuttal of the evidence as to the difficulty.

3. An instruction that an accused, answering a charge of crime by plea of self-defense, must, to be acquitted, be "entirely free from fault in bringing on the difficulty," is not erroneous, since the word "entirely" exacts no higher degree than the expression "free from fault."

4. A definition of "reasonable doubt" as "doubt for which a reason may be assigned" is correct.

5. Where, on a prosecution for assault with intent to murder, there is evidence to prove and disprove a conspiracy between accused and another, an instruction that, to convict, it was not necessary for the jury to find that there was such a conspiracy, is proper.

6. An instruction that if the sole purpose actuating accused to stab a person was revenge for a wrong previously done him, whether real or fancied, the act was done with malice, is not erroneous, where the stabbing is not denied, and there is evidence that it was done for revenge.

7. Passion engendered by mere words, or by information communicated by another, will not serve to reduce a felonious assault to a simple assault.

Appeal from city court of Montgomery; A. D. Sayre, Judge.

John Ellis was convicted of assault with intent to murder, and he appeals. Reversed.

On the trial of the case, the state introduced as a witness one Jack White, who testified that, a short time before he appeared before the grand jury that found the indictment against defendant, the defendant attacked him, and stabbed him several times with a knife; that the facts of the difficulty were as follows: He was going along the public road with several other persons, and as he approached the defendant he was standing near

the side of the road; the latter beckoned to him to stop; that, as he (the witness) went up to the defendant, the defendant grabbed him with one hand, and began to stab him with a knife which he held in the other, saying to him that "you told Mr. Chestnut"; that the witness did not offer to strike the defendant, and had no weapon of any sort in his hand; that, as the defendant was stabbing him, Jim Williams came up, and, pointing a gun at the witness, told the other people to stand back, and not to interfere. The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give the same as asked: "If the defendant attacked Jack White unlawfully, but made such attack, not from malice aforethought, but from passion aroused by recent knowledge that Jack White had falsely accused him of a felony, you may look at this to determine the grade of offense committed by defendant."

Joseph Callaway, for appellant. Charles G. Brown, Atty. Gen., for the State.

DOWDELL, J. The appellant was tried and convicted on an indictment for an assault with intent to murder. Upon the trial the state introduced testimony tending to show the felonious character of the assault. Jack White, the assaulted party, among other things, testified as follows: "What started the trouble was this: The night before the difficulty, I was watching a field for Mr. Chestnut, as for several nights previous to this some person or persons had been stealing from it. While I was so watching, I saw Jim Williams and defendant stealing from this field, and shot at them. In reply, defendant snapped a cap at me. After this, both ran off. The next day, I told Mr. Chestnut what happened in the field the night before." This testimony, no doubt, was offered to prove a previous difficulty, and as tending to show malice on the part of the defendant in making the assault for which he was on trial, and for that purpose was competent.

On the cross-examination by the defendant of the state's witness, Mr. Chestnut, the defendant sought to show by the witness, who

stated on the cross-examination that he had seen two sets of men's tracks in the field where Jack White said he shot at defendant, the size and shape of those tracks; and this the court refused to allow, on objection made by the state. We think this evidence was competent, on the line of being in rebuttal of the evidence offered by the state as to the previous difficulty. If the size and shape of the tracks had shown them such as not to have been made by defendant, this would have shown that the defendant was not the party shot at by Jack White, and was clearly in rebuttal of the evidence as to the previous difficulty. The court erred in refusing to allow the defendant to make this proof.

The bill of exceptions states in general terms that the testimony introduced in behalf of the defendant tended to show that defendant acted in self-defense. In the course of its general charge to the jury, in describing the necessary elements of self-defense, the court charged the jury as follows: "The law does not institute any comparison for the purpose of ascertaining the relative fault of the accused and the person assaulted; but it says that the accused who answers a charge of crime by the plea of self-defense must, in order to be acquitted on that ground, be entirely free from fault in bringing on the difficulty." To that part of the foregoing which is in the words, "but it [the law] says that the accused who answers a charge of crime by the plea of self-defense must, in order to be acquitted on that ground, be entirely free from fault in bringing on the difficulty," the defendant then and there duly excepted, stating the ground of the exception to be that the law does not qualify the freedom from fault, but says that the defendant must be free from fault. The exception and objection of the appellant goes to the use of the word "entirely," employed by the court in its charge. It is contended by counsel for appellant that this is contrary to the decisions of this court, wherein it has been said that, under the plea of self-defense, a charge requested by the defendant, which, by its language, qualified the freedom from fault on the part of the defendant, was properly refused. We cannot agree to this contention of appellant's counsel. Upon an examination of those cases, it will be found that the language of the charges requested did qualify this important element and principle of the law of self-defense, and with the tendency, if not the purpose, to fix degrees of defendant's freedom from fault in bringing on the difficulty. The language employed by the court in this case in the general charge exacted no higher degree than is imported by the expression "free from fault." In its final analysis, without being hypercritical, the only just and reasonable construction of the language employed in the charge is that it means "free from fault," nothing more nor less. Besides, the trial court was not without precedent in authorities in the employment of the word "entirely" in the connection in which it was used. In *Bell v.*

State, 115 Ala. 39, 22 South. 530, this court, in commenting on a charge, used the following language: "Charge 20 does not sufficiently hypothesize the defendant's freedom from fault in bringing on the difficulty. If he made the declaration testified to by the witness, Jim Tom Childress, as the deceased and others approached defendant, it was a circumstance to be considered by the jury in determining whether or not defendant was *entirely* free from fault." (The italics are ours.) In *Crawford v. State*, 112 Ala. 29, 21 South. 223, speaking of this element of self-defense, Brickell, C. J., uses the following language: "The defendant must have been free from *all* fault or wrongdoing on his part, which had the effect to provoke or bring on the difficulty." (The italics ours.) See, also, *Rains v. State*, 88 Ala. 91, 7 South. 315.

The court, in its oral charge, in defining a reasonable doubt, stated that "a reasonable doubt is a doubt for which a reason may be assigned"; and this was excepted to by the defendant. This definition has been several times decided by this court to be correct, and we adhere to those decisions. *Hodge v. State*, 97 Ala. 37, 12 South. 164; *Walker v. State* (Ala.) 23 South. 153.

There was testimony on the part of the state tending to show a conspiracy between defendant and one Jim Williams to commit the offense charged in the indictment, and testimony on the part of defendant tending to disprove any conspiracy. In their arguments to the jury, counsel for the state contended that a conspiracy was proven, while counsel for defendant contended that the evidence did not warrant such conclusion. The court, in its general charge, instructed the jury that, in order to convict the defendant, it was not necessary for them to find that there was a conspiracy between defendant and Jim Williams. To this part of the general charge the defendant duly excepted. There is nothing in the exception. The charge was eminently proper and correct.

The court further, in its general charge to the jury, said: "'Malice,' as used here, does not necessarily mean personal ill-will or hatred; yet, if the sole purpose actuating defendant to stab Jack White was to get revenge for some wrong previously done him, whether real or fancied, then the law would consider the act as done with malice." The court then defined "legal malice." To that part of the foregoing charge beginning with the word "yet," the defendant excepted. The stabbing of Jack White by defendant was not denied, and there was evidence tending to show that it was done for revenge. We think the charge was free from error.

The written charge requested by the defendant was very properly refused. It is not only argumentative, but it also fails to correctly state the law. Passion engendered by mere words will not serve to reduce the felonious assault to an assault and battery

or simple assault, and the same rule obtains as to information communicated by others.

For the error pointed out, the judgment of the city court is reversed, and cause remanded.

(120 Ala. 523)

McCARVER v. HERZBERG.

(Supreme Court of Alabama. Dec. 2, 1896.)

JUDICIAL NOTICE — RESOLUTION OF GENERAL ASSEMBLY — RAILROAD LAND GRANT — TITLE OF STATE — CONFLICTING GRANTS — FORFEITURE — CANCELLATION — ACKNOWLEDGMENT.

1. Courts take judicial notice of a joint resolution of the general assembly as a public legislative act.

2. Act Cong. June 3, 1856, granting lands to Alabama in aid of certain railroads, and providing that the lands granted by it should be exclusively applied in the construction of the road for which they were granted, and that if any of the roads were not completed within a stated time the lands granted for them should revert to the United States, vests the title of such lands in the state of Alabama from the date of said act, in trust for the railroads for whose construction they were granted, without power to dispose of them in aid of any other railroad.

3. Under Act Cong. June 3, 1856, granting to Alabama lands in aid of certain railroads, three different companies each became entitled to the same tract of land by reason of its being within the limits of the grant of each. *Held*, that the grant was of equal undivided shares for the benefit of each railroad, regardless of the priority of location or construction of any of them.

4. Where, by reason of overlapping grants to other companies, a railroad company is entitled to only a moiety of a tract of land granted by the United States in aid of its construction, the forfeiture by the other companies of their shares of the tract does not entitle the company which earned its grant to the entire interest; and Acts 1882-83, pp. 62-66, vesting persons therein named with the title to a tract of land within the limits of the land grants of each of three railroad companies, two of which forfeited their grants, passes the title to the share of the company which earned its tract only, and is a nullity as to the rest.

5. On an issue whether a railroad land grant had been canceled as to certain lands, a notice by the United States land commissioner to the register and receiver of a local United States land office of the cancellation of a list of lands selected by the railroad company under the grant is inadmissible, if unaccompanied by evidence showing the lands in controversy to be affected by the cancellation.

6. An acknowledgment before a judge of probate, the venue of which only gives the name of the state, is valid, because prima facie it was executed within the state, and it is presumed that the judge of probate, of whom, and of whose term of office, the court takes judicial notice, took it within the limits of his county.

Appeal from city court of Gadsden; John H. Disque, Judge.

Ejectment by H. Herzberg against W. W. McCarver. The cause was tried by the court without the intervention of a jury, and upon the hearing of all the evidence the court rendered judgment for the plaintiff for the entire title in and to all the lands sued for. To the rendition of this judgment the defendant duly excepted. The defendant appeals, and assigns as error the rulings of the court upon the evi-

dence to which exceptions were reserved, and the rendition of judgment in favor of the plaintiff. Reversed.

James Aiken, for appellant. Denson, Burnett & Cull, for appellee.

PER CURIAM. The lands in controversy are a part of the lands granted to the state of Alabama by the act of congress approved June 3, 1856, to aid in the construction of certain railroads, by the terms of which there was granted to the state for this purpose "every alternate section of land designated by odd numbers, for six sections in width on each side of each of said roads." One of these roads was to run "from near Gadsden to some point on the Alabama and Mississippi state line, in the direction of the Mobile & Ohio Railroad, with a view to connect with said Mobile & Ohio Railroad"; and by a joint resolution of the general assembly of Alabama, approved January 30, 1858, the lands granted to aid in the construction of this road were granted to the Northeast & Southwest Alabama Railroad Company, which afterwards, by authorized consolidation with the Wills' Valley Railroad Company, became the Alabama & Chattanooga Railroad Company. Another of these railroads was to run from Selma to Gadsden; and, by an act of the general assembly approved January 20, 1858, the lands granted by the act of congress to aid in the construction of this road were granted to the Alabama & Tennessee Rivers Railroad Company, which afterwards became the Selma, Rome & Dalton Railroad Company. And still another of these roads was to run "from or near Gadsden to connect with the Georgia and Tennessee line of railroads, through Chattanooga, Wills', and Lookout valleys"; and by an act of the general assembly approved February 8, 1858, the lands granted by the act of congress "in aid of the construction of a railroad from or near Gadsden to some suitable point so as to connect with the Western & Atlantic Railroad of the state of Georgia, designated in said act of congress as running from 'Gadsden to connect with the Georgia and Tennessee line of railroads, through Chattanooga [Chattooga?], Wills' and Lookout valleys,'" were granted to the Coosa & Chattanooga (Chattooga?) Railroad Company. Each of these several grants was made subject to the conditions and restrictions, and for the purposes specified, in the act of congress.

The testimony shows that the lands in controversy are situated within the six-miles limit of each of the above-named railroads, according to the original survey and location thereof on file in the general land office at Washington; and that the Alabama & Chattanooga Railroad was completed in 1873; no part of the Coosa & Chattanooga Railroad was ever constructed; and the Alabama & Tennessee Rivers Railroad was constructed only to Jacksonville, a point 22 miles distant from the lands sued for. On September 29, 1890,

an act of congress was approved by which it was declared that "there is hereby forfeited to the United States, and the United States hereby resumes title to, all lands heretofore granted to any state, or to any corporation in aid of the construction of any railroad opposite to and coterminous with the portion of any such railroad not now completed and in operation, for the construction and benefit of which said lands were granted." The joint resolution of the general assembly relating to the lands granted to the state in aid of the construction of a railroad from Gadsden to some point on the Alabama and Mississippi state line, to connect with the Mobile & Ohio Railroad, was not offered in evidence, so far as the record shows. But that is not of importance; the resolution is a public legislative act, of which courts take notice. The title acquired by the state was conveyed to John Swann and John A. Billups, as trustees, with power to sell, by the deed of the governor of Alabama made February 8, 1877, in pursuance of an act of the legislature authorizing the same. It is through two deeds executed by said Swann and Billups, as trustees,—one dated June 1, 1877, conveying the N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, and the other dated May 30, 1877, conveying the S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$,—that plaintiff claims title to the land in controversy. The defendant claims title under a homestead entry made in the year 1894, after the passage of the forfeiture act above mentioned. It is manifest, therefore, that the determination of the superiority of these respective claims must depend upon the extent of the power of the state to dispose of the lands lying within the conflicting or overlapping six-miles limits of these three roads, on the one hand, and, on the other, upon the extent of the power of congress to declare such lands forfeited, and the effect of the exercise of this power.

The act of congress of June 3, 1856, as frequently construed by this and other courts, vested in the state the right and title to the lands embraced in the grant from the date thereof, which right and title, when the line of each road was definitely fixed, attached to the specific sections, designated by odd numbers, lying within six miles on each side of the fixed line of the road. The granting act, however, provided that "if any of said roads is not completed within ten years, no further sale shall be made, and the lands unsold shall revert to the United States." This provision constituted a condition subsequent, for the breach of which, by the failure to complete either of the roads within the time limited, the United States had the right, at any time thereafter, either by judicial proceedings or by legislative action, to enforce a forfeiture of the lands granted in aid of the construction of such road, and to resume the title thereto. *Swann v. Lindsey*, 70 Ala. 507; *Swann v. Miller*, 82 Ala. 530, 1 South. 65; *Schulenberg v. Harriman*, 21 Wall. 44. By the acceptance of the grant, the state became the trustee of the United States, and as such

its application and power of disposition of the lands was limited to the purposes expressed in the act creating the trust. The act of congress was a law, as well as a grant, and any application or disposition of the lands by the state in violation of the terms of the act was absolutely void. One of the express provisions of the grant, by which the power of the state to use or dispose of the lands was limited, was "that the lands hereby granted for and on account of said roads, severally, shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted." In the execution of the trust, therefore, the state had no power to apply or dispose of, to aid in the construction of one railroad, lands which had been granted to it exclusively in aid of the construction of another road, and any attempt on the part of the state to vest in one railroad title to lands granted for and on account of another would be a mere nullity, and inoperative to defeat the right of the United States, in the event of the failure to construct the latter road, to enforce a forfeiture of the lands granted in aid of its construction, and to resume title thereto.

As we have said, the lands in controversy are within the six-miles limit of the surveyed line of each of the three railroads above named. In construing this and similar acts of congress, granting public lands in aid of the construction of railroads, it has become thoroughly well settled that when, by the same statute, several grants are made for the benefit of different railroads, neither priority of location nor priority of construction gives priority of right; but where two or more roads, legally located in pursuance of the act, cross each other, or approach each other so nearly that the limits of the primary grant for the benefit of each overlap, the grant is of equal undivided shares for the benefit of each road. *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 720, 5 Sup. Ct. 334; *Sioux City & St. P. R. Co. v. Chicago, M. & St. P. Ry. Co.*, 117 U. S. 406, 6 Sup. Ct. 790; *Iron Co. v. Cunningham*, 155 U. S. 354, 15 Sup. Ct. 103; *Chicago, M. & St. P. Ry. Co. v. U. S.*, 159 U. S. 372, 16 Sup. Ct. 26. Hence, while the act of congress of June 3, 1856, vested in the state the entire interest in all the lands embraced in the grant lying within the six-miles limit of each legally located road, yet the state, by the terms of the act, acquired an undivided one-third interest in the lands in controversy, in trust to apply the same exclusively to aid in the construction of the railroad from Gadsden to the Alabama and Mississippi state line to connect with the Mobile & Ohio Railroad; and another undivided one-third interest, in trust to apply the same exclusively for the benefit of the railroad to be built from Selma to Gadsden; and the remaining undivided one-third interest, for the exclusive benefit of the road from Gadsden to connect with the Georgia and Tennessee line of railroads

through Chattooga, Wills', and Lookout valleys. Holding these interests under such express trusts, the state was wholly without power to divert them to other or different purposes, or to apply either share for the benefit of any railroad other than that for and on account of which it was granted, notwithstanding the latter road may never have been constructed or completed. In *Chicago, M. & St. P. Ry. Co. v. U. S.*, supra, it was said: "The grant of an equal undivided moiety of lands in the overlapping limits of two roads was a grant for the benefit of each road in the particular moiety of lands dedicated by the act of congress to its construction. Neither road could get the benefit of the moiety of lands granted for the building of the other road, by reason of the failure of the company constructing the latter road to earn its moiety of the lands. This results from the explicit declaration by congress of the purposes for which the lands were to be used, and, by express words, excluding all others. The provision that the lands 'hereby granted shall be disposed of by said state for the purposes aforesaid only' precludes the idea that the state could, without a breach of trust, apply lands for the benefit of one railroad that had been granted to aid the construction of another road." Hence, the act of the general assembly of Alabama approved February 20, 1883 (Acts 1882-83, pp. 62-66), which was offered in evidence by plaintiff, in so far as it was an attempt to vest in John Swann and John A. Billups, as trustees, to whom had passed by the governor's deed the title to the lands granted in aid of the construction of what is now the Alabama & Chattanooga Railroad, the title to the interests which had been granted to the state to be applied exclusively for the benefit of the other two railroads, was a mere nullity, and did not operate to vest any title in said trustees, or to defeat the right of the United States to enforce the forfeiture as to these interests and resume title thereto.

From what has been said, it clearly results that Swann and Billups never acquired title to more than an undivided one-third interest in the lands in controversy, either by the deed of the governor of the state or by the act of the general assembly above referred to, and that plaintiff acquired no greater interest through the deed of Swann and Billups. It further results that, by reason of the failure to construct the railroad from Gadsden through Chattooga, Wills', and Lookout valleys, to connect with the Georgia and Tennessee line of railroads, and the failure to complete the railroad from Selma to Gadsden to the lands in controversy, an undivided two-thirds interest in the lands became subject to the reverter clause of the original granting act; and, being lands lying opposite to and coterminous with the uncompleted portions of these two roads, they were within the operation of the forfeiture act of September 29, 1890, and the title to

said undivided two-thirds interest was, by force of said act, resumed in the United States. But the other undivided one-third interest in said lands, having been earned by the completion of the Alabama & Chattanooga Railroad, congress had no power to declare forfeited, and it was not, in fact, included in the terms of the forfeiture act. By his homestead entry, in 1894, the defendant, therefore, acquired a right to said undivided two-thirds interest, superior to that of plaintiff. The duly-certified copies of defendant's homestead application, and of the receiver's certificate of entry, or receipt, were admissible in support of this right, and the trial court erred in excluding them. The certified copy of the official letter from the commissioner of the general land office to the register and receiver at Huntsville, notifying the latter of the cancellation of list 2 of lands selected by the Alabama & Chattanooga Railroad Company, filed May 13, 1885, would, perhaps, have been competent evidence, if accompanied by evidence tending to show that the lands in controversy were affected by the cancellation. *Holmes v. State*, 108 Ala. 24, 18 South. 529. But no such evidence was offered, and there is nothing in the letter itself to indicate to what particular lands it referred. On its face, therefore, the letter was irrelevant, and was properly excluded on a general objection.

To the introduction of the deed from Swann and Billups, trustees, to plaintiff, the defendant objected, on the ground that its execution by John A. Billups had not been proven, and it was not acknowledged by him as required by law. The certificate of acknowledgment reads: "The State of Alabama, County of —, I, T. G. WILLIAMS, judge of probate, hereby certify that John A. Billups, whose names are signed to the foregoing conveyance," etc.; the remainder being in the plural form of the acknowledgment prescribed by the statute. There is nothing either in the caption or in the body of the acknowledgment, or in the signature of the officer, to indicate in what county it was taken and certified, nor is there anything in the deed or caption thereof, as copied into the record, to indicate in what county it was executed; and for this reason it is insisted the acknowledgment is invalid. It is the policy of the law to uphold certificates of acknowledgment when it is possible to do so, and not to permit conveyances to be defeated by mere technical objections to the certificate, if the substance thereof complies with the form prescribed by the statute. For this purpose courts will, in proper cases, resort to well-founded presumptions, and to those rules of evidence which require them to take judicial cognizance of certain facts not affirmatively proven. Courts will, for instance, take judicial notice of the various commissioned officers of the state, and of their official signatures, the extent of their authority, the dates of their commissions,

and the date of the expiration of their respective terms of office. *Cary v. State*, 76 Ala. 78; *Sandlin v. Anderson*, Id. 403. The venue of the acknowledgment as stated was simply "The State of Alabama." This is prima facie evidence that the acknowledgment was taken and certified by the officer within this state, and we judicially know that T. G. Williams was, at the time of the acknowledgment, probate judge of Pickens county. We know, then, that the acknowledgment was taken in this state by an officer authorized by statute to take and certify acknowledgments within the territorial area of his county. We may therefore indulge the presumption, in favor of the regularity and validity of official acts of this character, that the officer exercised his functions in this particular case within the limits of his territorial jurisdiction,—that is to say, in Pickens county. A precisely similar acknowledgment was upheld in *Carpenter v. Dexter*, 8 Wall. 528, in which it was said: "The words, 'State of New York,' present some definite locality. * * * The commissioner of deeds in New York had authority to act only in his county; and it will be presumed, although the state be named, that the officer exercised his office within the territorial limits for which he was appointed." See, also, *Rackleff v. Norton*, 19 Me. 274; *Bradley v. West*, 60 Mo. 33; *People v. Snyder*, 41 N. Y. 397. The acknowledgment was sufficient, and, the deed having been recorded within 12 months from the date of its execution, was admissible in evidence without proof of its execution. Code 1896, § 992. The evidence, as presented in the record, shows title in the plaintiff to only an undivided one-third interest in the land sued for, and the court below erred, therefore, in rendering judgment in plaintiff's favor for the entire interest. Reversed and remanded.

The foregoing opinion was prepared by Hon. ROBERT C. BRICKELL, late chief justice, before his retirement from the bench, and was adopted by the present court.

(120 Ala. 295)

LINEHAN v. STATE.

(Supreme Court of Alabama. Jan. 10, 1899.)

MURDER—INDICTMENT—CONVICTION FOR LESSER OFFENSE—APPEAL—EVIDENCE—CONDUCT OF SOLICITOR—CONFESSIONS—DECLARATIONS IN INTEREST—INSTRUCTIONS—JUDGMENT—COSTS.

1. Under an indictment for murder, conviction may be had for manslaughter in the second degree.

2. Objections to evidence, to be available, must state specifically the grounds thereof.

3. Where accused testifies in his own behalf, it is competent to inquire on cross-examination as to his motives for particular acts relevant to the issues.

4. It is not objectionable for the solicitor to stand close to accused, who is a witness, and motion with his hands in illustration of a question asked.

5. It is incompetent, on cross-examination of

a witness testifying to confessions of accused, to inquire of him concerning another statement of accused made 20 minutes after the conversation containing the confession terminated, no connection between the two conversations being shown.

6. An independent declaration of accused, made 20 minutes after a confession, that he had "done nothing wrong, and wanted to come to court and stand his trial," is inadmissible, being a declaration in interest.

7. The evidence for the state tended to show that accused swore at deceased, who stepped down and towards accused. Accused used another opprobrious epithet towards him, and, when he was 15 feet away, drew his pistol, holding it by his side, and, when 8 or 10 feet away, accused shot at deceased, who turned to leave, and took two or three steps, when accused shot him again, killing him. Accused's evidence tended to show that deceased, as he advanced towards accused, put his hand to his hip pocket, and was pulling and jerking at something in his pocket when accused fired. Held, that the affirmative charge for accused was properly refused.

8. A judgment ordering accused to perform additional labor, not to exceed a certain time, at so much per day, until the costs are satisfied, is not a determination of the time necessary to work out the costs, as required by Code 1896, § 4532.

Appeal from circuit court, Walker county; James J. Banks, Judge.

John Linehan was convicted of manslaughter, and he appeals. Reversed.

The evidence introduced by the state tended to show that in Morgan county, Ala., before the finding of the indictment, the defendant, John Linehan, killed Allen Oakley, by shooting him with a pistol, and then tended to show that the killing was done under the following circumstances: One George Fram was to have a trial before the mayor of Carbon Hill. Oakley was the marshal of said town. The case was continued, and, when Oakley walked out on a small porch in front of the mayor's office, Linehan asked him why the trial had been put off. Oakley replied that he was running that court, whereupon Linehan told him that "he was running it in the hell of a way." Linehan stepped down from the porch, and put his hand in his hip pocket. Oakley told him to go off; that he wanted peace. Linehan then started up the street, and said, "Damn you, if you have not got peace, I will give it to you." Oakley told him that he must not curse him, and stepped down from the porch. When Linehan was about 15 feet from Oakley, he used a very opprobrious epithet towards him, and drew his pistol, and held it by his side; and, as Oakley advanced to within 8 or 10 feet from Linehan, Linehan turned, and shot at Oakley. Oakley then turned to leave, and took two or three steps, when Linehan shot again, striking Oakley in the shoulder blade, from which wound he died. The evidence for the defendant tended to show that, after Linehan used the opprobrious epithet to Oakley, Oakley stepped down from the porch, and put his hand to his hip pocket, and started towards Linehan, pulling and jerking at something in his pocket, and that then it

was that Linehan fired. The facts pertaining to the rulings of the trial court upon the evidence which are reviewed on the present appeal are sufficiently stated in the opinion. The bill of exceptions recites that, "during the examination of the defendant, the solicitor stood up in front of him, and near to him, and asked defendant 'If Oakley did not tell him to go on off, just before the shooting, and motion this way.' The solicitor had both hands raised, and motioned to go away." The defendant objected to the manner of the solicitor. The court overruled the objection, allowed the solicitor to proceed in the same manner, and to this ruling the defendant duly excepted. Upon the introduction of all the evidence, the defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "If the jury believe the evidence, they will find the defendant not guilty." (2) "The court charges the jury that, if the defendant relies on a justification of his acts partly by threats made against him by Allen Oakley before the killing, then such threats will be a justification of the killing, if the jury find from the evidence that deceased, at the time of the killing, was manifesting an intention of carrying such threats into execution, by a positive act then done, or that, from the acts of Allen Oakley at the time of the killing, it would have appeared to a reasonable mind, under the circumstances, that the deceased was attempting to execute the threats against defendant, and there was no reasonable means of escape without increasing the danger, and the defendant was not at fault in bringing on the difficulty." (3) "The court charges the jury that a person charged with murder, and who is not at fault in bringing on the difficulty, who seeks to justify himself on the ground of threats against his own life, is permitted to introduce such threats so made, and the same should be regarded as affording a justification for the killing, if it be shown that at the time of the homicide the person killed, by some act done, manifested an intention to execute the threats so made, or reasonably appeared to defendant to be so doing, if said threats had been previously communicated to this defendant, and it is shown that there was no reasonable means of escape without increasing the peril." After the return of the verdict, and before sentence, motion was made by the defendant in arrest of judgment, upon the grounds as stated in the opinion. This motion was overruled, and the defendant duly excepted.

Coleman & Bankhead, for appellant. Wm. C. Fitts, Atty. Gen., for the State.

DOWDELL, J. The defendant was tried and convicted of manslaughter in the second degree, under an indictment for murder. Motion was made by the defendant in arrest of judgment, "on the ground that the defendant,

as shown by the record in this case, was not on trial for manslaughter in the second degree." This motion was overruled by the court, and we have no doubt of the correctness of the ruling. There is nothing in the contention that a conviction for manslaughter in the second degree cannot be had under an indictment for murder. The charge in the indictment of the higher offense of murder includes the lower grades of homicide. Manslaughter in the second degree is an unlawful killing, and is necessarily included in an indictment for the higher offense of murder. The question raised by this motion is fully answered by the statute. Code 1896, § 5306. See, also, *Hudson v. State*, 34 Ala. 253; *Henry v. State*, 33 Ala. 389, the latter case overruling *Bob v. State*, 29 Ala. 20.

The defendant testified as a witness in his own behalf, and, upon his cross-examination by the solicitor, was asked if he put the pistol in his pocket, and followed Oakley (the deceased) down the street, the time the witness J. R. Cooper testified about. The defendant answered that he put the pistol in his pocket, and went down the street the same way Oakley had gone. The solicitor then asked the witness, "What did you get that pistol for?" The defendant objected to the question; the court overruled the objection, and required the witness to answer; and the answer was, "Just got it, and put it in my pocket." Motion was made by defendant to exclude the answer, which was overruled, and exception to the ruling reserved. The defendant further testified on cross-examination that he went down the street, and stood awhile, and went back, and put it (the pistol) up. The solicitor then asked the witness, "How came you to put the pistol up when you went back?" to which he answered, "Because Cooper said it was Naugher's pistol." This question and answer were also objected to by the defendant, and exception reserved to the action of the court in overruling the objection. The objections made to both of these questions were general, not specifying any ground, and for that reason were bad. *Gunter v. State*, 111 Ala. 23, 20 South. 632. But, apart from the generality of the objection, it was permissible upon a cross-examination of the defendant, when sworn as a witness in his own behalf, to inquire as to his motives for particular acts relevant to the issues, though it would not be competent for him to testify as to his motives as an excuse for his acts, upon his direct examination. If the evidence sought to be elicited by the question to the defendant was to show that the defendant had put the pistol in his pocket, and gone down the street the way Oakley, the deceased, went, for the purpose of using it on Oakley, and this was within the scope and purview of the question, then it was certainly competent. The case of *Burke v. State*, 71 Ala. 382, cited by counsel for defendant, does not contravene this proposition. In that case it was decided that

the defendant, testifying in his own behalf, could not on his direct examination tell his motives for certain particular acts of his; and there can be no doubt of the soundness of that decision, but the proposition, and the reasons therefor, are quite different when the adversary party, on a cross-examination, institutes an inquiry into the motives of the witness, who is a party to the suit, for particular acts of his which are themselves relevant to the issues.

There was nothing objectionable in the solicitor's standing up before the witness, and motioning his hands in illustration, when he asked the witness "if Oakley did not tell him to go on off, just before the shooting, and motion this way." See *Gunter v. State*, supra.

One Tesney, a witness for the state, testified to a conversation with defendant, in which defendant made certain confessions as to his guilt. On cross-examination, this witness was asked "if defendant did not say to him, about twenty minutes after the above conversation, that the defendant had done nothing wrong, and wanted to come to court and stand his trial." The question being objected to by the state, the objection was sustained, and defendant excepted. The court did not err in not permitting the question to be asked. There was nothing showing that it had any connection with or relation to the conversation which had terminated 20 minutes previously. It was simply an independent declaration in interest, and clearly inadmissible.

The written charges asked were properly refused. The first written charge was intended as the general affirmative charge, and should have been refused, if it had been correctly written, but it omits the word "find," which rendered it unintelligible as asked. The other two charges are faulty in several respects. They not only do not assert correct legal propositions, but are involved and misleading.

In accordance with the verdict of the jury, the court sentenced the defendant to 12 months' hard labor for the county of Walker, and, the costs not being presently paid, nor judgment confessed, as provided by the statute, made additional sentence to hard labor to pay the costs, the judgment as to costs being as follows: "It is further ordered and adjudged by the court that the defendant perform additional hard labor for the county of Walker, not to exceed eight months, as will be sufficient to satisfy the costs in the case, working at thirty cents per day." The court, by this sentence and judgment, failed to determine the time required to work out the costs. It is true the judgment says not to exceed eight months, and working at the rate of 30 cents a day; but this is not sufficient under, nor a compliance with, section 4582 of the present Code. That section provides that the court must determine the time required to work out the costs, and that must

be done whenever a convict is sentenced to hard labor for the county; and this determination of the time of hard labor for the costs should be shown in the judgment or sentence of the court. Such a judgment as the court rendered in this case was held by this court to be good, under the law of the Code of 1876, prior to the act of February 18, 1895, which enacted the present section 4532 into law, but there was no requirement then that the court should determine the time required to work out the costs at 30 cents a day. This is the only error contained in the record, and, on account of this omission in the sentence, the judgment of the circuit court will be reversed as to the sentence, and the cause remanded for further sentence by the circuit court as indicated above.

(120 Ala. 616)

SOUTHERN BUILDING & LOAN ASS'N v. McCANTS.

(Supreme Court of Alabama. Jan. 11, 1899.)

TRUST DEED — SATISFACTION — FAILURE TO DISCHARGE ON RECORD — PENALTY.

Civ. Code 1886, § 1869, provides that if, on satisfaction of a "mortgage," the holder thereof does not discharge it of record within three months after a written request by the mortgagor, the holder shall forfeit a penalty. *Held*, that the maker of a trust deed to secure a debt due to defendant cannot recover the penalty on defendant's refusal to satisfy the deed of record within three months after written request, as a trust deed is not a mortgage, within the statute.

Appeal from city court of Talladega; John W. Bishop, Judge.

Action by Jason S. McCants against the Southern Building & Loan Association. There was a judgment for plaintiff, from which defendant appeals. Reversed.

This action was brought to recover the statutory penalty of \$200, for failure to satisfy on the margin of the record of a deed of trust executed by the plaintiff and his wife to secure the indebtedness of plaintiff to the defendant, after having been requested by the plaintiff, in writing, to do so. The complaint originally filed contained two counts. The first count was stricken from the file at the request of the plaintiff. The second count averred the execution by the plaintiff of a written obligation for the payment of \$1,000 to the defendant, dated April 12, 1892, which is set out therein, and is, in substance, a bond in the sum of \$1,000 made by the plaintiff, and payable to the defendant, six years after date; reciting that the same was given on a loan to the plaintiff under his application, and on 10 membership shares in said association. It also sets out a copy of the deed of trust made by the plaintiff and his wife to a trustee, April 12, 1892, to secure such indebtedness, the same being made by the plaintiff and wife to Joseph Martin, as trustee, and his successors, conveying the property therein described to such Martin, as such trustee, and

his successors, to secure the indebtedness evidenced by said note or bond owing to the defendant, containing full powers of sale and for foreclosure, given to said trustee. The deed also provides for the appointment of a substituted trustee of the Southern Building & Loan Association in the event of the death, resignation, or removal of said Joseph Martin. The instrument is a strict deed of trust, conveying the property to Joseph Martin, the trustee therein named, to secure the plaintiff's indebtedness to the defendant, the defendant being the beneficiary in said deed of trust. Said count also avers that William H. Moore was regularly substituted as trustee, and, with the defendant, executed and delivered to the plaintiff a release and discharge of said deed of trust, and a quitclaim deed to the land therein conveyed to the plaintiff, reciting the full payment of the indebtedness secured by said deed of trust; such release and discharge being set out in full in the complaint, showing a full acknowledgment of the payment of such indebtedness, and being a quitclaim deed to such property to the plaintiff; the same being executed on October 6, 1896, by the defendant and by William H. Moore, substituted trustee, and being duly acknowledged as a deed. It is further averred that on December 9, 1896, the plaintiff requested, in writing, the defendant to enter the fact of payment and satisfaction of said mortgage or deed of trust on the margin of the record, and that the defendant failed to make such entry within three months. To the second count the defendant demurred, among others, upon the following grounds: (1) Said count does not show that the plaintiff ever executed to the defendant a mortgage; (2) said count shows that the instrument executed by the plaintiff was a deed of trust; (3) for that the deed of trust therein set out is not such a mortgage as that the failure to mark payment or satisfaction of the debt therein secured after demand, as in said complaint alleged, imposes a penalty on this defendant, or entitles plaintiff to maintain this action. This demurrer was overruled, and to this ruling the defendant duly excepted. The defendant filed two special pleas, to which demurrers were sustained, and issue was joined on the plea of the general issue. Upon the trial of said cause, the plaintiff introduced in evidence the deed of trust (a copy of which was set out in the complaint) executed by the plaintiff and wife to Joseph Martin, as trustee, to secure the plaintiff's indebtedness to the defendant, hereinbefore described. The defendant objected to the introduction of such conveyance in evidence, on the ground that the same was a deed of trust, and not a mortgage. The court overruled such objection, and admitted the same in evidence, to which the defendant duly excepted. The plaintiff also introduced the release and discharge of such indebtedness, and of said deed of trust executed by the defendant and W. H. Moore, the substituted trustee, on October 6,

1896, a copy of which is set out in the complaint. To the introduction of this paper there was no objection. Plaintiff also introduced in evidence a letter of defendant dated October 6, 1896, acknowledging receipt of \$374.62 balance, in discharge of his indebtedness to the association, also inclosing original note and deed of trust, abstract of title, policy of insurance, together with the release from the association to him; and also introduced in evidence a certain check certified by the cashier of the Isbell National Bank for \$374.62, dated October 3, 1896, which was duly marked "Paid" and indorsed by the defendant. Of the fact of payment of the indebtedness secured by the deed of trust there was no dispute. Plaintiff also introduced in evidence a copy of a letter written by him to defendant December 9, 1896, demand having been made for the production of the original. Such letter being, in substance, a request to enter the fact of payment and satisfaction on the margin of the record in the probate office of Talladega county, Ala., of that certain mortgage executed by him, dated April 19, 1892, and recorded in said probate office Book of Mortgages, No. 17, pp. 507, 510. The defendant objected to the introduction of such letter by a copy thereof, upon several grounds of objection numbered from 1 to 7, inclusive; being, in substance, that there was no mortgage from plaintiff to defendant, but a deed of trust made by the plaintiff to Joseph Martin as trustee; that in said letter the alleged mortgage is described as being dated April 19, 1892, and the deed of trust described in the complaint and offered in evidence is dated April 12, 1892; that in such letter a demand is made on the defendant to enter the fact of payment or satisfaction of the alleged mortgage on the margin of the record thereof, and said association is not the mortgagee in said instrument or deed of trust, but Joseph Martin, trustee therein, is the mortgagee in said conveyance, and such letter was not addressed to said Joseph Martin or any substituted trustee. It was also shown by the evidence that such letter was written and request made after a release and reconveyance was made by W. H. Moore, substituted trustee in said deed of trust to plaintiff, of the property described in said deed of trust; also, that said letter was not written to any trustee in said deed of trust, either Joseph Martin, original trustee, or W. H. Moore, substituted trustee, but, as is shown by the plaintiff's testimony, was addressed and mailed to the defendant alone. The court overruled all of such objections, and each ground of said objection, and admitted said letter in evidence, to which ruling of the court the defendant duly excepted. There were introduced in evidence several letters which passed between the plaintiff and the defendant, and the plaintiff's attorney and the defendant. It is, however, unnecessary to set these letters out in detail. The cause was tried by the court without the intervention of

a jury. Upon the introduction of all the evidence, the court rendered judgment in favor of the plaintiff for the sum of \$200. From this judgment the defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Whitson & Graham and Lawrence Cooper, for appellant. Knox, Bowie & Dixon, for appellee.

SHARPE, J. Deeds of trust have grown into common use, along with mortgages, as a form of security for debt; and it is probably because of that fact that the terms "mortgage" and "deed of trust" are sometimes used interchangeably. At least one decision as to their identity appears in *Wolfe v. Dowell*, 13 Smedes & M. 103, where a statute relating to the satisfaction of mortgages upon the record, but without a penalty, was under consideration, and it was held by the court that "a deed of trust is but a species of mortgage, and is included by the statute." This was inaccurately said, however, for the two terms are not synonymous, even when used in reference to security for debt; and that a substantial difference exists as between the two classes of instruments has been pointed out in numerous adjudications. The distinction was well drawn in an opinion by Chief Justice Field, of California, in the case of *Koch v. Briggs*, 14 Cal. 257, 71 Am. Dec. 651, where a conveyance similar to the one described in this complaint was under consideration, and the question was presented whether it was a mortgage, within the meaning of a statute providing that "a mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale." It was there said of the instrument: "It has no feature in common with a mortgage, except that it was executed to secure an indebtedness. This will be evident from a consideration of the rights of parties to a mortgage with reference to the mortgaged property. Where there is a mortgage, there is a right, after condition broken, to a foreclosure on the part of the mortgagee, and a right of redemption on the part of the mortgagor. * * * These two rights are reciprocal. When the one cannot be enforced, the existence of the other is denied; and, when either is wanting, the instrument, whatever its resemblance in other respects, is not a mortgage." It was further shown in the opinion that, under such a conveyance, equity could not decree a strict foreclosure, or a foreclosure by sale, in the proper sense of the term, and that its interposition to effectuate the sale of the property could only be by way of enforcing or aiding the performance of the trust. That case was followed in *Grant v. Burr*, 54 Cal. 298, and quoted with approval in *More v. Calkins*, 95 Cal. 435, 30 Pac. 583, and 29 Am. St. Rep. 128, and in *Merrill v. Hurley* (S. D.) 62 N. W. 958, 55

Am. St. Rep. 859. In *More v. Calkins*, supra, it was said, in effect, that the test in determining whether a conveyance securing a debt is to be treated as a mortgage is not whether the grantee is the creditor or a third person, since it may be to the creditor, but with such trusts declared as to prevent its operation as a mortgage. And in *Merrill v. Hurley*, supra, it was held that the conveyance may be to a third person, and yet a mortgage by appropriate provisions, leaving no trust to be executed by the third person. It would be impracticable to lay down a test which would in all cases serve to distinguish between such instruments in construing statutes relating thereto, since a statute which is purely remedial admits of a more extended application of its terms than does a statute which is penal. This statute here in question is highly penal, and must be strictly construed. *Grooms v. Hannon*, 59 Ala. 510; *Jarratt v. McCabe*, 75 Ala. 325; *Scott v. Field*, Id. 419. It may be stated generally, as applicable to this statute, that, if the conveyance be to a third person upon a declared trust to sell and convey the property in default of and for the payment of the debt secured, it is a trust deed, and not a mortgage. *Koch v. Briggs*, supra; *Grant v. Burr*, supra; *Gillespie v. Smith*, 29 Ill. 473; *Reece v. Allen*, 5 Gilman, 236.

This conveyance is from appellee to a trustee upon a declared trust to sell the property for the payment of appellant's debt, if not paid according to the contract, and to apply the proceeds thereto, and to convey the title to the purchaser. It is not a mortgage, within the terms or meaning of the statute, and it follows that the demurrer to the second count of the complaint should have been sustained, and that the deed of trust should have been excluded from the evidence. As this view of the case is conclusive against the plaintiff's right to recover, the assignments of error need not be further noticed. The judgment of the city court must be reversed, and a judgment here rendered that the defendant (the appellant in this court) go hence without day, and that it recover of the appellee its costs in this behalf expended.

(123 Ala. 54)

GAFFORD v. STATE.

(Supreme Court of Alabama. Jan. 11, 1899.)

HOMICIDE—SELF-DEFENSE—EVIDENCE.

1. Where defendant, accused of homicide, claims that he acted in self-defense, and the testimony is irreconcilable as to who was the aggressor, and there is testimony that deceased had made threats against defendant's life, evidence of adulterous relations between deceased and defendant's sister is admissible to show a motive for deceased's being the aggressor, and the reasonableness of defendant's fear of bodily harm, if deceased was the aggressor.

2. Where one arms himself with a deadly weapon, and goes onto a public road, with the design of killing another to avenge wrongs done by the latter to the former's family, or to

avenge threats by the latter, the former cannot invoke self-defense, though the latter was the aggressor, the former not having abandoned his design.

3. In a prosecution for homicide, an instruction that if, at the time of the killing, deceased was attacking, or about to attack, defendant with a deadly weapon, defendant was not bound to retreat, is properly excluded, as it assumes that defendant could not have retreated without endangering his safety, which was for the jury to determine.

4. An instruction that unless the evidence excludes, to a moral certainty, every hypothesis but that of guilt, the jury must acquit, is incorrect, as exacting too high a measure of proof.

5. Where deceased was shot by defendant with a shotgun on the public road, and there was no dispute as to defendant's right to carry a gun on the road, a charge that, if he had reason to apprehend an attack, he had a legal right to bear arms, was properly refused, as foreign to the issues.

Tyson and Haralson, JJ., dissenting.

Appeal from circuit court, Butler county; John R. Tyson, Judge.

John A. Gafford was convicted of murder, and appeals. Reversed.

The appellant, John A. Gafford, was indicted and tried for the murder of Francis Bartow Lloyd, was convicted of murder in the first degree, and sentenced to be hung. The material facts of the case, necessary to an understanding of the decision on the present appeal, are sufficiently stated in the opinion. Upon the introduction of all the evidence, the defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "The court charges the jury that if they believe from the evidence in this case, beyond all reasonable doubt, that deceased, at the time of the killing, was attacking, or in the act of attacking, the defendant with a deadly weapon, then the defendant was not bound to retreat, but had the right to stand and defend himself, provided he was without fault in bringing on the difficulty which resulted in the killing." (2) "The court charges the jury that, unless the evidence against the defendant should be such as to exclude to a moral certainty every hypothesis or supposition but that of his guilt of the offense imputed to him, the jury must not convict the defendant." (3) "The court charges the jury that, if the defendant had reason to apprehend an attack, he had a legal right to bear arms in defense of himself."

Terry Richardson and James Weatherly, for appellant. William C. Fitts, Atty. Gen., for the State.

SHARPE, J. The defendant was indicted, tried, and convicted on the charge of murder, and sentenced to capital punishment. The material questions reserved for review by this court arise from the rulings of the trial court upon the admissibility of testimony and the refusal of instructions requested by the defendant. We have, however, given to

the entire record the careful scrutiny required by the vital importance of the case to the defendant, and the solemn duty imposed upon us by law, and, at the same time, impressed, on the one hand, with the necessity, for the repose and security of society, of sustaining all legal convictions in cases of this character, and, on the other, with our duty to see that the accused is not deprived of any right necessary or proper to the full presentation of his defense, and the enjoyment, to the fullest extent authorized by law, of his constitutional right to a full, fair, and impartial trial by jury.

There are certain facts bearing upon the homicide that are undisputed, and as to which there is no conflict in the testimony, a brief summary of which is necessary to be given in order to a clear statement of the conclusions we have reached upon the rulings of the circuit court upon the testimony. On the morning of Monday, August 25, 1897, deceased visited Greenville, in Butler county, Ala., riding there in his buggy, as had been his habit for some time. On the afternoon of the same day he was returning in his buggy, alone, from Greenville to his home. At about 6 o'clock of that afternoon he came upon defendant, who was on or near the public road, with his gun, at a point not far from defendant's home. At or near the time of this meeting two rapid reports of a gun were heard by several persons who were near the locality, and immediately thereafter the defendant was seen walking away with his gun, and, upon meeting two other persons near at hand, told them he had shot deceased, but did not know whether he was dead, and requesting them to do what they could for deceased. Deceased was found by these two parties, and others, lying dead in the road, with gunshot wounds on his body, and a pistol, which was recognized as belonging to deceased, lying on the ground about five or six feet away from the body. There were two eyewitnesses to the homicide besides the defendant himself, one testifying for the state and the other for the defendant, and their statements are altogether irreconcilable. The statement of the state's witness makes out a case of unprovoked, willful, premeditated, and deliberate murder by lying in wait with a deadly weapon; while the defendant's witness makes deceased the aggressor with a deadly weapon, and discloses a shooting in self-defense by the defendant. The testimony of this witness corresponds in all respects with that of defendant himself, except that the latter gives a conversation between him and deceased which his witness stated he (witness) could not hear. The state's witness was contradicted in some collateral statements made by her, and other witnesses testified she had told them she did not see the killing. The defendant's witness was shown to have resided, when the homicide occurred, on defendant's place. Numerous other witnesses were examined, both on be-

half of the prosecution and the defense, but it is not necessary to refer in detail to their testimony. Among other things, their testimony shows threats, both recent and remote, on the part of deceased against defendant's life, and from some of said testimony it might be inferred that the defendant had made like threats against deceased, and that the threats of each were communicated to the other. It is also inferable, from unchallenged testimony, that these threats grew out of certain rumors connecting the names of defendant's widowed sister and deceased in an unfavorable light. The defendant offered to introduce proof of an adulterous relation between deceased and his sister at the time of and before the homicide, as well as specific acts of adultery on their part, but the court refused to admit the testimony so offered, and to this action of the court the defendant excepted. If the question of self-defense were out of the case, it would be quite clear that all testimony of this character would be inadmissible for the purpose of justifying the murder, and would be equally unavailing to reduce the killing from murder to manslaughter, unless the circumstances of such provocation were of such a character as were reasonably calculated to provoke sudden passion and resentment, and the homicide was traceable solely to the influence of passion thus engendered. For example, if the defendant had discovered deceased and his sister in the act of adultery, and, under the influence of sudden passion thus aroused, had slain him, then the killing would not have been willful, malicious, deliberate, and premeditated, or murder in the first degree, but murder in the second degree, or, according to circumstances, manslaughter in the first degree. *Ex parte Sloane*, 95 Ala. 22, 11 South. 14; *Watson v. State*, 82 Ala. 12, 2 South. 455. It is not necessary, however, to consider the question of the admissibility of this testimony in this aspect, for the reason that it was not and could not have been offered for any such purpose, inasmuch as the defendant, in his own testimony, negatives the idea that he acted upon any such provocation, and rests his case entirely upon the right of self-defense.

The real question, therefore, is, would the testimony offered to be introduced by defendant have any tendency, even though slight, to shed light on the main inquiry as to self-defense, which was clouded by conflicting and hopelessly irreconcilable testimony? In *Mattison v. State*, 55 Ala. 224, we said: "In inquiries of fact, dependent on circumstantial evidence for their solution, no certain rule can be laid down which will define, with unerring accuracy, what collateral facts and circumstances are sufficiently proximate to justify their admission in evidence. * * * Whatever tends to shed light on the main inquiry, and does not withdraw attention from such main inquiry by obtruding upon the minds of the jury matters which are foreign, or of

questionable pertinency, is, as a general rule, admissible evidence." In view of the conflicting testimony as to which of the two, deceased or the defendant, was the aggressor in the unfortunate tragedy, would the offered testimony shed any light on that question? Could the jury fairly determine that question without knowledge of facts which might have exerted an influence upon, or supplied the motive to, one or the other to become the aggressor? Or did the knowledge by the defendant of the facts sought to be proven reasonably exert any influence upon the mind of defendant in interpreting deceased's threats, motive, or conduct? Or, in other words, would knowledge of these facts by defendant authorize him to regard, as hostile and dangerous, threats, motive, or conduct on deceased's part which, in the absence of that knowledge, might not have justified that conclusion? In *Ball v. State*, 29 Tex. App. 125, 14 S. W. 1012, the court, upon a much similar question, says: "It was important to the defendant that the jury should be fully informed as to the true cause of the enmity entertained by the deceased against him and the character of that enmity. Such information would enable the jury, in determining the issue of self-defense, to view the acts of the deceased from the defendant's standpoint. Without this information, the jury could not know, as the defendant did, the settled, determined, and deadly character of the deceased's hatred towards him, and the true cause of that hatred. This testimony throws light, not only upon the motive actuating the deceased in attacking the defendant, but upon the conduct of the defendant upon that occasion, and the motive which actuated him to kill the deceased. It tends to show that he had reasonable ground to apprehend that the attack made upon him was intended by the deceased to be a deadly one. It gives character to the threats, motive, and conduct of deceased towards the defendant, and also to the motive and conduct of the defendant,"—citing *Russell v. State*, 11 Tex. App. 238. We would not be understood as indicating any opinion that the deceased made an attack upon the defendant, or was in any wise the aggressor, but there was evidence on the part of the defendant to that effect before the jury, which it was fully as much their duty to weigh and consider as the testimony on behalf of the prosecution showing the defendant to have been the aggressor.

In *Rutledge v. State*, 88 Ala. 83, 7 South. 335, it was said by this court: "We understand the rule, in respect to the admission of evidence, on the part of a defendant on trial for murder, of previous threats by, or difficulties with, or ill feeling on the part of, deceased, to be this: That when any phase of the testimony would, if believed, present a case of self-defense, then the accused, using this aspect of the facts adduced as a predicate therefor, may go further, and strengthen it, by showing that the deceased had threatened him, or entertained ill feeling towards him,

or that there had been difficulties between them; * * * or, to state the principle in a more concrete form, the evidence adduced must have some tendency to establish the constituents of the right to destroy life that life may be preserved. * * * The theory of the rule is that a right to kill can never be the result of the violent, bloodthirsty disposition, revengeful feeling, or threats of the deceased; and hence, until there are facts offered which go in some measure to establish the necessity to strike, as the law defines that necessity, such evidence is patently irrelevant. These matters, in other words, are competent to give character to a necessity otherwise shown, and, no necessity being otherwise shown, there is an utter absence of the predicate upon which alone such qualifying evidence should be received." In *Copeland v. State*, *Hor. & T. Cas.* 41, the defendant killed a woman with whom her husband had adulterous relations, and the question was whether such killing was in self-defense. The court on this point says: "But it becomes highly important to investigate with care—First, the effect which this intercourse, notorious as it was, produced upon the feelings and vindictive passions of the prisoner and the deceased towards one another; and, second, the mode and manner in which these feelings and passions were brought to bear in producing the catastrophe so much deplored." And in *Green v. State*, 69 Ala. 9, this court said: "There being ground for argument, at least, that the deceased must have taken some action in the matter of drawing his pistol before the accused fired, this lets in the threat the witness testified the deceased made * * * shortly before the rencounter. If believed, it tended to show the animus of the deceased towards the accused so recently before the homicide as to authorize its consideration by the jury in ascertaining the conduct of the parties immediately before the firing."

We cannot avoid the conclusion, in the light of the foregoing authorities, and that portion of the evidence tending to show that deceased was the aggressor, with a deadly weapon, that the exclusion of the testimony offered by defendant as to deceased's relations with defendant's sister deprived the jury of proof which, if admitted, might, in their opinion, have shed light upon the main inquiry in the case, and as to which the testimony before them was so hopelessly conflicting.

It was proved, without contradiction, that defendant and deceased went, on Saturday before the Monday of the killing, in the presence of deceased's father; that a satisfactory interview was had between them as to the rumors affecting deceased and defendant's sister; and that the two parted with repeated friendly shaking of hands. Notwithstanding this, it is further shown, without conflict, that on the morning of the day of the killing deceased sent a hostile and deadly message to defendant, and the two met in the public road in the afternoon of that day, both armed with deadly weapons. Under these circumstances,

and in the absence of the offered testimony, and with deceased's denial of his unlawful relations with defendant's sister before the jury, the jury would naturally look in vain for any motive that might have impelled the deceased to become the aggressor under such circumstances, and might have reasonably inferred that his pistol was drawn, if drawn at all, for defensive purposes against the defendant, who is shown to have had, at the time, a double-barrel shotgun in his hands. With no facts before them to illustrate the character of deceased's threats of that day, or furnishing an inference for a motive on his part to attack defendant, the jury could not, under such circumstances, have reached any other conclusion than that they did reach, viz. that the defendant was the aggressor. But if it had been shown to them that, notwithstanding deceased's denials to defendant of improper relations between deceased and defendant's sister, such relations in fact existed then, and had existed for a considerable length of time previously, it may well be that the jury, from their knowledge of human nature and the history of like cases, might, in the light of such testimony, have inferred a motive on deceased's part to remove a dangerous obstacle out of the way of his illicit enjoyment. However that may be, such testimony would have shown the cause of the enmity of the deceased towards the defendant, its intensity, and would have tended to show a reasonableness of defendant's apprehension of danger of death or serious bodily harm from the attack made upon him by deceased, if the jury should believe that such an attack was made. We are, at all events, persuaded that, with the testimony referred to before them, the jury would have been enabled to balance more justly the substantial merits of the question of self-defense by reason of a fuller and juster apprehension of the defendant's real position at the critical moment of the fatal encounter and the real state of feeling then existing on the part of each. It is proper, however, for us to observe that, with this testimony in, it would, nevertheless, still be the duty of the jury to inquire whether or not, in view of the provocation, and the state of feeling between the parties, and other attending circumstances, the words or conduct of deceased at the time of the rencounter were seized upon by defendant as a pretext to execute a previously formed design to take the life of deceased. While the defendant had the right to carry his gun, and, also, had the right to be upon the public road, at the time and place where he and deceased came together, yet if he went to such place at such time, and with his gun, with the formed design of taking the life of deceased to avenge the wrongs done his sister and family, or to wreak vengeance upon the deceased because of the latter's threats of that day, or previously, then the defendant was not free from fault, and cannot invoke self-defense, even if the jury should believe that deceased had

drawn his pistol upon defendant before the latter fired and killed deceased, if the defendant at the time of the killing had not abandoned, but still entertained, such previously formed design. Our conclusion upon the question of the admissibility of the testimony offered by the defendant to show an adulterous relation between the deceased and defendant's sister, and defendant's knowledge thereof, is that the circuit court erred in excluding it, and that its exclusion is reversible error.

We think there was no error in the refusal of the court to give the charge numbered 1, requested by the defendant. In the case of *Springfield v. State*, 96 Ala. 81, 11 South. 250, we said: "Charge No. 14 assumes, as matter of law, that, on the facts thereon postulated, the defendant could not have retreated without endangering his life. It was an inquiry for the jury to determine, on all the proof, whether the defendant could have retreated without endangering his safety, or increasing his peril, and not a matter to be decided by the court."

Charge No. 2 exacts too high a measure of proof in order to a conviction, and was properly refused. A charge in identical words was condemned by us in the case of *Baldwin v. State*, 111 Ala. 12, 20 South. 528.

There was and could have been no dispute about the defendant's right to carry a shotgun, the trial involving only his right to use it against the deceased, and therefore the court could not be required to charge, as requested by charge 3, upon a matter foreign to the issue.

As supporting the case for the state, upon the question of evidence here under consideration, the case of *Rogers v. State*, 117 Ala. 9, 22 South. 666, has been cited, but it is wanting in analogy. There the proof showed that Rogers, being armed, sought Hale, who was unarmed, began the dispute with him, and shot him. The evidence he sought to introduce was that Hale had eloped with his daughter, promising to marry her, and had returned from the trip without fulfilling the promise. This showed not an infatuation for the daughter interfered with by Rogers, but rather an abandonment of the daughter, and a desire to get away from her; and, furnishing no motive for hostility on the part of Hale as against Rogers, it had no tendency to show that Hale was the aggressor. Moreover, the proof concerning hostile demonstrations on the part of Hale was insufficient to raise the question of self-defense. Rogers testified that Hale threw his hand to his hip pocket; but there was no proof that the pocket contained, or had contained, a weapon, or that Hale was making any present threat, or doing any act, to make the hip pocket movement significant of danger to Rogers, if Rogers was not then himself aggressing upon Hale, and, if he was so aggressing, he could not invoke the principle of self-defense. Under the circumstances in proof in that case, the evidence there offered was properly excluded, under the general

rule declared in *Robinson v. State*, 108 Ala. 14, 18 South. 732, which was referred to in the opinion.

The other rulings of the circuit court appear to be without error; but, for those pointed out herein, it results that the judgment of the court below must be reversed, and the cause remanded for further proceedings in conformity with this opinion. Reversed and remanded.

NOTE. The foregoing opinion, down to what is said of charge 2, inclusive, was prepared by BRICKELL, C. J., before his retirement, and is adopted by a majority of the present court.

TYSON, J. (dissenting). The writer of this opinion presided at the trial of the defendant in the court below, and for this reason he would have preferred not to participate in a discussion of this case in this court. The law, however, does not disqualify him from sitting, but, on the contrary, imposes upon him the duty and responsibility of declaring the law as he believes it to be. The importance of the question involved, and the conviction that there was no error committed on the trial, warrants him in expressing his views.

The sole proposition upon which a majority of the court rest the decision for a reversal was the refusal to allow defendant to offer testimony tending to establish that illicit sexual relations existed between the deceased and defendant's sister, Mrs. Miller, for some months prior to the killing. In my opinion, some of the conclusions reached by the writer of the main opinion can be shown to be erroneous by a review of the testimony as disclosed by the record, and by keeping in view the order of its introduction in the trial court, bearing upon this question.

I do not deem it necessary to state the evidence introduced in behalf of the state tending to establish the culpability of the defendant, nor all the evidence offered by him to prove his innocence, but will confine my statement of it, strictly, to such portions as tend to shed light upon the question under consideration. Before doing so, however, I desire to state what the record does not contain. It nowhere appears that the defendant's sister was a widow, as stated in the main opinion. All the witnesses who speak of her designate her as Mrs. Miller. This would authorize the presumption, and, indeed, we must presume, that she was a married woman, living at the time with her husband. Again, the evidence is entirely wanting to show as to where she resided,—presumably, in the absence of proof to the contrary, with her husband; and it is not shown that defendant resided with them, in the same house. On the contrary, it is disclosed affirmatively that the defendant, at the time and prior to the killing, was living at the home of his kinsman W. S. Hartley, assisting him in caring for and nursing his

sick wife. It appears that the only threat ever communicated to defendant was the one made to W. S. Hartley, the first witness examined by the defendant. He testified to a conversation with the deceased on the day of the killing, in which deceased said to him; "Tell John Gafford, if he is at your house, that he [deceased] was going to kill him; that the country was not big enough for them both." To this statement witness asked, "What's the trouble?" to which deceased replied, "He knows what's the trouble; you tell him what I say." It nowhere appears in this conversation that any allusion was made to Mrs. Miller, or the alleged relations that existed between her and deceased; and the defendant in his testimony, in narrating what this witness told him as to this threat, does not intimate that he had been informed by Hartley that deceased made any reference to his sister. In fact, he says that Hartley simply told him that deceased said "that this country was not large enough for us both." For aught that appears from the above, this threat had reference to some other matter of controversy between deceased and defendant. The testimony offered by defendant to establish acts of adultery, and excluded by the court, is not shown to have been communicated by the witnesses to him before the killing. Indeed, the only facts disclosed by the evidence introduced by defendant, tending to show there was any controversy between deceased and defendant over Mrs. Miller, appears in defendant's testimony as occurring just before the killing, which is in the following language: "Lloyd said he had heard some talk in Greenville, and defendant said he was surprised that Lloyd had broken his agreement. Lloyd asked, 'How?' 'By lending her your buggy,' said defendant. Lloyd said he was not at home when she got the buggy; that his wife lent it to her. 'Well,' said defendant, 'that is all right, if you did not let her have it.'" In offering the testimony of specific acts of adultery, there was no intimation by counsel, and it was not stated to the court, so far as appears in the record, that either of the witnesses who were called to testify to seeing specific acts of adultery between deceased and Mrs. Miller had ever informed defendant of what they had seen. It is upon the refusal of the court to permit this evidence to be introduced that defendant's counsel in their brief complain.

Before entering upon a discussion of the question raised by this ruling of the court, I desire to dispose of the question propounded by defendant's counsel to him relating to this subject; and, in order to do so intelligently, the fact must not be overlooked that there was no evidence before the court tending to establish any illicit intercourse between deceased and Mrs. Miller, when the question was asked, and we must not be unmindful of the rule, so often announced

by this court, that error will not be presumed, but must affirmatively appear from the record. *Wilson v. State*, 113 Ala. 104, 21 South. 487; *Hurd v. State*, 116 Ala. 440, 22 South. 993. The question propounded was: "Were you aware of any illicit intercourse between Lloyd and your sister? (The solicitor objected, and the court sustained the objection of the solicitor, and the defendant duly and legally excepted to the ruling of the court.)" I have quoted the exact language of the question asked and the objection and rulings of the court. It will be observed that only a general objection was made by the solicitor, and, if there existed any legal objection to the question, this court will be constrained to hold that the ruling of the court, in refusing to allow the question to be answered, was without error. *Cobb v. State*, 115 Ala. 18, 22 South. 506; *Wilson v. State*, supra; *Hurd v. State*, supra. The question was undoubtedly leading, and assumed as a fact that illicit intercourse between deceased and Mrs. Miller existed, when no such proof had been allowed to be introduced, and none had been offered, tending to establish such a relation of which defendant had been informed by the witnesses called to testify to it. *Green v. State*, 96 Ala. 29, 11 South. 478. "In order to reserve an available objection to the exclusion of evidence, a proper question must be asked." 8 Enc. Pl. & Prac. 236, and note 4. Besides, an offer must have been made showing what evidence would be given if the witness was permitted to answer the question and the purpose and object of the testimony sought to be introduced. *Id.* In the case of *Tolbert v. State*, 87 Ala. 27, 6 South. 284, Judge Stone, in speaking on this subject, said: "Several objections were made and sustained to questions propounded to witnesses; but it is not shown what answers the witnesses were expected to give, nor, indeed, that they could have given any information on the subjects inquired about, affecting the defendant. We cannot consider these objections."

There was other testimony introduced by defendant, after he was examined as a witness, but it contained no reference to threats, or the alleged relations between deceased and Mrs. Miller. It, however, does appear that, on rebuttal, the state introduced as a witness the father of the deceased, who testified to two distinct interviews between defendant and deceased,—one had at Hartley's house one week before the killing, and the other at the home of the deceased on Saturday night before the killing. In the first conversation the subject of discussion was whether there was any truth in the threats that each had been reported as making against the other, and a charge by defendant that deceased had been lending his buggy to Mrs. Miller, which was denied by deceased. In the second conversation defendant asked deceased "if there was any foundation in the rumor about you and

my sister," to which deceased replied: "There is no truth in the rumor; I have always had the greatest respect for her." That defendant and deceased parted at the end of each of the interviews very friendly. I have alluded to this testimony for the purpose solely of showing that it cannot, in my opinion, affect the question under consideration, should it be construed, as it seems to be by the learned judge in his discussion of this question, that it showed that improper relations existed between deceased and Mrs. Miller, and, as a result, that an injustice was done defendant by reason of the rulings of the court in this respect, in that "the jury would naturally look in vain for any motive that might have impelled the defendant to become the aggressor" after a friendly separation between them. Upon whom should the blame rest? Trial courts are not clothed with the power or authority to direct the manner in which parties litigant try their causes. Neither can they compel the order in point of time in which testimony shall be offered, nor are they presumed to know what state of facts will be proven by any witness. To so hold, as is clearly held in the opinion of my Brothers, is to say that the trial judge must possess a mind capable of penetrating the future and foretelling future events. In other words, he must be capable of anticipating the character and nature of the testimony of every witness to be examined, when called upon to decide the admissibility of evidence which in his opinion at the time is improper.

I feel confident that what I have said demonstrates that there was no error in the refusal of the court to allow the question to be propounded to defendant, and reduces the points of difference between myself and the majority of the court to a single inquiry. It is whether the specific acts of adultery between deceased and Mrs. Miller, uncommunicated to defendant, were admissible in evidence for any purpose. Leaving out of consideration for the present the element of self-defense, and according to the defendant the same protection which the law accords to a husband who kills the adulterer of his wife,—which, however, under the circumstances of this case, I shall show, later on, that he is not entitled to,—let us inquire what were the husband's rights in such cases. The rule stated in 2 Bish. New Cr. Law, § 708, as follows: "If a husband finds his wife committing adultery, and, under the provocation, instantly takes her life or the adulterer's, the homicide is only manslaughter; but if, on merely hearing of the outrage, he pursues and kills the offender, he commits murder,"—seems to be, with one single exception, the universal rule of the courts of England and this country. In England this rule was so declared in the following cases and authorities: *Reg. v. Mawgridge*, Kel. J. 137, *Fost.* 296; *Reg. v. Kelly*, 2 Car. & K. 814; *Manning's Case*, T. Raym. 212; *Fisher's Case*, 8 Car. & P. 182; *Maddy's Case*, 1 Vent. 158. In America the following cases declare the same rule: *Hill v. State*, 64

Ga. 453, 1 Cr. Law Mag. & Rep. 355; *Shufflin v. People*, 62 N. Y. 229; *People v. Osmond*, 138 N. Y. 80, 33 N. E. 739; *Sanchez v. People*, 22 N. Y. 147; *State v. Bulling*, 105 Mo. 204, 15 S. W. 367, and 16 S. W. 830; *State v. Holme*, 54 Mo. 153; *State v. France*, 76 Mo. 681; *State v. Pratt*, 1 Houst. Cr. Cas. 249; *People v. Hurtado*, 63 Cal. 288; *Reed v. State*, 62 Miss. 406; *Alfred v. State*, 37 Miss. 296; *Sawyer v. State*, 35 Ind. 80; *State v. Avery*, 64 N. O. 608; *State v. Harman*, 78 N. O. 515; *State v. Samuel*, 48 N. O. 74; *State v. John*, 30 N. O. 330.

In this state the rule seems to be that if the husband detects his wife in the act of adultery, and immediately slays her or her paramour, the law does not entirely justify or excuse him, but holds the provocation sufficient, as matter of law, to reduce the killing to manslaughter; and if he detects them, not in the act of adultery, but in a compromising position, under suspicious circumstances, and immediately kills one or both of them, it is a question for the jury whether the provocation was sufficient to reduce the grade of the offense, and whether he acted under the heat of sudden passion thereby excited, as in other cases of homicide under the heat of passion excited by great provocation. *Hooks v. State*, 99 Ala. 166, 13 South. 767; *McNeill v. State*, 102 Ala. 125, 15 South. 352; *Dabney v. State*, 113 Ala. 88, 21 South. 211. It will be observed that these three cases do not contravene the doctrine as laid down by Bishop, but simply do not require that it shall be necessary that the husband shall detect or discover them in the very act of adultery.

I have examined all of the cases above cited, and many of the text-books, carefully, and have been unable to find any departure from that provision of the rule declaring that, if the husband, on merely hearing of the outrage, pursues and kills the offender, he commits murder, except the case of *Copeland v. State*, *Horr. & T. Cas.* 41, relied upon as authority in the main opinion, which I maintain stands alone in American and English jurisprudence, and of which I will later give a more extended notice. The reason underlying this rule in England is stated in the case of *Reg. v. Mawgridge*, *supra*, decided by the court of king's bench during the reign of Charles II., to be because the adultery of the wife is an invasion of the property rights of the husband. The language used by the court is in these words: "For jealousy is the rage of man, and adultery is the highest invasion of property."

Pretermittin an extended discussion of the relations and rights of husband and wife under the old common law, I will content myself by showing, in a brief way, that this reason assigned by the courts of England was the only logical one upon which the doctrine could rest. He was her lord and master, and her will was subservient to his in all matters. So great was the matrimonial subjection of the wife to the husband that "for at

least one thousand years," says Blackstone, in the kingdom of Great Britain, the command or coercion of the husband, either express or implied, "will privilege the wife from punishment, even for capital offenses." As civilization progressed, the marital rights of the wife, however, were enlarged, and her responsibility for crime increased; but even to this day, in England and this country, actual constraint imposed by the husband will relieve her from the guilt of any crime committed in his presence. 1 Blah. New Cr. Law, § 358 et seq. While the cases cited from the various courts of this country do not expressly assign any reason for the recognition of this rule, yet it may be fairly inferred from them that this right is accorded the husband on account of the jealousy and frenzy produced in his mind, incapable of being restrained by him, upon seeing or detecting an act so grossly violative of his sacred conjugal rights.

The next question I will discuss is, did the defendant occupy such relation to Mrs. Miller as that he can be accorded the protection afforded her husband, had he, the defendant, detected or discovered her and deceased in an act of adultery, and slain him on the spot? We have heretofore shown that Mrs. Miller was a married woman, living, presumably, with her husband, and that defendant was not an inmate of their household. Therefore there could have been no relations between them which imposed upon him a legal right or natural duty to protect her chastity. She had surrendered those that existed between herself and her father's and mother's household when she made the allegiance by marriage with her husband. By this act of marriage, she formed new and different relations and obligations, which bound her to fulfill only to the satisfaction and gratification of her husband and their immediate household, and transferred to them alone this legal right and natural duty to protect her. These reasons, to my mind, are conclusive that the reason given by the courts which accorded to the husband this right has no application to this case. It is a maxim of the law that "reason is the soul of the law, and when the reason of any particular law ceases so does the law itself." Broom, Leg. Max. 159. In support of the correctness of my views, I quote the language as found in 1 Whart. Cr. Law, § 460, as follows: "A man cannot, indeed, thus avenge the adultery of his paramour; for the connection is not merely unauthorized by law, but in defiance of law. But where there is a legal right and natural duty to protect, there an assault on the chastity of a ward (using this term in its largest sense) will be sufficient provocation to make hot blood thus caused an element which will reduce the grade to manslaughter. * * * Supposing the injury to female chastity to be avenged in hot blood by a brother, a father, or other person having a right to protect the person injured, the offense is but manslaughter. But a brother cannot, after his sister has been ap-

prehended in adultery, set up the provocation as a defense to an indictment against him for killing her paramour." In the case of *Lynch v. Com.*, 77 Pa. St. 205, the supreme court of Pennsylvania held, where Lynch, the defendant, who lived with his sister, a married woman, whose husband was away from home and had been for five weeks, suspecting that she was in the act of adultery, listened at the door of her chamber, and, being confirmed in his suspicions, took his knife from his pocket, opened it, and forced the door in; he found her rising from the bed, undressed, and a man in bed; he stabbed the man three times with the knife; of one of the strokes the man died,—that the provocation was not sufficient to reduce the killing to manslaughter. The foregoing demonstrates, to my mind, conclusively, that deceased could not have regarded defendant as an obstacle to his illicit intercourse with Mrs. Miller, if it existed; and that the jury would not have had a right to infer, had the fact of such intercourse been proven, a motive on the part of deceased, as said by my Brothers, "to remove a dangerous obstacle out of the way of his illicit enjoyment."

The opinion of my Brothers, in treating of the doctrine of self-defense, proceeds upon the assumption that the fact of sexual intercourse between deceased and Mrs. Miller was known to defendant. This I have shown to be erroneous. The testimony most favorable to this contention was that of the father of the deceased, which I have shown was introduced by the state on rebuttal. It nowhere appears in defendant's testimony. So, in dealing with the rulings of the court on this question in connection with the defense of self-defense, we are bound to do so upon the state of the proof before the court at the time of its rulings. The only theory, therefore, upon which the main opinion is defensible, is that this testimony stands upon the same footing with uncommunicated threats. In discussing the declarations of deceased other than threats, the supreme court of California, in the case of *People v. McLaughlin*, 44 Cal. 439, said: "We do not see that the deceased stood in any such relation towards the commonwealth as to render his declarations admissible as evidence. It cannot be properly said that, in prosecution of offenses mala in se, the commonwealth asserts a private right, or maintains an individual interest, in any such sense as may be affected or bound by hearsay statements of those who may have been the victims or objects of a criminal act on their property or person. There is no such legal identity or privity between them and the commonwealth as to render their statements admissible in behalf of those who are charged with the commission of the crime." This rule would, of course, govern as to the admissibility of acts of deceased of like import. The general rule is that the defendant charged with a crime is limited in the introduction of evidence to such acts and declarations as constitute a part of the *res gestae*; "in other

words, they must stand in immediate causal relation to the act, and become a part either of the action immediately producing it or of action which it immediately produces. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act." Whart. Cr. Ev. (8th Ed.) § 263, and note. The only exception to this rule that I have been able to find is that the acts or declarations of deceased, indicating a hostile condition of his mind towards the defendant, are admissible in cases of doubt as to who was the aggressor, and to explain the nature and character of the assault, if made by him. And this doctrine is treated by all the text writers upon the subject of evidence as an exception to the general rule, and the only one recognized by them. All of them treat of the law of self-defense and of threats, communicated and uncommunicated, and, if the law be as contended for by my Brothers, it is, indeed, passing strange that not one of these writers upon the subject of criminal law, nor any of the learned judges in the numerous cases which have been decided involving the doctrine of threats, ever intimated that the cause from which the threats made by deceased emanated was admissible. Mr. Rice, in his work on Criminal Evidence, limits the doctrine to threats, and, inferentially, excludes even acts indicating a hostile mind.

Should I concede that the threats made by deceased emanated from a belief that the defendant was interfering with his relations with Mrs. Miller, I must confess I cannot see how the evidence of the acts of adultery would add any potency to their intensity or give them a deadlier hue of hostility. While this court has held in a number of cases that evidence of former difficulties between the defendant and the party slain by him may be introduced by the state for the purpose of showing malice or motive for doing the deed, yet the inquiry was limited strictly to the fact of the difficulty, refusing to inquire into its merits or the particulars, and this, too, upon cross-examination by the defendant for the purpose of showing that the deceased was at fault in the former difficulty. Many of these cases show that the party slain had made threats against the defendant. The reason given by the court was that "any evidence touching the merits would have multiplied the issues before the jury, and would have served no other purpose than to distract and divert their attention from the real issues they were to try." *Commander v. State*, 60 Ala. 1; *McAnnally v. State*, 74 Ala. 9; *Gray v. State*, 63 Ala. 66; *Rutledge v. State*, 88 Ala. 85, 7 South. 335; *Hudson v. State*, 61 Ala. 333; *Lawrence v. State*, 84 Ala. 424, 5 South. 33; *Stitt v. State*, 91 Ala. 10, 8 South. 669; *Jones v. State*, 116 Ala. 468, 23 South. 135. It certainly will not be denied that, if defendant had been permitted to introduce this evidence, the state would have had the right to contradict it, and to this end introduce testi-

mony to disprove it. So the issue tried would practically have been the one of illicit sexual intercourse between deceased and Mrs. Miller. Instead of the crime as preferred by the indictment against the defendant.

The only case of this court cited by my Brothers upon which they rely for the latitude which they allow for the admissibility of this evidence is *Mattison v. State*, 55 Ala. 224. I have no controversy with the doctrine announced in that case, but insist that a proper application of it is an authority for my contention and in perfect harmony with the principles declared in *Commander v. State* and other cases cited *supra*. This court there said: "In inquiries of fact, dependent on circumstantial evidence for their solution, no certain rule can be laid down which will define, with unerring accuracy, what collateral facts and circumstances are sufficiently proximate to justify their admission in evidence. Human transactions are too varied to admit of such clear declaration of the rule. Whatever tends to shed light on the main inquiry, and does not withdraw attention from this main inquiry, by obtruding upon the minds of the jury matters which are foreign or of questionable pertinency, is, as a general rule, admissible evidence. On the other hand, undue multiplication of the issues is to be steadily guarded against, as tending to divert the minds of jurors from the main issues." In the main opinion, while a portion of these qualifying words are quoted, still it is apparent that no importance is attached to them. In fact, they are entirely ignored, and the broad language, "whatever tends to shed light upon the main inquiry," is made the basis of authority to sustain their views.

And these principles would be applicable if the defendant had known of the acts of adultery. In the case of *State v. Neville*, 51 N. C. 423, the evidence introduced by defendant tended to show that deceased was advancing upon him with a drawn knife, after hot words had passed between them, when he shot and killed him. The defendant offered to prove that, on the evening before the killing, the deceased came to his home, and tried to ravish his wife. The court below refused to permit him to do so. Justice Ruffin, in an able opinion, which is the leading authority in this country on this subject, speaking for the court, held that, "if admitted and believed, it could not change the character of the offense, and ought to have been rejected." In the case of *State v. Herrell*, 97 Mo. 105, 10 S. W. 387, the defendant killed the paramour of his mother, who was a widow, in a sudden rencounter, and there was testimony tending to show he acted in self-defense, and this was one of his pleas. He offered to prove that the deceased and his mother had been living in adultery. The court said: "All this testimony as to deceased having lived in adultery with defendant's mother was wholly outside of the case, and constituted no palliation or mitigation of defendant's guilt of the homicide, and should not have been admitted."

In the case of *State v. Wilson*, 88 Conn. 126, the defendant offered to prove that, while a prisoner confined in the state prison as a convict for a long time previous to the killing and at the time of the killing, the deceased, who was the warden of the prison, fed him on "putrid and stinking meat," and that, by reason thereof, he was compelled to kill deceased in self-defense, which was refused by the lower court. The supreme court of Connecticut affirmed this ruling, saying: "If all the prisoner claimed to be able to prove had been proven or admitted to be true, the court would have been bound to instruct the jury that it furnished no justification for the killing. * * * The suggestion of counsel that the evidence might be admissible to mitigate the offense was without force; for the undoubted effect of the evidence was to show that the killing was intentional, deliberate, premeditated, and not occasioned by any sudden provocation." In *Rogers v. State*, 22 South. 668, 117 Ala. 9, the evidence of the defendant showed that he was the father of Emma Rogers, a girl about 13 years old; that the deceased carried her to church on Sunday night before the homicide, and had never brought her back; that he (defendant), who was away, returned to Gadsden Tuesday evening, and some of his children told him that deceased was back, and had a gun, and had said if he (defendant) asked him anything about Emma he was going to kill him; that on the morning of the killing he saw deceased at one Patterson's house, and that, upon going up to the crowd who were sitting on the front porch, he asked deceased where his daughter was, to which he made no reply, and he then asked him why he had carried her off, and that to this inquiry the deceased said he carried her off because he wanted to, and then threw his hand to his hip pocket, whereupon defendant shot him. The defendant then offered to prove, by other witnesses, that deceased had carried his daughter from the church on Sunday night next before the killing to the house of a kinswoman of his, and that during the night, between midnight and day, he induced the girl, under promise of marriage, to go with him to Ashville, Ala., and stopped at the house of a sister of deceased; that the two stayed at the house for a day and night, when the deceased left Tuesday, and returned to Gadsden, Ala., leaving the girl in Ashville, not having married her, or even offered to marry her; and that these facts were communicated to defendant a short time before the homicide. The circuit judge refused to permit the evidence to be introduced. On appeal to this court, Justice McClellan, delivering the opinion, said: "The facts that the deceased, a boy 16 years of age, carried the daughter of defendant, a girl of 13 or 14 years, from Gadsden to Ashville, three or four days before the homicide, under a promise of marriage; that he did not marry her; and that, leaving her at Ashville, he returned to Gads-

den two days before the shooting,—can neither justify nor palliate the defendant's act in killing him, nor shed any legitimate light on the transaction. And this would be true, even had his wrong been more aggravated,—even had he debauched the girl, of which there is no pretense. In such case, if the mortal blow had been given by the father immediately upon hearing of the wrong to his daughter, and in the heat of passion engendered by the fact coming to his knowledge, all the facts would have been admissible to eliminate the element of malice from the act, by referring it to passion which had not had time to cool, and thus reducing the homicide to manslaughter. But there is no pretense that the homicide was committed under these circumstances. To the contrary, it affirmatively appears that the defendant came to a knowledge of all the facts—as full knowledge as he had at the time he shot deceased—two days before the shooting occurred. This court is firmly committed to this view, in consonance with long-established principles, and we take this occasion to utterly repudiate what is said in the case of *Flanagan v. State*, 46 Ala. 708, to the contrary, and on the point under consideration that case is overruled. The trial court did not err, therefore, in its rulings on the proposed evidence. The homicide involved here was either murder or justified on the ground of self-defense." This case, however, was reversed upon the refusal of the lower court to give a charge requested by defendant. On the second trial, the record shows that the evidence introduced by defendant tending to establish self-defense was substantially the same as upon the first. The defendant then offered to prove that deceased did have sexual intercourse with his daughter on their trip to Ashville, under promise of marriage. Upon a second appeal to this court (23 South. 1007), Justice McClellan, speaking for the court, said: "On this appeal, the court holds that the trial court in its rulings followed the ruling of this court on the former appeal, and there is no error in the record. *Rogers v. State*, 22 South. 668." The main opinion undertakes to distinguish this case from the one under consideration, and holds, as a matter of law, that the proof concerning hostile demonstration on the part of Hale, the deceased, was insufficient to raise the question of self-defense. With all due respect to the opinion of my Brothers, I submit that their reasoning is fallacious and indefensible. The facts in the two cases are practically the same, except that in the *Rogers Case* the defendant was the father and the natural guardian of the chastity of his 13 year old girl, and the outrage upon her was known to him at the time of the killing; while in the case under consideration, as we have shown, the defendant was not the guardian of Mrs. Miller's chastity, and did not know of any acts of adultery between her and deceased. It will be observed that in each there were threats made by deceased against the defend-

ants. In the Rogers Case the threats of deceased were directly traceable to the act of adultery with defendant's daughter, whereas in this case they were, at best, merely inferably traceable to the acts of adultery between deceased and Mrs. Miller.

If the specific acts of adultery offered to be proven between deceased and Mrs. Miller were unknown to defendant, as I contend they were, but he merely suspected the relation to exist, then the case of Robinson v. State, 108 Ala. 14, 18 South. 732, is directly in point. The evidence in this case for the defense tended to show that, when approached by defendant, the deceased was in a conversation with a 16 year old sister of the former; that defendant asked the deceased his intentions, and called his attention to the fact that he had told him to let his sister alone; and that, after some quarreling, the deceased drew his pistol, and fired twice upon the defendant, and that the latter returned the fire, killing the deceased. During the progress of the trial the defendant showed that a note from his sister was found on the body of the deceased, and offered to prove the contents of the note, stating that this would show that deceased had met the defendant's sister at the place of the killing by appointment, and for the purpose of having illicit intercourse with her. The court refused to allow the note in evidence. Again Justice McClellan delivered the opinion of the court, in which he said: "Neither the contents nor the existence of the note received by the deceased from the defendant's sister, and found on the person of the former after the homicide, nor the note from deceased to the sister to which this was a response, was known to the defendant at the time of the killing. His conduct, therefore, could not possibly have been influenced in any degree by these notes; and, of course, they could not be looked to, to furnish a circumstance either of guilt or innocence, nor of aggravation or palliation, in respect of the offense for which he was tried and convicted. Had he known of this correspondence and its character, it, and his knowledge of it, would have been competent evidence of premeditation and malice on his part, unless he came by it for the first time to a knowledge of the illicit relations between deceased and his sister, and immediately, in the heat of passion engendered by it, and before cooling time, as the law wisely defines that period, he had shot and killed deceased. As he did not know of it at all, the court properly excluded it from the jury." This case is not only authority for the proposition for which I have cited it, but also for the doctrine laid down in the case of Rogers v. State. If dictum upon this last point, it is in harmony with every decision of the American courts except the decision in the case of Copeland v. State, Horr. & T. Cas. 41, heretofore referred to. In the case of People v. Osmond, 138 N. Y. 87, 33 N. E. 741, Justice Peckham said: "Again, coun-

sel for the defendant claims evidence should have been permitted, even though the defendant was ignorant of it, which tends to show that his wife and Burchell were maintaining illicit relations. * * * The principle is not the same as that decided in Stokes v. People, 53 N. Y. 104. There the question was in regard to the character of the encounter which took place between the parties when the shooting was done. Was it done by Stokes in self-defense or was he the aggressor? It was held competent to prove the fact that the deceased had himself made violent threats against Stokes shortly before, even though those threats had not been communicated to defendant. This was upon the ground that the jury might consider the fact in determining the character of the encounter between the parties. But how can acts of infidelity, or acts which tend to prove infidelity on the part of the wife, in any degree tend to show the state of the mind of the defendant upon this subject, if such evidence had not been known or repeated to him? We entertain no doubt of the correctness of the ruling of the court below in this case."

On account of the length of this opinion, I must content myself with only a short criticism of the opinion in the case of Copeland v. State, upon which the decision of the majority of the court in this case relies mainly for their conclusion. As a fair criticism of it, I adopt the language as used by the attorney general in his brief, as follows: "A casual reading of this case shows that Judge Turley was swept off his feet by the passion aroused in him by the testimony in the case. Not a single authority is quoted by him in support of his contention. And, furthermore, he does not confine himself to a review of the law of the case, but reviews, in detail, the testimony of all the witnesses examined in the court below, and assumes the province of the jury, and decides the facts." Besides, it does not go to the length of holding that, if the act of adultery had been unknown to defendant, it would have been considered by the court. In the main opinion it is said, "If the question of self-defense were out of this case, it would be quite clear that all testimony of this character would be inadmissible for the purpose of justifying the murder, and would be equally unavailing to reduce the killing from murder to manslaughter." The argument is, as self-defense is in the case, the defendant may introduce this testimony for the purpose of justification, which I have shown tends alone to establish that the killing was intentional, deliberate, and premeditated. If this is sound logic, he may take the sword of justice, and convert it into a shield to protect himself from the legal consequences of a deliberate murder. In my opinion, the judgment of the court should be affirmed.

HARALSON, J., concurs in the conclusion reached in the foregoing dissenting opinion.

(120 Ala. 412)

McKISSACK et al. v. WITZ et al.

(Supreme Court of Alabama. Jan. 17, 1899.)

ATTACHMENT—AMENDMENT—PARTNERSHIP—PLEADING—PROVINCE OF JURY—APPEAL—ASSIGNMENTS OF ERROR—RECORD.

1. An action against two persons, "doing business under the firm name of," etc., is not an action against them as partners, the quoted words being merely descriptive.

2. Under Code 1896, § 564, providing that plaintiff in attachment may amend any defect in the affidavit, bond, or writ, the affidavit, bond, and writ may be amended by inserting the name of an additional party defendant.

3. Where parties are sued jointly, and are described as doing business under a firm name, it is error to exclude evidence of one that he was not a partner of the other at the time of the transaction in suit, though such partnership is not put in issue by a special plea.

4. An assignment of error made jointly by two defendants is not available to one of them, where he alone is prejudiced.

5. Where parties are sued on a joint account, and are described as doing business under a firm name, it is error to affirmatively charge for plaintiff against one of them, who testifies that he does not owe plaintiff anything, and never for himself, or with another, or by agent, bought anything from plaintiff.

6. Where a ruling was erroneous on the evidence set forth in the bill of exceptions, regardless of what other evidence might have been introduced, it is immaterial that the bill does not set out all the evidence.

7. Rulings copied into the transcript from bench notes made on the trial docket, and not appearing in any formal judgment, are not reviewable as part of the record proper.

Appeal from circuit court, Henry county; J. M. Carmichael, Judge.

Action in attachment by Witz, Biedler & Co. against S. J. McKissack and another. There was a judgment for plaintiff, and defendants appeal. Reversed.

R. H. Walker and Espy & Farmer, for appellants. H. A. Pearce and W. W. Sanders, for appellee.

McCLELLAN, O. J. Witz, Biedler & Co. instituted this action, December 13, 1892, by attachment, against S. J. McKissack alone, the affidavit setting forth a debt due from him by account to the plaintiff, and affirming that he had fraudulently disposed of his property. The bond and writ followed the affidavit. The bond was conditioned to pay damages, etc., to him alone, and the writ was directed only against his estate. On March 25, 1893, the following memorandum or entry was made by the judge or court: "The plaintiff has leave to amend attachment, bond, and writ, which is done in red ink." The amendment here intended and referred to consisted in inserting in the affidavit, bond, and writ before the name of S. J. McKissack, as originally set down in each, the following: "S. J. McKissack and R. L. McKissack, doing business under the name of;" so that, with the amendment in the affidavit, bond, and writ, the action stood against S. J. McKissack and R. L. McKissack, doing business under the name of S. J. McKissack. The effect

of this amendment was merely to add a new party defendant to the action. It was not to convert the action from one against S. J. McKissack individually to one against a partnership composed of S. J. and R. L. McKissack, but from one against S. J. McKissack individually and solely to one against him and R. L. McKissack as individuals, the added words, "doing business under the name of S. J. McKissack," being merely descriptive of the persons of the defendants, or of the relation existing between them. *Baldrige v. Eason*, 99 Ala. 516, 13 South. 74; *Blackman v. Hardware Co.*, 106 Ala. 458, 17 South. 629; *Sawmill Co. v. Smith*, 78 Ala. 108; *Shapard v. Lightfoot*, 56 Ala. 506. Such an amendment is clearly within the authorization of the statutes as to pleadings (Code 1896, §§ 3304, 3331), and as to the affidavit, bond, and writ in attachment (*Id.* § 564).

The complaint filed in the cause follows the affidavit and writ as amended, and is against "S. J. McKissack and R. L. McKissack, doing business under the name of S. J. McKissack," and claims of them in the plural, as "defendants"; and thus the case stood to the end. The court having stricken a plea filed by R. L. McKissack, denying the existence of a partnership, the trial was had on the general issue. Of course, the burden was on the plaintiff to prove his alleged debt. It may be admitted that this was done as against S. J. McKissack, and that plaintiff was therefore entitled to verdict and judgment against him. There was, however, no evidence that R. L. McKissack ever owed this debt or any part of it to the plaintiff. His liability was rested by the trial court on the theory that he was a partner of S. J. McKissack at the time and in the business in which the debt was contracted. And this conclusion of the existence of such partnership was arrived at by assuming that the fact could not be put in issue by R. L. McKissack under this complaint, except by special plea denying its existence. And the court, having stricken such special plea, because, as is insisted, it was not seasonably filed, declined to admit any evidence going to show that R. L. was not a partner of S. J. McKissack. This was clearly and palpably erroneous. The suit not being against a partnership by its firm or common name, but only against individuals described as doing business under a common name, it was upon the plaintiff, seeking judgment against each of the individuals, to show that each owed the debt. This might have been done either by showing that each actually contracted the obligation to pay, or that one only actually participated in the transaction by which the indebtedness accrued, but that the other was his partner in respect of that transaction. And it was clearly competent for the defendant R. L. McKissack to testify, as he was allowed to do, that he never had any transaction with the plaintiff firm, and

owed it nothing, and also that he was not a partner of S. J. McKissack at the time of the transaction, before or since, which the court would not allow him to do. Such testimony was not in denial of the capacity in which he was sued, for he was not sued as a partner, but as an individual; and its exclusion cannot be justified on the doctrine which obtains where the defendant is sued in some special capacity, to the effect that such capacity can be put in issue only by special plea (*Espalla v. Richard*, 94 Ala. 159, 10 South. 137), even if that principle is applicable to suits against a partnership at all. The error of the court in excluding this evidence, however, is not presented here, so as to be available to R. L. McKissack. The ruling of the court in this regard was clearly not of injury to the defendant S. J. McKissack. It is assigned here jointly by both of the defendants. Under these circumstances, R. L. McKissack, who alone was prejudiced by the ruling, can take nothing by the assignment. *Kimbrell v. Rogers*, 90 Ala. 339, 7 South. 241; *Rudolph v. Brewer*, 96 Ala. 189, 11 South. 314; *Hillens v. Brinsfield*, 113 Ala. 304, 21 South. 208. But, as has been indicated, R. L. McKissack was allowed to testify "that he never owed plaintiff a cent in his life; that he never, for himself or with another, bought anything from plaintiff, or authorized any one else to buy anything from plaintiff, nor was he ever in any manner indebted to plaintiff." With this evidence in the case, the court gave the affirmative charge for the plaintiff against both defendants. This was erroneous, no matter what other evidence was introduced. So it is of no consequence that the bill of exceptions does not purport to set out all the evidence. And the action of the trial court in giving this instruction is separately assigned as error by R. L. McKissack in this court, on leave granted to sever in the assignment. This ruling is therefore properly presented for review, and, on account of it, the judgment of the circuit court must be reversed.

All other assignments of error are made jointly by the appellants. On the evidence in the bill of exceptions,—and we will not presume there was other evidence for the purpose of putting the lower court in error,—plaintiff was entitled to the affirmative charge against S. J. McKissack. On this state of case, the rulings assigned would not be of injury to him, and, though they be erroneous, would not avail to reverse the judgment at his instance. On the principle stated above, we cannot reverse those rulings, assigned, as they are, jointly by both appellants, and lacking in prejudice to one of them. Moreover, for the most part, these rulings could not be reviewed on this record if separately assigned, for that they either should be shown by the bill of exceptions, and in fact appear only by the record proper, or, belonging to the record proper, they are attempted to be shown

here only by copying into the transcript the bench notes made by the judge on the trial docket, and do not appear in any formal judgment of the court. Reversed and remanded.

(120 Ala. 653)

THORNTON v. DWIGHT MFG. CO.

(Supreme Court of Alabama. Jan. 12, 1899.)

TRASPASS—PLEADING—EVIDENCE—ADMISSIBILITY—SUFFICIENCY.

1. A plea of not guilty in an action for damages caused by the purchase of timber by defendant with knowledge that the seller had wrongfully cut it from plaintiff's land, by Code 1896, § 3296, puts in issue all material allegations of the complaint, but does not permit evidence of matters of excuse or justification, unless specially pleaded.

2. In an action for damages resulting from the purchase of timber by defendant with knowledge that the seller had wrongfully cut it on plaintiff's land, the only evidence of plaintiff's damage was a statement showing dates and several columns of figures, without anything to indicate their meaning. *Held*, that the evidence was insufficient to support a recovery for more than nominal damages.

Appeal from city court of Gadsden; John H. Disque, Judge.

Action by A. G. Thornton against the Dwight Manufacturing Company. There was judgment for defendant, from which plaintiff appeals. Reversed.

This action was brought to recover damages resulting to the plaintiff in the purchase of a certain quantity of lumber by the defendant from one Davis. The complaint contained three counts, as is stated in the opinion. The defendants pleaded only the plea of not guilty. On the trial of the cause, the plaintiff introduced in evidence the statement of an account furnished her by the defendant on demand for the books of the defendant, showing the amount of lumber received by it from one C. M. Davis during the month of December, 1895. This statement was as follows:

Dec. 6.	G. P.	19158	4942	6.50	32.12
" "	" "	" "	853	2	1.70

—There then follow, in the statement, entries, similarly made in each of the columns, for December 10th, 12th, 17th, 18th, and 19th, these dates indicating when the lumber was delivered. The plaintiff introduced evidence tending to show that C. M. Davis entered into a written contract with the plaintiff by which he was to cut a certain quantity of pine timber from plaintiff's lands, agreeing to pay her monthly therefor at the rate of \$1 per 1,000 feet. It was stipulated in this contract that in default of payment the contract became void. It was further shown on the part of the plaintiff that there was default made by said Davis in payment for the lumber cut from the lands of the plaintiff, whereby the plaintiff notified Davis that his contract was avoided, and that he could no longer cut timber from the lands of the plaintiff; and that the plaintiff also notified the defendant in the present suit that said contract by which Davis was

to cut timber from the lands of the plaintiff was no longer in force, and that the defendant must not purchase any of the timber thereafter offered by Davis which was cut from the lands of the plaintiff; and that the timber, for the taking and conversion of which the present suit was brought, was purchased by the defendant from Davis after said contract had become null and void. It was shown that the plaintiff had recovered two judgments against O. M. Davis for lumber which had been cut by him prior to the time plaintiff notified him of the avoidance of the contract. The defendant offered in evidence the record and proceedings in a suit instituted by the plaintiff against said Davis, in which the defendant was summoned as a garnishee. This suit of plaintiff against Davis was instituted before the commencement of the present suit. The plaintiff objected to the introduction of this evidence upon the ground that it was irrelevant and immaterial. The court overruled the objection, allowed said record and proceedings to be introduced in evidence, and to this ruling the plaintiff duly and separately excepted. The cause was tried by the court without the intervention of a jury, and upon the hearing of all the evidence the court rendered judgment for the defendant. The plaintiff appeals from this judgment, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Burnett & Culll and G. D. Motley, for appellant. Dortch & Martin and Amos E. Goodhue, for appellee.

DOWDELL, J. The complaint contains three counts; the first being in trespass, the second trover, and the third case. A demurrer was sustained to the third count, but after being amended by the plaintiff, no further objection was made to its sufficiency as amended. The only plea filed to the complaint was the plea of not guilty. On this plea issue was joined, and a trial was had by the court, trial by jury having been waived. The plea of not guilty, in actions of tort, is, under the statute (section 3295, Code 1896), made the general issue, and puts in issue all the material allegations of the complaint. No matter in avoidance of the allegations of the complaint, or in excuse or justification of the wrongful act imputed to the defendant, is within the scope of the issue thus made. All such matters the statute requires to be specially pleaded. *Petty v. Dill*, 53 Ala. 645; *Lunsford v. Walker*, 93 Ala. 38, 8 South. 386; *Railroad Co. v. Trammell*, 93 Ala. 350, 9 South. 870; *Behrman v. Newton*, 103 Ala. 525, 15 South. 838; *Extract Co. v. Ryan*, 112 Ala. 337, 20 South. 644; *Scarborough v. Blackman*, 108 Ala. 656, 18 South. 785.

The only evidence offered by the defendant was the record and proceedings in a suit instituted by the plaintiff, before the commencement of the present suit, against one C. M. Davis, and in which the defendant in this action was summoned as a garnishee. The object and

purpose of this evidence was to show that the plaintiff, in suing Davis on his contract made with plaintiff for the purchase of the lumber in question, and garnishing the defendant, the Dwight Manufacturing Company, as the debtor of Davis in its purchase of the lumber from Davis, had elected to ratify the sale by Davis to the defendant company, and thereby waived the tort. This defense was, in effect, an admission that the wrong imputed by the complaint had been committed by the defendant, but that the plaintiff, by her subsequent conduct, had waived the tort. The evidence was clearly irrelevant to the issue made by pleading, and the court erred in admitting it against the objection of defendant. This was matter which was required to be specially pleaded. See *Extract Co. v. Ryan*, supra, and other authorities cited.

The only evidence offered by plaintiff to show the quantity of lumber received by the defendant from said Davis is a written statement or account furnished by the defendant upon plaintiff's demand for the books of defendant, showing amount of lumber received by it from Davis in December, 1895. This statement contains several different columns of figures, besides the column of dates, without anything to indicate their meaning or significance. Nor is there anything in the rest of the testimony in the case affording any aid in this direction. It was, therefore, impossible to determine with any degree of certainty the amount of lumber received by defendant from Davis, and without this the court would be unable to ascertain the amount of damages beyond mere nominal damages the plaintiff might be entitled to recover. But, apart from this, there was sufficient evidence on the part of the plaintiff to authorize a judgment for nominal damages. For the error pointed out, the judgment of the city court is reversed, and cause remanded.

(120 Ala. 316)

HENSON v. STATE.

(Supreme Court of Alabama. Jan. 12, 1899.)

HOMICIDE—SELF-DEFENSE—THREATS BY DECEASED—INSTRUCTIONS—MANNER OF PUNISHMENT—HARMLESS ERROR—CONTRADICTION OF WITNESSES—INCONSISTENT STATEMENTS.

1. Evidence of threats by deceased before the homicide, not shown to refer to accused, is inadmissible to justify the homicide.

2. The statement of a witness (who had testified that deceased was the aggressor in a fight between the parties immediately before the homicide) that he was present at the shooting is a statement of a material fact, which may be contradicted by proof of his having made contradictory statements.

3. Proof that a witness made statements inconsistent with his testimony is admissible, though he says he does not remember having made them.

4. A homicide is not justifiable on the ground of self-defense merely because accused was without fault in bringing on the difficulty, but it must have been necessary for him to do the act which resulted in deceased's death to save

himself from impending danger or grievous bodily harm, either real or apparent.

5. Under Code 1896, § 4333, providing that prejudicial error only shall cause a reversal, the fact that the court, in a trial for manslaughter, instructed the jury that it was punishable by imprisonment for not more than two years, when by section 4862 the maximum punishment is ten years, is no ground for reversal, where the jury fixed the punishment at one year.

6. Under Code 1896, § 5412, providing that, where a felony is punished by imprisonment at more than one and not more than two years, it shall be discretionary with the court to fix the punishment at imprisonment in the penitentiary or county jail or by hard labor for the county, a verdict of guilty of felony fixing the punishment at one year will not be set aside because it also provides that it shall be by hard labor, since that part is surplusage, and may be disregarded.

Appeal from circuit court, Walker county; James J. Banks, Judge.

John Henson was convicted of manslaughter, and he appeals. Affirmed.

On the trial of the cause, the state introduced as a witness one John Taylor, who testified that he was present at a dance at the house of one Mollie Burns, in Walker county, when John Henson, the defendant, shot and killed Dan Hall; that on the night of said dance there was a disturbance in the yard, between the defendant and some one, not known to the witness, about some whisky; that Henson went into the house, and said that some one, cursing him, had stolen his whisky; and that thereupon Dan Hall, taking hold of him, asked him if he meant that he had stolen it, to which Henson replied that he did not; that thereupon Hall shoved Henson back, and said, "Don't talk so big about it;" that Henson then shot, whereupon Hall took hold of a big country-made chair, and struck Henson with it; that then Henson shot twice more, one of the last shots taking effect in the body of Hall, producing his death. On the cross-examination of this witness, he testified that he had gone to the place of the killing that night with Hall. He was then asked this question: "Did not Dan Hall, the afternoon of the day he was killed, say to you, while on the way to the dance, that he was 'going down there one more time to raise h—l, * * * and fan out the crowd?'" The state objected to this question, upon the grounds that it was too general, and the threat was not communicated. The court sustained the objection, and the defendant duly excepted. The evidence for the defendant tended to show that the killing was in self-defense; that Hall had struck the defendant with a heavy, home-made chair twice, before he fired upon him. The defendant introduced, as a witness, one Albert Fisher, who testified that he was present at the house of Mollie Burns at the time Hall was killed by the defendant; and, after testifying as to the dispute between Hall and the defendant, he stated that Hall pushed Henson, and struck him with his fist, and picked up a chair and struck him, and witness turned away, and stepped outside; that he was standing in the

door; that he did not see Henson shoot Hall, but heard the three shots of the pistol after Hall struck Henson, and after witness turned to step into the yard. The solicitor asked this witness, on cross-examination, the following question: "Did you tell Americus Coker, at the preliminary trial, next day after the killing, that you were not in the house, and did not see the shooting; and that you knew Henson was going to kill Hall, and you turned away to keep from seeing it?" The defendant objected to this question, because it called for incompetent and illegal evidence, and was an attempt to contradict the witness about an immaterial matter. The court overruled the objection, and the defendant duly excepted. The witness answered that "he did not remember whether he made that remark to Mr. Coker; but he may have made it." In rebuttal, the state introduced as a witness Americus Coker, and the solicitor asked him the following question: "Did Albert Fisher tell you, at the preliminary trial, that he was not in the house, and did not see Henson shoot Hall; and that he knew Henson was going to kill Hall, and he turned away to keep from seeing it?" The defendant objected to this question, on the ground that it called for immaterial, illegal, and incompetent evidence, and was an attempt to contradict the witness Fisher on an immaterial question, and that Fisher did not deny it. The court overruled the objection, allowed the question to be asked and answered, and to this ruling the defendant duly excepted. In the court's oral charge to the jury he instructed them, among other things, as follows: "If you find the defendant guilty of manslaughter in the first degree, you may fix his punishment at hard labor for the county for a period of not less than one nor more than two years." To the giving of this charge the defendant separately excepted, and also excepted to the court's refusal to give each of the following charges, requested by him: (1) "If the defendant was in fault in bringing on the difficulty, he cannot plead self-defense." (2) "If the jury believe, from the evidence, that the defendant in good faith abandoned the difficulty in the yard, and was free from fault in bringing on the difficulty in the house, the defendant may invoke the law of self-defense." The verdict of the jury was as follows: "We, the jury, find the defendant guilty of manslaughter in the first degree, and fix his punishment at hard labor for the county of Walker for one year."

Norvell & Smith and Coleman & Bankhead, for appellant. Wm. C. Fitts, Atty. Gen., for the State.

SHARPE, J. The threat on the part of the deceased which was sought to be shown by the witness Taylor, if it can be classed as a threat, was not shown to have reference to the defendant; and, therefore, it did not imply any purpose to injure him. A mere general threat, or one not directed to any special per-

son, is not, in such case, admissible as evidence to show an intent to harm a particular individual. *King v. State*, 89 Ala. 148, 7 South. 750; *Redd v. State*, 68 Ala. 492. The witness Fisher testified, in behalf of defendant, "that he was present when Dan Hall was killed." He also testified to the particular acts of aggression on the part of deceased immediately before the shooting, when he said he "turned away, and went outside"; also, that he was "standing in the door," and that he "did not see Henson shoot Hall, but heard the three shots of the pistol after Hall struck Henson, and after witness turned to step into the yard." It was thereafter competent for the state to show that the witness was without knowledge of the matters to which he so testified; and to that end to show that he had made the statement as to his being out of the house at the time of the shooting. The statement involving a material fact, it was one upon which the witness could be contradicted after the predicate laid. The latter part of the statement, wherein the witness said he "turned away to keep from seeing Henson kill Hall; that he knew he was going to do it," was a part of a connected statement as to the witness being out of the house, and his reason for being out; and was, therefore, competent to be shown, as a whole, for the purpose of discrediting the witness. The liability of a witness to be so contradicted could not be avoided merely because the witness says he does not remember the statement about which he is so interrogated. *Brown v. State*, 79 Ala. 61; *Payne v. State*, 60 Ala. 80.

The evidence as to whether Hall, at the time he was shot, was seriously menacing the defendant, was in conflict. Some of defendant's evidence tended to show that Hall was pressing upon him, and striking with a heavy chair; but the witness Taylor, testifying for the state, in a part of his testimony said, "Henson shot first, before Hall took hold of the chair." In view of that testimony, and upon the whole evidence, it was open for the jury to find that defendant, when he fired the pistol, was in no peril, real or apparent, of serious injury from any attack by Hall. In the absence of a necessity to defend, the principle of self-defense is without application, and cannot properly be invoked. The charge requested by the defendant assumes that it could be invoked, if only the defendant be without fault in bringing on the difficulty, thereby ignoring the state's evidence as to the absence of necessity for the killing. Therefore, if for no other reason, the charge was defective, and calculated to mislead the jury, in that it failed to hypothesize the necessity, real or apparent, for shooting Hall, in order for defendant himself to escape present impending danger of grievous bodily harm. Such necessity, as well as the freedom from fault hypothesized, must have existed to properly entitle the defendant to invoke the law of self-defense. *Bain v. State*, 70 Ala. 4; *Evans v. State*, 109 Ala. 11, 19 South. 535; *Miller v. State*, 107 Ala. 40, 19 South. 87; Ro-

den v. State, 97 Ala. 54, 12 South. 419; *Story v. State*, 71 Ala. 337. A charge having a similar fault, though not identical with this, was held bad on a former appeal in this case. *Henson v. State*, 114 Ala. 25, 21 South. 79.

The portion of the oral charge excepted to stated the law incorrectly as to the punishment for manslaughter in the first degree. The period of punishment is fixed, by section 4862 of the Code of 1896, at not less than one, nor more than ten, years, according to the jury's discretion. That section is modified by the later enactment found in section 5412, so that, where the jury fix the period of punishment at more than one, and not more than two, years, the place and manner of punishment, whether by imprisonment in the penitentiary or in the county jail, or by hard labor for the county, is left to the discretion of the presiding judge; and if the jury fix the period at one year, the sentence must be either to the county jail or to hard labor for the county, in the discretion of the judge. The charge of the court in stating the maximum period of punishment at two, instead of ten, years, was only too favorable to the defendant, and therefore will not work a reversal of the judgment. Code 1896, § 4333. Independent of this recent statute, errors which were beneficial to the defendant were not available to reverse. *Marks v. State*, 87 Ala. 99, 6 South. 377, and cases there cited.

That the jury was allowed to express in the verdict the place, as well as the period, of punishment, was likewise without injury. Such expression was only surplusage, and could not interfere with the discretion of the judge in designating such place. *Evans v. State*, 109 Ala. 11, 19 South. 535; *Zaner v. State*, 90 Ala. 651, 8 South. 698. No reversible error appearing in the record, the judgment of the circuit court must be affirmed. Affirmed.

(120 Ala. 332)

JONES v. STATE.

(Supreme Court of Alabama. Jan. 17, 1899.)
SELF-DEFENSE—INSTRUCTION—PREJUDICIAL ERROR
—EVIDENCE—RELEVANCY.

1. Where self-defense is relied on, an independent charge that "self-defense is the defense in 75, or perhaps 80 or 90, per cent. of the cases in this country," is prejudicial.

2. During a conversation leading up to an assault, the prosecuting witness applied an opprobrious epithet to accused, who told him that, if he had said that six months ago, he would have hurt him, but that circumstances had changed in that time. Held, in a prosecution for the assault, that accused's attempted explanation that his marriage within the six months was the change of circumstances referred to was irrelevant.

Appeal from city court of Montgomery; Edward A. Graham, Special Judge.

Walter Jones was convicted of assault and battery, and he appeals. Reversed.

On the trial of the case, the evidence for the state tended to show that the defendant shot one Young with a pistol, and that the

defendant was at fault in bringing on the difficulty.

The testimony for the defendant tended to show that the shooting was in self-defense. Upon the examination of the defendant as a witness in his own behalf, he testified that the difficulty arose from his asking Young for the payment of an account for goods which Young had bought from him; that during the conversation the defendant stated to Young that he had gotten the goods under false pretenses, whereupon Young said to the witness (the defendant) he was "a d—d liar"; that the witness told Young that if he had said that six months ago, he would hurt him, but that circumstances had changed in that time; that upon his insisting upon the payment of the account that Young applied to him an opprobrious epithet and grabbed at the witness with his left hand and threw his right hand towards his hip pocket, and thereupon the witness jumped back and immediately shot him. This witness was asked the following question: "If at the time of the difficulty he was a married man?" The state objected to this question, the court sustained the objection, and the defendant duly excepted. The attorney for the defendant stated to the court that the object of the question was to show that at the time of the difficulty the defendant had been married about five months, and that this was the explanation of the remark when Young called him "a d—d liar"; that six months before he would have hurt him for that, but that his circumstances had changed; the defendant's counsel then asked the witness the following question: "If at that time he had not been married about five months?" The state objected to this question on the ground that the testimony sought to be elicited thereby was irrelevant; the court sustained the objection, and the defendant duly excepted.

The defendant separately excepted to the following portion of the court's general oral charge to the jury: (1) "If you find from the evidence that defendant had no reasonable cause to expect great bodily harm from Young at the time he shot him, then you must find defendant guilty." (2) "The fact that the defendant used a deadly weapon raises a presumption of malice." (3) "When an unlawful assault is made with a deadly weapon in sufficient proximity to inflict a deadly wound, the law implies malice and casts on the defendant the burden of proving self-defense, unless the evidence which shows the shooting rebuts the presumption by showing that it was in self-defense." (4) "Proof of an unlawful assault and use of a deadly weapon casts on defendant the burden of showing self-defense." (5) "There is no denial of an assault in this case and the fact that the defendant used a deadly weapon within shooting distance casts on the defendant the burden of proof of showing that the shooting was done by him in self-defense." At the time of said last exception the court in explanation of the

same said to the jury: (6) "I mean that the defendant did not deny the shooting, nor the use of a pistol in doing the shooting." (7) "After the state had shown that Young was shot and a pistol used in the shooting the burden of proof is upon the defendant to show self-defense." (8) "Self-defense is the defense in 75 or perhaps 80 or 90 per cent. of the cases in this country."

The court at the request of the state gave to the jury the following written charges to the giving of each of which the defendant separately excepted: (A) "If the jury believe that Joe Young used opprobrious epithets to the defendant, yet if the defendant provoked such epithets by first charging said Young with obtaining goods under false pretenses, he cannot set up such epithets in mitigation or justification of the shooting, if they find that the defendant did shoot Young." (C) "Before the defendant can be acquitted on the ground of self-defense, these three essential elements must be found to concur: (1) The defendant must have been free from fault; that is, he must not have said or done anything for the purpose of provoking a difficulty nor must he have been disregarding of the consequence in this respect of any wrongful word or act. (2) There must have been a present impending peril to life or of great bodily harm, either real or so apparent as to create the bona fide belief of an existing necessity; and (3) there must have been no convenient or reasonable mode of escape by retreat or declining the combat." (D) "The passion mentioned in the charge numbered three given at the request of the defendant must have been provoked by a blow given or apparently about to be given and not by mere words no matter how insulting, and such passion does not justify the defendant but merely reduces the grade of the offense, unless the blow given or about to be given which produced it was felonious in its character."

Under the opinion it is unnecessary to set out at length the two charges requested by the defendant.

Francis G. Caffey, for appellant. Wm. C. Fitts, Atty. Gen., for the State.

HARALSON, J. The court in its oral charge said to the jury: "Self-defense is the defense in 75 or perhaps 80 or 90 per cent. of the cases in this country." This appears as an independent charge. In what connection with any other part of the oral charge it was given, does not appear. Its logical and inevitable effect was to prejudice the minds of the jury against the defense, the defendant was making to the charge against him, and it should not have been given.

The other parts of the general charge, and those given at the request of the state, are free from reversible error, and the charges requested by defendant were properly refused.

The evidence sought to be introduced by the defendant was impertinent and illegal, and

was properly excluded. The principles involved in these several rulings complained of, have been so often discussed and decided, it would serve no good purpose to go over them again.

For the error pointed out, the judgment of the court below must be reversed and the cause remanded.

Reversed and remanded.

(120 Ala. 449)

THORNTON et al. v. SAVAGE.

(Supreme Court of Alabama. Jan. 17, 1899.)

ACTION ON CONTRACT—EVIDENCE—EXPERTS—ESTOPPEL—IMPEACHMENT.

1. A contract which is the foundation of the suit is admissible in evidence without proof of execution under Code, § 1801, where the execution is not denied by plea filed by affidavit.

2. In an action to recover under a contract under which defendant agreed to cut all timber on certain land suitable for railroad ties, under a penalty for each tie which might have been cut out of trees left standing, evidence of a witness, having special knowledge as to trees suitable for ties, as to the number of ties in the trees remaining on said land which should have been cut by defendant, is admissible.

3. Evidence by persons familiar with the timber, that the trees left standing and not cut by defendant were as good as those which he had cut, is admissible.

4. Where defendant undertook to cut all timber on certain land suitable for ties, testimony that the land was broken, or that it was level, was inadmissible in an action for failure to cut all such trees.

5. Where, in negotiating a contract with defendant to cut all ties on certain land, a stranger gave his estimate as to the number of ties on the land, it did not estop plaintiff thereafter to claim that there were more ties there because of his silence at such time.

6. The fact that of the ties cut by defendant under the contract certain of them were rejected was incompetent on an inquiry as to how much suitable timber defendant had failed to cut.

7. Where a witness for defendant on cross-examination had his attention called to statements made by him in contradiction to his evidence, and made no explanation thereof, it was competent for plaintiff by way of impeachment to prove such conversation.

Appeal from circuit court, Pike county; J. W. Foster, Judge.

This action was brought by D. C. Savage against H. C. Thornton & Co., and counted upon a contract, which is copied in the opinion. Judgment for plaintiff. Defendants appeal. Affirmed.

On the trial of the cause, when the plaintiff offered in evidence the contract sued on, which was signed by the plaintiff and the defendants, the defendants objected to the introduction of said contract upon the ground that the execution thereof had not been proven. The court overruled the objection, and the defendants duly excepted. The plaintiff then read in evidence the depositions of four witnesses, who, by their testimony, showed that they had special knowledge of the premises, and were experts in respect to what trees were suitable to be made into cross-

ties, and as to the number of cross-ties that could be cut from certain standing trees. The defendants moved to exclude certain portions of the testimony of these several witnesses, which are set forth in the opinion. The court overruled the motion, and to each of these rulings the defendants separately excepted.

The plaintiff, as a witness in his own behalf, testified to the making of the contract sued on, and that the defendants, after cutting 1,484 cross-ties under said contract, quit cutting, and that under said contract the lands were inspected for the purpose of determining how many cross-ties the defendants could have cut from the trees thereon. The plaintiff was then asked, as a witness, the following question: "What is the character of the trees left standing on the lands after Thornton quit work there?" The defendants objected to this question, upon the ground that it called for matter which is not material, and which is incompetent and irrelevant. The court overruled the objection, and the defendants duly excepted. After testifying as to the character of said trees, the plaintiff further testified as follows: "The timber left standing on the land and not cut by defendants is as good as that which they had cut and made into ties." The defendants moved to exclude the portions of the plaintiff's testimony which is copied above, upon the ground that it was a mere expression of the opinion, and a comparison between the timber which had been cut into cross-ties and the timber which had not been cut, and was immaterial and irrelevant. The court overruled this motion, allowed said testimony to go to the jury, and to this ruling the defendants duly excepted.

The defendants introduced in evidence the depositions of the witness N. J. Scott. One of the questions propounded to the witness Scott in the interrogatories was as follows: "State whether it is not a fact that, after the cutting of the timber ceased, you and D. C. Savage went out to count the ties that had been cut, and while so occupied upon the land, counting the ties, D. C. Savage called your attention to several patches of timber upon the land which had not been cut into cross-ties. And did you not say to him that there was timber left on the land not cut that would make cross-ties, but that you could not get the negroes to cut it?" This witness answered this interrogatory by stating that, after cutting the timber, he went with D. C. Savage to count the trees which had been cut, and while so occupied D. C. Savage called his attention to some timber on the land which had not been cut into cross-ties; but he further testified that said timber was not suitable for cross-ties, and he so told Savage. And in answer to the same interrogatory he testified that Savage said there were plenty of men who would work, and mentioned one Scroggins, and that thereupon he (the witness) offered Scroggins one cent

per tie more than defendants were paying for cutting, which offer of the witness Scroggins declined to accept. The plaintiff moved to strike from this answer of the witness Scott that part thereof in which he testified that he offered to employ Scroggins for the purpose of cutting ties, etc., upon the ground that such testimony was illegal, irrelevant, and immaterial, and that it was not responsive to the interrogatories propounded. The court granted this motion, and to this ruling the defendants duly excepted. One Charles Massey, a witness for the defendants, testified that he knew the land in question, and was thereupon asked the following questions: "How was the land situated? Is it broken or level?" The plaintiff objected to these questions upon the ground that they called for matter which was immaterial and irrelevant. The court sustained this objection, and the defendant duly excepted. The defendant asked this witness the following question: "Did you hear Wilson make an estimate as to the number of ties, before the contract was made, in the presence of Mr. Savage?" The plaintiff objected to this question upon the ground that it called for irrelevant and immaterial evidence, which objection the court sustained, and the defendants duly excepted.

Upon the examination of the defendant Thorton as a witness, he testified that when he ceased to get the timber from the plaintiff's lands there was no timber left thereon suitable for cross-ties. Said witness was then asked the following question: "What ratio of cross-ties that you cut from the land in question was rejected?" The plaintiff objected to this question, because it called for evidence which was incompetent to the issues in the case, and was irrelevant and immaterial. The court sustained the objection, and the defendants duly excepted.

Upon the examination of the plaintiff in rebuttal he was asked the following question: "Did not you and N. J. Scott, after the cutting of the timber had ceased, go on the land to count the ties that had been cut, and while there did you not call the attention of said Scott to several bodies of timber on the land which had not been cut into cross-ties, and did he not say to you that there was timber left on the land uncut that would make cross-ties, but that he could not get the damn negroes to cut it, and that they then moved to another belt of timber?" The defendants objected to this question, because it called for irrelevant and immaterial evidence, and was an effort on the part of the plaintiff to make testimony for himself by proof of conduct and declarations when defendants were not present. The court overruled this objection, and the defendants duly excepted. Upon the witness answering the question in the affirmative, the defendants moved to exclude the answer upon the same grounds assigned in support of the objections to the questions. The court overruled this motion, and the defendants duly excepted.

Upon the introduction of all the evidence the defendants requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "The jury must be reasonably satisfied from the evidence that trees suitable for cross-ties were left on the land, free from twist, dote, punk knots, rot, sap, or red heart, before they can find for the plaintiff; and the burden of satisfying you of this is on the plaintiff." (2) "If the jury are not reasonably satisfied from the evidence that trees suitable for making cross-ties were left on the land, free from twist, dote, punk knots, rot, sap, or red heart, then they should find for the defendants, and the burden of satisfying them is on the plaintiff." There were verdict and judgment for the plaintiff. The defendants appeal, and assign as error the several rulings of the trial court to which exceptions were reserved.

Hubbard & Hubbard, for appellants. Warthy, Foster & Carroll, for appellee.

McCLELLAN, C. J. This action is prosecuted by Savage on a written contract entered into by him and H. C. Thornton & Co. on April 23, 1897, which is in the following words: "This agreement, made and entered into this, the 23rd day of April, 1897, by and between D. C. Savage, of the first part, and H. C. Thornton & Co., of the second part, and witnesseth that the first party, for and in consideration of five cents per tie, has sold to the second party all the timber on the N. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ and N. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, section 10, T. 21, R. 11, in Chilton county, Ala., suitable for making cross-ties; and the second party agrees and binds himself to make into cross-ties every tree on said land which can be used for said purpose of making cross-ties, and not pick and cull out the best of said timbers, and leave such as might be classed undesirable or hard to work into ties; and the second party agrees to cut and remove said timbers within 120 days from said land, and pay for the same at five cents per tie, as above, every fifteen days, beginning on the 13th day of May, 1897, and to have all paid for by the time the cutting and making of ties is completed; and the party of the first part and the party of the second part reserves the right to employ a man, and they to select a third, all of whose judgment are known to be good on timbers suitable for making cross-ties, to look over said land from time to time, and see if any trees or timbers are left which are suitable for making into cross-ties, and, in case such is found, the second party is to pay a penalty of five cents per tie for whatever such trees or timbers would amount to if made into cross-ties." This contract, being the foundation of the suit, and its execution not being denied by plea verified by affidavit, was, of course, admissible in evidence without proof of execution. Code, § 1801.

On the trial it was shown that defendants

set about cutting and removing cross-ties from the land, and continued therein until they had taken 1,400 ties, when they ceased work under the contract, claiming that they had cut all the timber from the land that came within its terms. Plaintiff's insistence is that defendants left a large amount of such timber on the land uncut, for which he is entitled to be paid at the contract rate; and this is the issue in the case: Whether timber embraced in the contract was left standing on the land, and, if any, how much. On this issue plaintiff took the depositions of four witnesses shown to have special knowledge in the premises, and to be experts in respect to what trees were suitable to be made into cross-ties, and the number of cross-ties in given standing trees, etc. Two of these witnesses said they had given the land and the timber left by defendants upon it a careful general examination with a view to estimating the number of ties in said timber, and that in their judgment "the timber left on the land would make 6,000 cross-ties." The other two of these witnesses examined the land and timber together. They counted the trees left on the land by defendants, which, in their judgment, were within the terms of the contract, and calculated the number of ties in each tree; and they each testified that "the number of cross-ties in the trees remaining on said land would be 6,291." The defendants moved to exclude the testimony quoted of these several witnesses, and excepted to the court's action in overruling their motions. These exceptions are without merit. The witnesses were clearly competent to give their estimates, based upon such inspection as they are shown to have made, of the number of ties in the timber covered by the contract remaining on the land. And from the context of the evidence in which these several statements occur it is manifest that by them the witnesses meant that in the timber left on the land, suitable for cross-ties, there were the number of ties stated by them respectively. Moreover, by the terms of the contract every tree which could be used for the purpose of making cross-ties was timber suitable for cross-ties; and this testimony that the timber would make a certain number of ties is no more nor less than to say that the trees referred to could be used for that purpose, and hence were suitable for cross-ties.

We are unable to see any ground of objection to the testimony of the witness Savage as to the character of the trees left on the land after defendants quit work. That was, indeed, the issue in the case,—whether the trees were of a character suitable for cross-ties,—and to its elucidation it was certainly proper that the characteristics of the trees so left should be shown to the jury. Nor do we think the court erred in allowing the witness to testify, in the connection just stated, that "the timber left standing on the land and not cut by defendant is as good as that which he had cut and made into ties." The witness

was familiar with the timber, that which had been cut as well as that which remained. He was competent to make the comparison stated in his testimony. And the fact that like timber had been made into cross-ties by defendants was evidence that the remainder could be used for that purpose, and was "suitable for cross-ties." Defendants undertook to cut all the timber on the land suitable for cross-ties. This undertaking was absolute and unconditional. It was in no wise dependent upon the conformation of the land itself; and hence testimony that the land was broken, or that it was level, was outside of any issue in the case, and was properly excluded.

The fact that one Wilson, a stranger to the transactions involved in this suit, in the presence of the plaintiff, before this contract was entered into, stated his opinion or estimate as to the number of ties in the timber on the land, could not have shed any legitimate light on any issue in the case. Plaintiff was under no obligation to take issue with him on the penalty of having his silence construed as an admission; and, besides, it is not made nor proposed to be made to appear what the estimate was, nor whether plaintiff dissented from it.

The court properly excluded the testimony offered by the defendants to show what proportion of the ties which they did cut and remove from the land "were rejected." The rejection referred to, we suppose, was that of some third party to whom defendants sold the ties. It was *res inter alios acta*, so far as plaintiff's rights are concerned. And, if this were not so, it is inconceivable that the fact that defendants had cut defective ties from the land could have any bearing upon the inquiry as to how much timber suitable for ties remained.

The testimony of the witness Savage, when called in rebuttal, as to calling Scott's attention to several bodies of timber remaining on the land after defendants had ceased cutting ties, and as to his (Scott's) admitting that there was suitable timber left, and giving an immaterial excuse for not having cut it, was unobjectionable. Scott was the agent of defendants in and about cutting the timber in question. He had testified as a witness for them, and his testimony was not in consonance with his statement as testified to by Savage. And he had been asked in a cross interrogatory, to which there was no objection, whether he had not made this statement under the circumstances and in response to Savage's calling his attention to bodies of uncut timber testified to by Savage. To this interrogatory he made no answer. Having thus had his attention drawn to this conversation, and his statement made in it, which was at war with his testimony in the cause, it was entirely competent for the plaintiff, by way of impeachment of Scott's testimony, to prove the whole of that conversation. And it is an error to suppose that the fact that Savage called Scott's attention to uncut bodies of

timber was intended as original evidence that there was such timber. It was merely inducement to Scott's statement made in response, and necessary to be shown as a part of the conversation in which the conflicting statement of Scott was made. It suffices to justify the exclusion of Scott's testimony as to the offer he made Scroggins to cut ties that it is not responsive to the interrogatory under which the statement was made. Common knowledge and the evidence in this case concur to show that freedom from sap is not an essential quality of timber suitable for cross-ties. The two charges refused to defendants were faulty in declaring the contrary, if not also in other respects. We find no error in the record, and the judgment must be affirmed.

(122 Ala. 384)

MCLENDON et al. v. DOE ex dem. et al.
(Supreme Court of Alabama. Jan. 17, 1899.)

EJECTMENT—TITLE—RIGHTS OF TENANT—MORTGAGES—EXECUTION—ACKNOWLEDGMENT—PARTIAL INVALIDITY—FORECLOSURE—NOTICE—HOMESTEAD—PLEADING—EVIDENCE—INSTRUCTIONS.

1. Code 1896, § 1534 (Code 1886, § 2700), provides that, when ejectment is brought against a tenant, the landlord must be made a party defendant on the tenant's motion; and section 1535 (2701) provides that the tenant is not liable beyond the rent in arrear at the commencement of the suit and what may accrue pending his possession. *Held*, that a tenant is not entitled to have his landlord made a sole party defendant, so as to relieve him, should plaintiff recover, of liability to plaintiff for rent in arrear at the commencement of the suit, and for such as might thereafter accrue pending his possession.

2. Where plaintiff in ejectment relies on a mortgage, and defendant pleads the general issue, it is proper to strike a special plea denying execution of the deed, since it is unnecessary.

3. A general provision of a mortgage requiring notice of foreclosure sale to be posted in "public places" does not require a notice to be posted on the premises.

4. Where a mortgagee sells pursuant to the deed, the legal title remains in it until it executes and delivers a deed to the purchaser, and consequently it may maintain ejectment in the interim.

5. In ejectment by one claiming under a mortgage which purported to have duly executed, acknowledged, and recorded, defendant denied executing the deed, contending that the only deed he executed was one of about the same date, and for the same amount, to a bank which procured a loan for him. But he admitted that he executed the mortgage note, the coupons, and a receipt to said bank for the amount thereof, "less commissions as agreed, being in full loan obtained by [the bank] for [him] from the [mortgagee]." *Held*, that the note was admissible against defendant.

6. Where one acknowledges a deed purporting to have been executed by him, it is a sufficient adoption of the signature as his own, though it be not such in fact.

7. The fact that a mortgage of a tract including a homestead is not signed by the wife of the mortgagor does not invalidate the deed as to the unexempt portion.

8. Plaintiff in ejectment claimed under a mortgage purporting to have been executed to it by defendant and his wife. While defendant

admitted executing the mortgage note and coupons, he contended that the mortgage he executed to secure the same was payable, not to plaintiff, the lender, but to the loan agent, and therefore he denied that he or his wife ever executed the mortgage on which plaintiff relied. He also contended that plaintiff's mortgage was void as to a part of the premises that was a homestead, because his wife never signed the instrument. *Held*, that a charge that the fact that defendant executed the note and coupons and paid some of the latter was no evidence that his wife executed the mortgage, nor sufficient evidence that defendant executed it, was properly refused as misleading.

9. It was also proper to refuse, as abstract, a charge that defendant had no right to the custody of any mortgage to plaintiff, and that it was plaintiff's duty to account for any mortgage to it from defendant.

10. And it was proper to refuse, as misleading, argumentative, and invasive of the province of the jury, a charge that the fact that defendant denied executing the mortgage in question, and contended that he executed a different mortgage to secure the money, was no evidence that he intended to defraud plaintiff.

11. Where plaintiff in ejectment relies on a mortgage which includes a tract of 160 acres claimed by defendant mortgagor as a homestead, and defendant's wife did not execute the deed, defendant must show that the value of the 160 acres does not exceed \$2,000 (Code 1896, § 2033; Code 1886, § 2507) if he wishes to have it exempted from the judgment for plaintiff.

Appeal from city court of Gadsden; John H. Disque, Judge.

This was a common-law action of ejectment, brought by John Doe ex dem. the Equitable Mortgage Company and another against James McClendon and Jonathan Hazel. In the complaint the demises were laid in the Equitable Mortgage Company and the Equitable Security Company. The defendant Hazel filed a motion, in which he asked that the defendant McClendon, who was his landlord, be made the sole party defendant. Objection being made by the plaintiff, this motion was overruled. The defendant McClendon filed the plea of not guilty, and a verified plea, in which he denied the execution of the mortgage which was the foundation of the plaintiff's title to the land sued for. The plaintiff moved to strike this special plea from the file on the ground that it was not a proper answer to the action. The court granted this motion, and had the plea stricken from the file, and to this ruling the defendant duly excepted. The foundation of the plaintiff's title to the land sued for was the mortgage alleged to have been executed by James McClendon and his wife to the Equitable Mortgage Company, which was foreclosed under the power contained therein, and the purchaser at said sale conveyed the lands by deed to the plaintiff. The other material facts of the case are sufficiently stated in the opinion. Upon the introduction of all the evidence, the court, at the request of the plaintiff, gave to the jury the following written charges: (1) "The court charges the jury that under the laws of Alabama it is not necessary, in order for husband and wife to make a valid mortgage,

that they, or either of them, should actually sign their names with their own hands; but if they appear before a proper officer, and acknowledge the execution as the law provides, and the officer attaches his certificate as the law provides, then this is sufficient, so far as the signing of the names to a mortgage is concerned." (2) "The court charges the jury that if they find from the evidence that the certificate is true as to James McClendon, then they will find for the plaintiff." (3) "The court charges the jury, if they find from the evidence that James McClendon signed the mortgage before Moody as an attesting witness, and Moody did attest same in McClendon's presence, and the mortgage was delivered, then they will find for the plaintiff." (4) "The court charges the jury that if they find from the evidence that the certificate is true, then they will find for the plaintiff, and it can make no difference whether James McClendon and Rutha McClendon actually did or did not sign their names to the mortgage with their own hands." To the giving of each of these charges the defendants separately excepted, and also separately excepted to the court's refusal to give each of the following charges requested by them: (1) "The court charges the jury that because James McClendon executed the note for the money, and also coupons for the interest for the same, is no evidence that Rutha McClendon signed her name to said mortgage before W. R. Moody on 2d of October, 1889." (2) "Because McClendon paid interest on two coupons for interest is no evidence that Rutha McClendon signed said mortgage before W. R. Moody on the 2d of October, 1889." (3) "The court charges the jury that because McClendon executed his note for the money, and also executed the coupons for the interest to be paid on said mortgage, is no sufficient evidence to show that he executed a mortgage to secure the same before W. R. Moody on 2d October, 1889." (4) "The court charges the jury that the defendants or the McClendons have no right to the custody of any mortgage from the McClendons to the plaintiff, but the right to the custody of such is with the mortgage company; and it is for the plaintiff who holds under the mortgage to show where or what has become of any unsettled mortgages to it from McClendons, and not for the defendants to account for them. The mortgage company, and not the defendants, must account for the second mortgage that Moody says was executed by the same parties on the same day, and before Moody." (5) "The court charges the jury that if they are reasonably satisfied from the evidence that James McClendon signed the mortgage, yet the jury are not reasonably satisfied from the evidence that Rutha McClendon signed her name to said mortgage, then, in such case, the jury must allow the homestead of one hundred and sixty acres to the McClendons, and find verdict

for the defendants for the 160 acres, the description of which is undisputed, and is 'southwest quarter section 13, township 11, range 5,' and there being no dispute that the McClendons are entitled to such homestead, if the jury believe Rutha McClendon never signed said mortgage." (6) "The court charges the jury that if, from the evidence, they are reasonably satisfied that Rutha McClendon did not sign her name to the mortgage in presence of W. R. Moody on the 2d October, 1889, then, in such case, the verdict must be for the defendants. In determining what credence the jury will give the evidence of W. R. Moody, they may look to what he swears, and whether or not he is contradicted by any witness or witnesses, and how many, and also upon what point he is so contradicted; and the jury, in this connection, may consider, in connection with all the other evidence, whether Rutha McClendon can write her name, or make her signature by her mark, and if the mortgage is signed by her writing her name or by making her mark; and if, after considering all the facts,—if the jury believes the evidence shows such facts, in connection with all the other evidence in the case,—the jury are not reasonably satisfied Rutha McClendon wrote her name to the mortgage, and it appears on said mortgage, then the verdict of the jury must be for the defendants." (7) "Although the law does not require the mortgage to be signed by mortgagors in their own handwriting, yet the evidence must show that, if they did not sign the mortgage by their own hand, yet the evidence must show that the McClendons authorized some other person to sign their names to said mortgage for them." (8) "Because the defendants deny that they executed the mortgage in question, but say they executed a mortgage to secure the money to the mortgage company before Dave Vann, is no evidence that the defendants intended, or now intend, to defraud the mortgage company." There were verdict and judgment for the plaintiff. The defendants appeal, and assign as error the several rulings of the trial court to which exceptions were reserved. Affirmed.

Denson, Burnett & Cull, for appellants.
Dortch & Martin, for appellees.

TYSON, J. This was a real action of ejectment, in which appellees were plaintiffs, and appellants James McClendon and Jonathan Hazel were defendants. The only error assigned by Hazel was the refusal of the court, upon objection of plaintiffs, to grant his motion that McClendon, his co-defendant, who was his landlord, be made sole party defendant. The evident object of this motion was to secure his discharge from any further proceedings in the cause, thereby relieving him of any liability to plaintiffs for rent in arrear at the commencement of the suit and such as might accrue during the continuance of his

possession should the plaintiffs succeed in recovering a judgment for the lands. The manifest purpose of Code 1886, § 1534 (Code 1886, § 2700), was to confer upon the tenant, when sued in an action of ejectment, the right, which did not exist at common law, of compelling his landlord to appear and defend his title, and to relieve the tenant of the burden of litigating with the plaintiff a matter in which he has no interest other than to pay his obligation of rental to the person who can give to him a legal acquittance. This view is accentuated by Code 1886, § 1535 (Code 1886, § 2701), prescribing and limiting the liability of the tenant to rent in arrear at the commencement of the suit and that which may accrue during the continuance of his possession under his lease or license. *Wisdom v. Reeves*, 110 Ala. 418, 18 South. 13.

2. The defendant McClendon filed the plea of not guilty and a special plea, termed by his counsel as a "plea of non est factum," alleging that the mortgage or other instrument upon which plaintiffs rely as the foundation of their title was not executed by him, or any one authorized to bind him in the premises, which plea was verified. To this special plea the court sustained a demurrer. The plea of the general issue imposed upon the plaintiffs the burden of proving, unless self-proving, the execution of every conveyance upon which they relied to show title in them; and, as to such of those executed by defendant as appeared to be properly acknowledged by him, their execution could have been assailed by him under the plea of not guilty, by proving the requisite facts to avoid the legal effect of the acknowledgment. The only appropriate plea in the trial of this action is not guilty, and under it anything that operates as a bar to the action may be given in evidence. *Smith v. Cox*, 115 Ala. 503, 22 South. 78; *Richardson v. Stephens*, 114 Ala. 238, 21 South. 949; *Bynum v. Gold*, 106 Ala. 427, 17 South. 667. Indeed, it appears that the defendant was permitted to introduce evidence tending to prove every fact alleged in his special plea.

3. The mortgage introduced in evidence by the plaintiffs purported to be signed and properly acknowledged by the defendant and his wife. It appears to have been executed on the 30th day of September, 1889, to the Equitable Mortgage Company, of Kansas City, conveying the land in controversy to secure the payment of a promissory note of even date, executed by the defendant in the sum of \$3,708.75, due on the 1st day of October, 1894, bearing interest from date at the rate of 6 per cent. per annum, which interest was payable annually on the 1st day of October in each year, and evidenced by five coupons attached to said note, executed by the defendant. It contained a power of sale authorizing, after default, the Equitable Mortgage Company to sell the land at public sale to the highest bidder at the door of the court house of Etowah county, after advertising time, terms, and place of sale by posting written notices thereof

in at least three public places in said county, one of which shall be at the court-house door of said county; and upon such sale shall execute and deliver a deed conveying the property sold to the purchaser. The testimony showed that three of the notices of the sale containing the requisite recitals were posted,—one on the bulletin board at the court-house door in Gadsden, Etowah county; another at the post office in Gadsden; and the third at some other public place in the town of Gadsden. The introduction of these notices in evidence was objected to by defendant because irrelevant, and because not posted upon the land to be sold. The location for the posting of only one notice was provided for in the mortgage. This was complied with. The mortgage failed to designate the location for the posting of the other two, but in general terms required the mortgagee to post them at public places in the county. The effect of this provision was to authorize the mortgagee to select the places, and the only limitation upon this authority was that he must post them at public places in the county. The posting of one of them at the post office and the other at some public place in the town of Gadsden was a sufficient compliance.

The evidence further showed that the land was exposed for sale, and that the Equitable Security Company bought it, to whom a deed was executed by the Equitable Mortgage Company. This deed was signed by the Equitable Mortgage Company, and its corporate seal was affixed by Charles N. Fowler, president, and also signed by Charles N. Fowler and James M. Gifford, receivers. This deed was objected to by defendant because it shows on its face that the corporation is in the hands of a receiver, and shows no order of court authorizing the receiver to make it. Conceding that the recitals of the deed showed at the date of its execution that the company was in the hands of a receiver, in the absence of an order of the court, or a conveyance by the company divesting it of the legal title to the lands conveyed by the mortgage, the legal title remained in this company until it signed and delivered the deed to the Equitable Security Company.

4. The only matter of controversy upon the trial was the execution by defendant and his wife of the mortgage to the Equitable Mortgage Company, which purported to have been acknowledged by each of them before the probate judge of Etowah county, and duly recorded. This authorized its introduction in evidence. It was *prima facie* a conveyance of the lands to this company, and shifted the onus upon the defendant of proving such a state of facts as would overcome the legal effect of the acknowledgment. The testimony offered by defendant tended to show that he and his wife never signed the mortgage, nor appeared before any officer, nor made any acknowledgment whatever, and that the certificate of the probate judge was untrue. It further tended to show they executed to the At-

lanta Trust & Banking Company of Atlanta, Ga., a mortgage about the date this one bears date, upon which he obtained a loan for the same amount secured by this mortgage. The defendant, on cross-examination, admitted that he executed the note, the interest coupons secured by this mortgage, and a receipt to the Atlanta Trust & Banking Company of Atlanta, Ga., for "\$3,708.75, less commissions as agreed, being in full for loan obtained by them for me [him] from the Equitable Mortgage Company," which receipt and interest coupons were introduced in evidence by plaintiffs without objection. The defendant further testified that on the 30th day of September, 1889, being the date of the mortgage, the land described in the mortgage was his homestead, and he resided on it with his family, and that "he thought his dwelling stood on the following 160 acres of land, to wit, S. W. ¼ of Sec. 13, T. 11, R. 5." There was some testimony tending to show that defendant's wife signed her name by mark. Her signature to the mortgage appears to have been made by her as though she wrote it. The plaintiff offered several witnesses in rebuttal, whose testimony tended to contradict the testimony offered by the defendant on every material point. In view of the admissions by the defendant of the genuineness of his signature to the receipt to the Atlanta Trust & Banking Company and the interest coupons, and the improbability of his having executed a mortgage to the Atlanta Trust & Banking Company, which was shown to have been merely his agent for negotiating the loan, to secure a debt he confessedly owed the Equitable Mortgage Company, there was no error in permitting the plaintiffs to introduce the note for \$3,708.75, executed by him, which was secured by this mortgage.

5. This brings us to a consideration of the charges given in writing at the request of the appellees and those refused to appellant. Charges 1 and 4 assert that if McClendon and wife appeared before the officer, and acknowledged their signatures to the mortgage, the mortgage was valid, although neither of them actually signed their names. The acknowledgment by them, if found to be true by the jury, was a sufficient recognition and adoption by them of the signatures as their own. *Lewis v. Watson*, 98 Ala. 479, 13 South. 570. Charges 2 and 3 given at the request of appellees were proper. They are not subject to the criticism which appellants' counsel contends for. Their insistence is that 160 acres of the land was the defendants' homestead, and, if the wife did not sign the mortgage, it was void as to this portion. The answer to this is, the charges do not instruct the jury as to the quantity of land the plaintiff would be entitled to recover, and the mortgage was not void as to the remainder of the tract, even though she had not signed it. *De Graffenried v. Clark*, 75 Ala. 425; *Marks v. Wilson*, 115 Ala. 561, 22 South. 134. Charges 1, 2, and 3 refused to appellants were misleading. Charge 4 was ab-

stract. Charge 5 instructs the jury, if they believe the defendant signed the mortgage, but that his wife did not, they must allow the homestead of 160 acres, the description of which is, "S. W. ¼ of Sec. 13, T. 11, R. 5." It will be observed that, while the proof showed that the defendant thought his dwelling was upon this quarter section, there is an entire absence of evidence as to its value. Pretermittting a discussion of the question as to whether or not the defendant would have been required to select this quarter section as his homestead, since it was adjacent to other lands sued for, it is very clear that its value should have been shown. The statute not only limits the area to 160 acres, but its value to \$2,000. Code 1896, § 2033 (Code 1886, § 2507). Charge 6 was bad in many respects. It instructed the jury to find a verdict for defendant should they believe that the wife did not execute the mortgage. Moreover, it, in effect, instructs them to find for the defendant notwithstanding they believed the wife acknowledged her signature to the mortgage before the probate judge. Charge 7 ignored the principle announced in *Lewis v. Watson*, supra. Charge 8 was misleading, argumentative, and invaded the province of the jury. We find no error in the record. Judgment affirmed.

(120 Ala. 380)

SIMS v. STATE.

(Supreme Court of Alabama. Jan. 18, 1899.)

INDICTMENT—CONVICTION ON ONE COUNT—VARIANCE AS TO OTHER COUNTS—HARMLESS ERROR—INSTRUCTIONS.

1. Where one indicted on two counts, for burglary and larceny, is found guilty of burglary, error in refusing a requested charge as to variance between the proof and the description of the property in the count for larceny is harmless error.

2. When others besides defendant were proceeded against at the same time, on the theory that they were jointly concerned in the burglary, a charge that the jury must acquit defendant if they find that others may have as reasonably committed the offense is misleading and properly refused.

Appeal from circuit court, Lee county; J. M. Carmichael, Judge.

The appellant, Jordan Sims, was tried under an indictment charging him, in separate counts, with burglary and grand larceny, was convicted of burglary, and sentenced to the penitentiary for 2½ years, and appeals. Affirmed.

The count in the indictment charging burglary described the article stolen as being different denominations of the currency of the United States, of the aggregate value of \$75. The evidence for the state was circumstantial, and showed that there were other persons besides the defendant suspected of the offense charged. The evidence for the defendant tended to show that he did not commit the offense charged in the indictment. Under the opinion in this case, it is unnecessary to set out in detail the facts of

the case and the several rulings of the trial court upon the evidence. Among the charges requested by the defendant, and to the refusal to give each of which he separately excepted, were the following: (16) "If, from the evidence, the jury shall find that others than the defendant may as reasonably have committed the offense charged, then the defendant should not be found guilty; and if the jury, from the evidence, have a reasonable doubt of that fact, the defendant should be acquitted, and the verdict should be, 'Not guilty.'" (17) "If the jury believe from the evidence that the circumstances of this case are such as to show that others may just as well have committed the offense as the defendant, then the defendant is not guilty."

Wm. C. Fitts, Atty. Gen., for the State.

McCLELLAN, C. J. The indictment contained two counts. The first charged burglary; the second, grand larceny. The jury found the defendant guilty of burglary under the first count. On this state of case, the rulings of the court upon charges requested by the defendant having reference to a supposed variance between the description of the property alleged to have been stolen in the second count and the evidence,—as, for instance, that the count charged larceny of treasury notes, and the evidence showed larceny of silver certificates,—if abstractly erroneous, involved no injury to the defendant, and will therefore not avail to reverse the judgment. Code 1896, § 4333. It is therefore of no consequence whether charges 15, 18, 19, and 20, requested by the defendant, and refused, were correct statements of the law or not.

Others besides the defendant were suspected of the offense charged in this indictment, and prosecuted therefor at the same time that defendant was proceeded against on the theory that they and the defendant were jointly concerned in the alleged criminal act. Under these circumstances, a charge that the jury must acquit the defendant if they find that others may have as reasonably committed the offense as the defendant, or may just as well have committed it, is, to say the least, misleading and confusing. The jury may well have found that there was as much reason for believing that the other parties proceeded against committed the offense as that the defendant did, and at the same time have had no reasonable doubt that the defendant was guilty. They might have found that the defendant and the others were jointly implicated in the criminal act alleged. It was doubtless upon these considerations that the court properly refused charges 16 and 17, requested by the defendant.

It must be confessed that the evidence against the defendant was not entirely satisfactory to the conclusion of his guilt, but it was quite sufficient for submission to the jury on that inquiry; and the court did not

err in refusing to give the affirmative charge on the whole indictment, nor the affirmative charge on the count for burglary, requested by the defendant.

We have examined the several rulings of the trial court on the competency of testimony to which exceptions were reserved, and find them so patently free from error as not to require discussion. The judgment of the circuit court must be affirmed. Affirmed.

(122 Ala. 231)

SOUTHERN RY. CO. v. GUYTON.

(Supreme Court of Alabama. Jan. 17, 1899.)

MASTER AND SERVANT—INJURY TO SERVANT—SCOPE OF EMPLOYMENT—NEGLIGENCE—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—PLEADING—EVIDENCE—QUESTION FOR JURY—APPEAL—PRESUMPTIONS.

1. In an action to recover for injuries caused by the derailment of a hand car, an allegation that the accident was caused by the fact that the "said hand car was out of plumb" is sufficiently specific.

2. In an action to recover for injuries caused by the derailment of a hand car, an allegation that the accident was caused by the fact that "the said hand car was so improperly adjusted that it was likely to jump or be thrown from the track" is sufficiently specific.

3. In an action to recover for injuries caused by the derailment of a hand car, an allegation in a plea that plaintiff was negligent, in that he failed to use due care for his own safety after he became aware of the danger of the accident, is a mere general averment of negligence, and therefore insufficient.

4. In an action to recover for injuries caused by the derailment of a hand car, an allegation in a plea that plaintiff voluntarily incurred the danger of the accident which caused the injury amounts merely to an assertion that plaintiff's action was without compulsion, and is not a sufficient allegation of an assumption of the risk.

5. Where demurrers to insufficient pleas do not appear in the transcript, it will be presumed that they were on proper grounds.

6. Allegations that the derailment of a hand car was caused by the fact that it was out of plumb, and improperly adjusted, are not supported by testimony of the section foreman that a few months before the accident he thought the car was out of repair, and applied for a new one, but had afterwards concluded differently; that his real reason for applying for a new car was that the old one was too slow, but that, after tests of speed, he decided that nothing was the matter with it.

7. Plaintiff is not entitled to recover for injuries caused by the derailment of a hand car, under allegations that the accident was caused by the fact that the car was out of plumb, and was improperly adjusted, without proof of the alleged defects, and also that they caused the accident.

8. A section hand belonging to a gang under one foreman, who is injured while engaged, voluntarily and without orders from his foreman, in assisting another gang under another foreman, is not within the scope of his employment, and cannot recover.

9. Where two gangs of section hands are working at a wreck, and one foreman, under instructions of the superintendent in charge of the work, ordered one of his men to assist the gang under the other foreman in doing a particular piece of work, such man is within the scope of his employment, so that he may recover for injuries received while so employed.

10. And the fact that the foreman whom he

was directed to assist was unaware of such directions would not affect the relations.

11. The refusal to submit to the jury a material issue, on which the evidence is conflicting, is error.

12. A section gang placed a set of trucks upon the track behind a hand car, and allowed them to coast down a heavy grade, behind the car. *Held*, that whether one of the gang, who knew such a proceeding to be dangerous, assumed the risk of an injury resulting from it, was for the jury.

13. A section gang placed a set of trucks on the track behind a hand car, and allowed them to coast down a heavy grade behind the car. The car was derailed, and one of the men was injured in the resulting collision with the trucks. *Held*, that whether the injury was caused by negligence of the foreman of the gang was for the jury.

14. And whether the injured man was negligent was also for the jury.

15. Where there is doubt as to the manner in which the derailment of a hand car occurred, evidence relating to the condition of the car is relevant.

Appeal from city court of Birmingham; W. W. Wilkerson, Judge.

Action by Charles H. Guyton against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

This action was brought to recover damages for personal injuries to the plaintiff, alleged to have been caused by reason of the negligence of the defendant. The complaint contained five counts. The first count, after alleging that the defendant was a railroad company operating a railroad, and that the plaintiff was in the employ of the defendant in the capacity of a section hand, and was so engaged at the time of the accident, then alleges that while so engaged it became the duty of plaintiff to be upon a hand car operated by the defendant on its road, while the same was in motion, and that a pair of trucks, consisting of two pairs of wheels, while following said hand car down a grade upon the road of defendant's track, collided with said car, and the hand car was thrown from the track, and, as the proximate consequence thereof, the plaintiff's foot was broken, mashed, and lacerated, from the effects of which injury the plaintiff was crippled, and rendered permanently less able to work than before. The first count then alleges the negligence as follows: "Plaintiff avers that said car was thrown or jumped from the track as aforesaid, and plaintiff's said injuries and damages were caused by reason of defects in the condition of the ways, works, machinery, or plant connected with, or used in, the said business of defendant, which said defects arose from, or had not been discovered or remedied owing to, the negligence of defendant, or of some person in the service of defendant, and intrusted by it with the duty of seeing that the ways, works, machinery, or plant were in proper condition, viz. the track at said place of derailment was not sufficiently firm, strong, and in line." In the second and third counts the plaintiff adopted all of the first

count, down to and including the word "viz.," and then in the second count it averred that "said hand car was out of plumb," and in the third count averred that "the said hand car was so improperly adjusted that it was likely to jump or be thrown from the track." In the fourth count the plaintiff adopted the prefatory averments of the first count, and then further averred "that said car was thrown or jumped from the track as aforesaid, and plaintiff's said injuries and damages were caused by reason of the negligence of a person in the service or employment of defendant, who had superintendence intrusted to him, while in the exercise of such superintendence, viz.: One Hixon, a section boss of defendant, negligently caused or allowed said wheels to follow said hand car down grade as aforesaid, without proper and sufficient care and precaution to prevent said wheels from colliding with said hand car." To the fifth count the defendant's demurrers were sustained, and it is therefore unnecessary on this appeal to set out the allegations of said count. The defendant demurred to the second and third counts of the complaint upon the following grounds: "(1) Because the defect complained of is not sufficiently set forth therein; (2) because it is not averred with sufficient certainty wherein said hand car was defective." This demurrer was overruled, and the defendant duly excepted. Thereupon the defendant pleaded the general issue, and the following special pleas: "(2) And, for further answer to each of said first and fourth counts of the complaint, defendant says that the plaintiff was himself guilty of contributory negligence, in this: that he failed to use due and proper care for his own safety after he became aware of the danger of a collision of said wheels with said car, by reason whereof he suffered the injury complained of. (3) Defendant, further answering each of said first and fourth counts, says that the plaintiff voluntarily incurred the danger of collision which resulted in his injury, by reason whereof he sustained the injury complained of. (4) Defendant, further answering each of said first and fourth counts of the complaint, says that the plaintiff, with knowledge or notice of the danger of collision between said wheels and said car, voluntarily remained on said car in a place of danger, by reason whereof he sustained the injury complained of." "(6) Defendant, for further answer to the complaint and to each count thereof, says that the plaintiff was aware of the fact that the said trucks were on the track behind said lever car, and were following it, and that they were to be propelled in that condition, and that it was dangerous and unsafe to do so, and dangerous and unsafe for him to then and there ride on said lever car on its trip down said grade, but he negligently got upon said car, and negligently did ride thereon, and thereby voluntarily incurred the risk of injury to himself, and that his doing so proxi-

mately contributed to his injury. (7) Defendant, for further answer to the complaint and to each count thereof, says that the plaintiff, with knowledge or notice of the danger of collision between said wheels and said car, voluntarily and negligently remained on said car in a position which was unsafe and dangerous, whereby and by reason whereof he was injured." In the judgment entry it is recited that demurrers to the second and third pleas were sustained, and demurrers to the sixth and seventh pleas were overruled, but these demurrers do not appear in the record.

On the trial of the cause, the evidence showed that the plaintiff was in the employment of the defendant as a section hand, and was in the squad controlled by his brother, J. D. Guyton, who was a section foreman; that on the day of the accident said J. D. Guyton, W. E. Hixon, and one Brooks, three section foremen, together with their section hands, were at work at a wreck which had occurred in the section presided over by W. E. Hixon; that, during the work in the adjustment of said wreck, it was necessary to have the trucks of a pole car, which had been left on the side of a track by Section Foreman J. D. Guyton; that plaintiff knew where said trucks had been left, and that he went with Section Foreman Hixon and some of his men on the hand car, known as a "lever car," to show them where said trucks were; that the trucks were placed on the track immediately behind the lever car, without being coupled or connected with it; that, as they started back to the scene of the wreck, they were on a down grade (described by some of the witnesses as a "heavy down grade"), and the trucks followed the lever car of their own momentum; that the plaintiff was standing on the back of the lever car, and, after going about a quarter of a mile, the lever car jumped the track, at which time the trucks following it collided with it, and in the accident the plaintiff suffered the injuries complained of.

W. E. Hixon, the section foreman, as a witness, testified that he had no control over the plaintiff, and was not authorized to give him any orders, and that the plaintiff volunteered to show him where the trucks were, and, without being requested, assisted his (Hixon's) squad in placing the trucks on the track.

J. D. Guyton, as a witness, testified that he and the other two section foremen were under the control of Road Supervisor Nelson, and that Nelson instructed Guyton to send his squad of men to work under Foreman Hixon at the wreck; all of the section hands being instructed that they must do whatever said Hixon instructed them to do.

The plaintiff, as a witness in his own behalf, testified that while he was at work at the scene of the wreck, under such instructions from Section Foreman Guyton, he was asked by Hixon to go with his men to show

him where the trucks were, and that it was in obedience to this direction from Hixon that he was on the hand car at the time of the accident. The other facts of the case necessary to an understanding on the present appeal are sufficiently stated in the opinion.

Upon the introduction of all the evidence, the court, at the request of the plaintiff, gave to the jury the following written charge: "Unless the jury believe from the evidence that it was so obviously dangerous to ride on the hand car, under the circumstances under which plaintiff rode, that a man of ordinary prudence would not have undertaken the risk, and if the jury further believe from the evidence that in so riding plaintiff was in the due performance of his duty as an employé of defendant, then so riding on said car would not, of itself, prevent plaintiff from recovering a verdict in this case." The defendant separately excepted to the giving of this charge, and also separately excepted to the court's refusal to give each of the following charges requested by it: (1) "If the jury believe the evidence in this case, they must find a verdict for the defendant." (3) "If the jury believe the evidence in this case, they must find a verdict for the defendant on the second count of the complaint." (4) "If the jury believe all the evidence in this case, they must find a verdict for the defendant on the third count of the complaint." (5) "If the jury believe the evidence in this case, they must find a verdict for the defendant on the fourth count of the complaint." (6) "If the jury believe from the evidence that plaintiff assisted in placing the wheels on the track of the railroad in the rear of the hand car, and that he knew that this was a dangerous thing to be done, and that nevertheless he did it, and subsequently rode on the hand car, and that the wheels which were so placed on the track caused the derailment of the hand car, and the injury to the plaintiff, they must find a verdict for the defendant." (9) "The court charges the jury that, under the evidence in this case, the plaintiff was himself guilty of proximate contributory negligence, and cannot recover a verdict against the defendant." (10) "The court charges the jury that if they believe from the evidence that the plaintiff was under the management and control of J. D. Guyton, and not of Hixon, and that plaintiff volunteered his services, just before he was hurt, to Hixon, and, while so engaged with Hixon in voluntary service, was injured, he cannot recover in this action against the defendant." (11) "The court charges the jury that if they believe from the evidence that ordinarily, and up to the time when the plaintiff started out with Hixon to get the wheels, the plaintiff was a member of J. D. Guyton's crew, and under his control, and subject to his orders or control, and that in going with Hixon's crew to get the wheels, and in and about doing the work of removing the wheels and being on the car, and doing the service he was engaged in when injured, he was a mere volunteer,

performing service for the accommodation merely of Hixon, their verdict must be for the defendant."

There were verdict and judgment for the plaintiff, assessing his damages at \$1,450. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Smith & Weatherly, for appellant.

SHARPE, J. This action was brought by appellee, under the statute known as the "Employers' Act," to recover for injuries sustained by him while engaged in operating a hand car, which injuries are alleged to have resulted from negligence imputable to the appellant, by whom he was employed. The complaint contains five counts, which vary only in respect to the kind of negligence averred as having caused the injury. A demurrer was interposed to each the second, third, and fifth counts, and those to the second and third counts, respectively, were overruled, and that to the fifth count was sustained. The general issue and several special pleas, each setting up contributory negligence, were interposed to the first, second, third, and fourth counts, respectively. On the trial the defendant requested a general affirmative charge in its favor as to the whole case, and separately as to each of the counts 1, 2, 3, and 4, of which charges that relating to the first count was given by the court, and those relating to the whole case and to the second, third, and fourth counts, respectively, were refused.

Counts 2 and 3 of the complaint are, under our system of pleading, sufficiently specific in respect to the defects alleged to have caused the accident, and therefore were not subject to the demurrers. *Railway Co. v. Chambliss*, 97 Ala. 171, 11 South. 897; *Railway Co. v. Davis*, 92 Ala. 307, 9 South. 252.

Plea 2 avers, as a mere naked conclusion, the want of due care on the part of the plaintiff, which is equivalent only to a general averment of negligence, and was therefore insufficient.

The averment of plea 3, that the plaintiff voluntarily incurred the danger of collision, taken in a usual sense and in the sense that will be accorded to it as against the pleader, asserts no more than that the plaintiff's action was without compulsion, which falls short of showing an intentional assumption by him of an obvious risk.

The demurrers to these pleas do not appear in the transcript, but in such case we will presume that they were upon proper grounds. *Hodge v. Tufts*, 115 Ala. 366, 22 South. 422.

The evidence is not sufficient to support the second and third counts of the complaint. The nearest approach to proof of the defects alleged to have caused the derailment of the car appears in the testimony of the witness Hixon, to effect that within a few months prior to the accident he had thought and stat-

ed that the car was out of plumb or out of repair, and had applied for a new car, but that he had afterwards concluded differently, and could not say, as matter of fact or opinion, that it was out of plumb or out of repair; that his real reason for applying for a new car was that this one did not run as fast as he desired, but, upon subsequent tests of speed, he fully decided that there was nothing the matter with the car, and that there might or might not have been. The appellee was not entitled to recover, under the second or third counts, without proof of the alleged defect, and also of its causal connection with the injury, neither of which facts are here shown, and therefore there was error in refusing charges numbered 3 and 4 requested by appellant.

Appellant's charges Nos. 10 and 11 should have been given. If an employé quits the work assigned to him by his employer, and voluntarily undertakes to do work about which he had no duties to perform by virtue of the contractual relation existing between him and his employer, then, while such condition exists, the duty growing out of that relation of using care for his safety does not rest on the employer. Therefore the rule obtains that, to hold an employer liable as such for injury resulting from a breach of such duty, it must appear that the employé was, at the time of the injury, acting within the scope of his employment. *Railway Co. v. Propst*, 85 Ala. 206, 4 South. 711. Such scope, however, would include work specially assigned to him by the employer, as well as that upon which he was usually employed.

In the testimony of the witness Hixon there was evidence tending to show that plaintiff was a mere volunteer in the operation of the hand car and trucks, while, on the other hand, there was evidence tending to show that he was employed by appellant to work as a section hand on its roadbed; that he had been working under Foreman J. D. Guyton on the section adjoining the one upon which he was then working; that on the day of the injury J. D. Guyton, by direction of Supervisor Nelson, who had control of the foremen and crews of both sections, sent appellee to work under Foreman Hixon on his section, where, pursuant to his directions, he was so working when injured. If such was the true condition, it could not be held that appellee was acting out of the scope of his employment, nor did ignorance of those directions on the part of Hixon affect the real relation existing between the plaintiff and defendant, nor the relation in which he, as superintendent, stood to the plaintiff, if he was in fact exercising superintendence. The inquiry as to whether the appellee was such volunteer being a material one, and the testimony being in conflict thereon, it was proper to be submitted to the jury, as requested by charges 10 and 11.

Charge 6 relates to the defense of contributory negligence, and may be considered to-

gether with the other charges as to which error is assigned, since, if it be held good, it would seem to follow that the defendant was entitled to the general affirmative charge as to the whole case. An employé is held by the law to the use of ordinary care for his own safety; so that, if he voluntarily undertakes to do work attended with danger which is obvious, he impliedly assumes the risk involved in its execution. It does not follow, however, that he is guilty of negligence in working merely because he knows the work to be dangerous, without regard to the degree of danger and risk involved, nor unless it be of a degree which would ordinarily deter one of ordinary prudence from the undertaking. *Iron Co. v. Andrews*, 114 Ala. 243, 21 South. 440; *Eureka Co. v. Bass*, 81 Ala. 200, 8 South. 216. The rule requiring the exercise of ordinary prudence applies in determining the question of negligence on the part of the plaintiff, and it also applies in fixing the charge of negligence upon the defendant, but with this additional consideration that, in the matter of investigating a risk which is not plainly apparent in the nature of the work, the employer and employé do not always stand on the same footing, since the employé may to some extent rely upon the judgment of the employer or of a superior in the same service. *Cook v. Railroad Co.*, 84 Minn. 45, 24 N. W. 311; *Russell v. Railroad Co.*, 32 Minn. 230, 20 N. W. 147; 7 Am. & Eng. Enc. Law, 423; *Wood, Mast. & S.* 718 et seq. This principle is applicable in this case, in connection with the plaintiff's testimony to the effect that the foreman told him that the transaction in question was not dangerous. Whether so sending the trucks involved much or little danger depended mainly upon the grade by which the road descended, which does not appear from the evidence more definitely than by the statement of a witness that it was a "very heavy grade," together with such inferences as may be drawn from the statement of a witness to the effect that the truck ran down by its natural force at a speed of five or six miles per hour. The principle applicable to such facts is that which leaves the question of negligence to the jury, though the facts be undisputed, where the inference to be drawn from them is uncertain.

Charge 6, whether considered abstractly or with reference to the evidence, would impute to the plaintiff contributory negligence upon the hypothesis merely that he knew the undertaking to be dangerous, without regard to the degree of danger apparent, and was properly refused.

There was evidence tending to show that appellee's foot was injured by the truck, which, by the foreman's direction, followed the hand car down the grade, without means for controlling its descent. In view of this phase of the testimony, and of all the circumstances in proof, it was proper to submit the questions arising under the fourth count of the complaint, as well as the question of

contributory negligence, to the consideration of the jury.

The manner in which the accident occurred is in doubt, and the evidence relating to the condition of the hand car was relevant upon that inquiry. For the errors mentioned the judgment is reversed, and the cause remanded.

(123 Ala. 405)

OLDACRE v. STUART.¹

(Supreme Court of Alabama. Jan. 17, 1899.)
BILLS AND NOTES—DEFENSE—WANT OF CONSIDERATION—GRATUITOUS NOTE—ENFORCEMENT.

1. Repeated promises to pay do not prevent the maker from insisting that there was no consideration for his note.

2. A note given voluntarily, without any consideration, cannot be enforced by the original payee.

Appeal from circuit court, Morgan county; H. C. Speake, Judge.

Action by J. B. Stuart against W. H. Oldacre. From a judgment for plaintiff, defendant appeals. Reversed.

W. R. Francis, for appellant. E. W. Godbey, for appellee.

HARALSON, J. Suit by appellee, plaintiff below, against appellant, the defendant, on a promissory note for \$823.79, dated 10th October, 1893, payable 10 days after date. It was tried by and before the presiding judge, a jury having been waived, resulting in a finding and judgment in favor of the plaintiff.

There was no conflict in the evidence between the plaintiff and the defendant on the main question at issue. The contract out of which the note grew was, that the plaintiff, who lived at Decatur, Ala., should furnish, which he did, \$1,500 worth of goods to defendant, which he was to sell at Milton's Bluff in Lawrence county. The defendant was to bear all the expenses of the business, including house rent, was to sell the goods and receive one-half of the profits for his services. About two months after the goods were sent by plaintiff to defendant, and placed in store at the place at which they were to be sold, the storehouse and the goods were destroyed by fire, without any fault or neglect, so far as is made to appear, on the part of defendant. Defendant had sold some of the goods, and a few days before the fire, he sent plaintiff \$100 of the proceeds of their sale. The defendant testified that the goods belonged to the plaintiff, and he had no interest in them, and got one-half of the profits for his services; and the plaintiff testified to nothing in conflict with this statement. He also testified, that a few days after the goods were destroyed, he agreed to pay the plaintiff one-half the value of the same and gave him a paper writing to that effect.

The plaintiff testified, that this paper, which he called the "first note," was payable in

¹ Rehearing denied February 3, 1899.

three installments, the first for \$200, payable in February, 1895, the second for same amount, payable in April following, and the balance whenever it was possible for defendant to pay it; that he became anxious to get a new note, because the statute of limitations was about to run on the first obligation, and he presented to defendant the new note,—the one sued on,—and asked him to sign it, which he did; that there was nothing said about the first or old note, when the new one was given, and that he merely presented the new one and asked him to sign it, and he did so. The defendant, as to this, testified, that after he had executed the note in suit, the plaintiff either gave or sent him the first note or paper writing he had executed, and he destroyed it. As to the giving of the first note or obligation, the plaintiff testified: "When the goods were burned, Oldacre came up after the fire and agreed to pay me for one-half the value of the goods. It was his own voluntary act. I did not require it of him. He gave me his note for \$713.16. He said he thought that would be right. This was October 21, 1884, and the goods were burned the 19th October, 1884." He also proved that defendant, before he gave the last note, had paid plaintiff, from one time to another, \$200 on the old one.

The plaintiff also introduced, against the objection of defendant, a number of letters written by him to plaintiff in which he recognized his obligation to pay and his desire and promises to do so, as soon as he could.

From the foregoing it will appear, that the defendant's renewed obligation stands, as for the consideration for its making, on precisely the same consideration, no more and no less, as that which supported the first obligation. If the first was wanting in consideration, so was the latter (*Stark v. Henderson*, 30 Ala. 438; *Russell v. Wright*, 98 Ala. 652, 13 South. 594); and the making of repeated promises to pay, does not prevent the maker from insisting that there was no consideration for the note, unless a new consideration had intervened, which was not the case in this instance (*Ware v. Morgan*, 67 Ala. 461). There had been no dispute between the parties, as to the ownership of the goods furnished by plaintiff and destroyed by fire, nor as to the contract that existed between them under which they were furnished to and received by defendant, nor as to any obligation of defendant to plaintiff arising out of any alleged fault or neglect of defendant out of which their destruction might have originated, nor was the note sued on the outgrowth of any compromise touching any of these matters; but, as plaintiff himself testified, the giving of the note was defendant's own voluntary act, and that he, the plaintiff, did not require it of him. It had no valuable or meritorious consideration to support it. The defendant was under no legal or even moral obligation to give it. Its giving was merely gratuitous on his part. A promise based on such a consideration is not recognized and cannot be enforced in a court

of law or equity. *Maull v. Vaughn*, 45 Ala. 134; *Hubbard v. Allen*, 59 Ala. 233; *Head v. Baldwin*, 83 Ala. 132, 3 South. 293; *Ezell v. King*, 93 Ala. 470, 9 South. 534; *Russell v. Wright*, *supra*.

The judgment of the court below is reversed, and one will be here rendered in favor of defendant.

Reversed and rendered.

(122 Ala. 301)

RICHARDSON et al. v. STEPHENS.

(Supreme Court of Alabama. Jan. 18, 1899.)

MORTGAGES — MARRIED WOMEN — LIABILITY AS SURETIES — FORECLOSURE — BONA FIDE PURCHASERS — ESTOPPEL — EQUITY — INJUNCTION.

1. A husband applied for and obtained a loan on the representation that the land offered as security belonged solely to him. The money was paid to him, and used by him partly in paying his debts and partly in improving the land, which in reality belonged to his wife, who joined in the note and mortgage without knowledge of how the proceeds were to be used. *Held*, that the debt was that of the husband, and hence the wife is only a surety, which makes the mortgage and note void as to her, under Code 1896, § 2529.

2. Under Code 1896, § 2529, providing that the wife shall not, directly or indirectly, become surety for her husband, a mortgage on her lands to secure her husband's debt is void, so that its invalidity can be shown as a defense in ejectment based on such mortgage, without a resort to equity to cancel the mortgagee's title.

3. A purchaser at the foreclosure of a void mortgage acquires no rights to the mortgaged property.

4. Failure of a purchaser at a foreclosure sale to show that he has paid anything on his purchase is fatal to his claim for protection as a bona fide purchaser without notice of the invalidity of the mortgage.

5. A married woman, being forbidden by statute to either directly or indirectly become surety for her husband, is not estopped from denying her want of power to make a mortgage to secure her husband's debt, though she has indirectly received the benefits of the proceeds of the mortgage.

6. Where the invalidity of a mortgage by a married woman does not appear except by resort to parol evidence, equity will remove the cloud from her title without requiring the payment of the mortgage debt.

7. Equity, having taken jurisdiction of a case to remove a mortgage as a cloud from complainant's title, will settle the entire controversy by enjoining an action of ejectment by the purchaser at the foreclosure sale.

Appeal from chancery court, Barbour county; Jere N. Williams, Chancellor.

Bill in chancery by E. E. Stephens against A. L. Richardson and another to remove a cloud from title and for other relief. From a decree for complainant, defendants appeal. Affirmed.

In 1888, J. W. Stephens, the husband of E. E. Stephens, made application to the British & American Mortgage Company, Limited, for a loan of money. The loan was granted, and made to said J. W. Stephens, and to secure the payment thereof a mortgage was executed by J. W. Stephens and his wife, E. E. Stephens, on certain lands which belonged to, and

were owned by, the wife, E. E. Stephens. Default was made in the payment of the debt secured by the mortgage, and the British & American Mortgage Company, Limited, sold the lands embraced in the said mortgage under a power of sale contained therein. At that sale A. L. Richardson became the purchaser, and a deed to said lands was executed to him. Thereupon Richardson brought an action of ejectment against E. E. Stephens and J. W. Stephens for the recovery of said land, and judgment was rendered in favor of the defendants. On appeal to this court, said judgment was affirmed. 21 South. 949. Thereupon Richardson instituted a second action of ejectment for the recovery of said lands, and, pending said action, E. E. Stephens, the appellee, filed the present bill in chancery against the said A. L. Richardson and the British & American Mortgage Company, Limited, and prayed to have the mortgage executed by J. W. Stephens and his wife to the mortgage company canceled, and the deed to A. L. Richardson, as purchaser at the mortgage sale, canceled, and that said mortgage and deed be removed as a cloud upon the title of E. E. Stephens to said lands, and also for an injunction restraining said Richardson from the further prosecution of the ejectment suit. The bill avers the ownership of the land by the wife; the execution of the mortgage; its foreclosure by sale at public auction, for cash, under and in pursuance of the power of sale therein contained; the purchase by Richardson, and the execution of a deed to him, and the pendency of the suit in ejectment; and averring that complainant received no part of the money loaned; asks that the suit be enjoined, and the mortgage and deed be canceled as a cloud, wholly because the debt was that of the husband, for which complainant was only a surety. The answer denies that complainant was the surety of her husband, and alleges that she received all of the proceeds of the loan, and obtained full benefit of and from the same. It avers that complainant was required to draw a draft, and did draw, jointly with her husband, for the proceeds of said loan, and that the notes and mortgage given for the loan were signed by complainant, with her husband, and that all the money arising from the loan was used in the cultivation and improvement of complainant's lands, with her full knowledge and assent; and that it was well known to complainant at the time the loan was made that the proceeds thereof were to be so used for her benefit, and that, knowing this fact, she executed the said notes and mortgage. The answer insists that this is an estoppel against complainant, and that she is entitled to no relief without doing equity, by returning the money so borrowed and used. The answer further sets up that the defendant A. L. Richardson is a bona fide purchaser for value, without notice of complainant's equity arising out of her suretyship for her husband, if such be the case; that the mortgage did not disclose whose debt was se-

cured by the same; and that defendants never heard of any controversy respecting the validity of said mortgage until after the purchase by Richardson under the foreclosure proceedings. J. W. Stephens, the husband, testified that he applied for the loan; that he received the money on the joint draft of himself and wife, on the faith of the mortgage executed by husband and wife; and that all the money, except a sum less than \$75, was used on and for the benefit of the wife's land; and that his wife knew of the application for the loan, and that he knows of no notice being given, before the sale to Richardson, of any claim by the wife. E. E. Stephens testifies that she never borrowed any money, and that she got none from the loan company, and that she signed as surety for her husband; that she signed the mortgage and notes and draft for the proceeds of the loan; that her husband had no other money than this to make a crop with on said lands in 1889, and that she knew he borrowed it; that he had no other business than that of farming and no other land to farm on; that she knew that her land was being mortgaged for the loan, and that her husband had charge of her lands, and was farming for her; and that the agents who had the papers signed told her husband, in her presence, that she would have to sign to get the money. The deed showing title in E. E. Stephens is set out as an exhibit to the bill, as are also the mortgage, deeds, applications, and other papers used in the negotiation of the loan. On the final submission of the cause, on the pleadings and proof, the chancellor rendered a decree granting the relief prayed for in the bill. From this decree the respondents appeal, and assign the rendition thereof as error.

Gunter & Gunter and P. B. McKenzie, for appellants. G. L. Comer, for appellee.

SHARPE, J. A branch of this litigation was before this court in an action of ejectment brought by this appellant for possession of the land included in this mortgage. Richardson v. Stephens, 114 Ala. 238, 21 South. 949. In that case the character of the transaction was considered under the proof there appearing, and it was held that the debt secured by the mortgage of Mrs. Stephens was that of her husband. The proof in the present case does not present the matter in any different aspect. It shows, without conflict, that John W. Stephens alone applied for and obtained the loan upon the representation that the land offered as security, as well as the other property described in his application, belonged to him alone. The money was paid to and used by him partly in paying his individual debt, and for two mules used for, and other expenses incurred in, cultivating a crop raised by him on appellee's land, and partly in clearing and improving that land.

The purpose for which the money was bor-

rowed is not otherwise disclosed, nor does it appear that appellee was informed of such purpose prior to the loan. The joining of appellee in the execution of the mortgage and notes, and of the draft for the collection of the money, are but circumstances to be considered in determining her relation to the transaction, but are not conclusive to fix upon her the character either of a principal or surety; and, in view of the whole proof, it sufficiently appears that the debt which was secured by the mortgage upon her property was that of her husband alone. By the uniform course of our decisions, such a mortgage is void, and it was so declared in *Richardson v. Stephens*, supra; but in a part of the opinion in that case not necessary to the decision it is stated, in effect, that the mortgage operated to divest the title out of Mrs. Stephens, and to vest it in the mortgagee, so that her remedy to avoid it was properly in a court of equity. This statement seems to need correction. Such would have been the effect of the mortgage under the former statute, providing simply that the separate estate of a married woman should not be subject to the debts of her husband. Under that statute, the doctrine was as stated in *Williams v. Bass*, 57 Ala. 487, that "a married woman is incapable of consenting to the appropriation of her statutory separate estate to the payment of her husband's debts, and any instrument executed by her to that end will, on her application, be declared void." Until declared void by a court of equity, however, such a mortgage, being only voidable at the election of the wife, carried the legal title to the grantee, leaving in her only an equity. It was upon such status of the parties that the defense of a bona fide purchaser for value might, as intimated in the case last mentioned, be shown to defeat the equity of the wife; but the statute of force since the 28th day of February, 1887 (section 2529 of the present Code), declares, in positive and prohibitive language, that the wife shall not, directly or indirectly, become the surety for the husband. Its effect upon such mortgages, as declared by the decisions involving its construction, was to make them void. The annulment was effected by the statute itself, without the aid of any court, and the invalidity can be shown at law as well as in equity, even in defense of the action of ejectment based upon such mortgage. *Elston v. Comer*, 108 Ala. 73, 19 South. 324; *McNeil v. Davis*, 105 Ala. 657, 17 South. 101; *Hawkins v. Ross*, 100 Ala. 459, 14 South. 278. The mortgage, being void, conferred no rights upon the mortgagee, or upon the appellant as a purchaser thereunder. 28 Am. & Eng. Enc. Law, 474; *Langan v. Sankey*, 55 Iowa, 52, 7 N. W. 393. There is a total lack of proof that appellant has paid anything on his purchase, and the burden is on him to show payment, and his failure to do so would be fatal to his claim for protection as a bona fide purchaser, even if he could be re-

garded as a purchaser under such mortgage. *Bynum v. Gold*, 106 Ala. 427, 17 South. 667; *Barton v. Barton*, 75 Ala. 400. The statute is founded upon public policy, which is to protect the wife's estate as against the influence of her husband or other person, or her own inclination, in respect to subjecting it to her husband's debts. Being by the law prohibited to so contract, appellee could not, by attempting to do so, estop herself to deny her want of power. Equity will not, by setting up an estoppel against her, accomplish that which the law and public policy have forbidden.

As the invalidity of the mortgage does not appear except by resort to parol evidence, equity will interpose to remove the cloud from appellee's title without requiring payment of the mortgage debt (*Lansden v. Bone*, 90 Ala. 446, 8 South. 65); and, having taken jurisdiction for that purpose, will settle the whole controversy by enjoining the action of ejectment. No error appears in the decree of the chancery court, and it must be affirmed.

(122 Ala. 557)

GIST v. LUCAS.¹

(Supreme Court of Alabama. Jan. 19, 1899.)
HOMESTEAD — ABANDONMENT — STATUTES — CONSTRUCTION.

1. The removal from a homestead to another state for four years, and renting it out during such time, with only occasional visits of inspection, and the failure to reoccupy the lands on the return to the state, constitute an abandonment.

2. Acts 1888-89, p. 113, entitled "An act for the protection of widows and minor children," providing for nonforfeiture of a homestead on their removal therefrom, as against the heir or creditor of the deceased husband or father, applies when the right of occupancy is for the life of the widow or the minority of the children, but not when the widow and children have an absolute title.

Appeal from circuit court, Shelby county; George E. Brewer, Judge.

Action by R. L. Lucas against Minnie H. Gist. From a judgment for plaintiff, defendant appeals. Affirmed.

The proceedings in this case arose upon a contest of a claim of exemptions. The appellee, R. L. Lucas, recovered a judgment against the appellant, Mrs. Minnie H. Gist, who was then Mrs. Minnie Hardy, in the circuit court; and upon this judgment an execution was issued, and levied upon the property in question. The defendant in the judgment interposed a claim of homestead exemptions to the property so levied upon, and thereupon the plaintiff filed an affidavit contesting the claim of exemptions. The facts of the case are sufficiently stated in the opinion. Upon the hearing of all the evidence, the court, at the request of the plaintiff in execution, gave the general affirmative charge in his favor. To the giving of this charge the defendant duly

¹ Rehearing denied February 3, 1899.

excepted, and also excepted to the court's refusal to give the general affirmative charge requested by her. There were verdict and judgment for the plaintiff. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

R. P. Morrisette, for appellant. W. S. Cary, for appellee.

TYSON, J. John Hardy died in 1887, in possession of a homestead; leaving surviving him his widow, appellant, and two minor children, who continued to reside thereon until and after appellant's intermarriage with one Gist, her present husband. In 1894, appellant, with her husband and children, went to Washington City, where her husband had employment in one of the government departments, and there remained until the summer of 1897, when they returned to Alabama, but not to the lands. During appellant's stay in Washington she and her husband made regular visits to Alabama each year, and during those visits would go upon the lands and inspect them. The land was rented out by her from year to year during her stay in Washington, and up to the time of the trial of this cause. In 1888 the land in controversy was set apart by the probate court of Shelby county, upon the petition of appellant, as a homestead for herself and minor children. After the homestead was set aside to appellant, and prior to 1894, the estate of John Hardy was declared insolvent. The foregoing is a statement of substantially all the evidence in the case, and about which there is no dispute.

The absolute title to the homestead was vested in appellant and her minor children, as tenants in common. Code 1886, § 2543. The execution levied ran against appellant, and she is entitled to have exempt to her her interest in the lands, as a homestead, unless she had abandoned it. *Id.* § 2507. Did she abandon it as a homestead? Without repeating the evidence on this point, we are compelled to answer the question in the affirmative, on the authority of *Blackman v. Hardware Co.*, 106 Ala. 456, 17 South. 629, and authorities therein cited. The contention of appellant, that she cannot be held to have abandoned her right, because of the provisions of the act of February 28, 1889, entitled "An act for the protection of widows and minor children" (Acts 1888-89, p. 113), is without merit. This act was manifestly intended to prevent a forfeiture by a removal from the homestead by the widow or minor children, in favor of the heir or creditor of the deceased husband or father, when the right of occupancy was for the life of the widow, or maturity of the child or children. In the case under consideration the appellant and her children had an absolute title, and therefore there could never be a forfeiture to the heirs of Hardy or his creditors.

The demurrer to appellee's affidavit of contest was properly overruled. There was no

error in giving the affirmative charge for appellee. The judgment of the circuit court must be affirmed.

(122 Ala. 555)

NEW ENGLAND MORTG. SEC. CO. v. DAVIS et al.

(Supreme Court of Alabama. Jan. 18, 1899.)

APPEAL — PRESUMPTIONS — DEFAULT DECREEES — SETTING ASIDE.

1. On an appeal from a decree dismissing a bill for want of prosecution, it will be presumed, in the absence of a contrary showing in the record, that the cause was called to be heard in court, and that complainant made default.

2. Rule 69 (Code 1896, p. 1217), providing that a default may be set aside, on timely application, on such terms as the court may impose, requires the application to be made at the term at which the decree of dismissal is rendered, since rule 84 (*Id.* p. 1220) so requires in regard to final decrees, and a decree of dismissal for want of prosecution is a final decree unless otherwise ordered (rule 28; *Id.* p. 1208).

Appeal from chancery court, Autauga county; J. R. Dowdell, Chancellor.

Bill in chancery by the New England Mortgage Security Company against B. F. Davis and others. From a decree denying complainant's petition to set aside a decree of dismissal, complainant appeals. Affirmed.

Caldwell Bradshaw and James E. Webb, for appellant. W. W. Pearson, for appellees.

TYSON, J. On the 10th day of September, 1896, at a regular term of the chancery court of Autauga county, the complainant failing to attend and prosecute its suit, on motion of the respondents the chancellor dismissed complainant's bill for want of prosecution. On the 7th day September, 1897, one year thereafter, at another regular term of said court, the complainant, appellant here, filed a petition seeking to have the decree of dismissal of September 10, 1896, set aside, and the cause reinstated on the docket. The chancellor denied the petition, stating, in his decree refusing the petition, that the decree of dismissal of the bill was a final decree, and, after the final adjournment of the court at which it was rendered, the court had no power or control over it. From this decree of the chancellor denying the petition this appeal is taken, and the same is now assigned as error.

We think there can be no doubt of the correctness of the ruling by the chancellor. The decree of dismissal of the bill for want of prosecution was as final as a decree of dismissal on the merits, and, "unless the court otherwise orders, is equivalent to a dismissal on the merits." Rule 28 (Code 1896, p. 1208). On an appeal from a decree dismissing a bill for want of prosecution, unless it otherwise appears from the record, we are bound to presume that the cause was called to be heard in court, and complainant made default. The only construction to be given to rule 69 (Code 1896, p. 1217), wherein it is provided that

"either party, on timely application, may set aside his default, on such terms as the court may impose," when taken in connection with rule 84 (Id. p. 1220), is that such timely application shall be made at the term at which the decree of dismissal is rendered. It follows, therefore, the decree of dismissal being final, the chancellor had no authority to set the same aside on the petition of complainant, after a final adjournment of the court. *Byrd v. McDaniel*, 28 Ala. 582; *Ex parte Gist* (Ala.; Oct. Term, 1898) 24 South. 831. There is no error in the record, and the decree of the chancellor is affirmed.

(120 Ala. 339)

LEWIS v. STATE.

(Supreme Court of Alabama. Jan. 19, 1899.)

HOMICIDE—SELF-DEFENSE—BURDEN OF PROOF—CONFLICTING INSTRUCTIONS.

1. The burden of proving self-defense is on defendant.

2. Where the state relies on self-defense to prove that defendant was at fault in bringing on the difficulty, the burden of proving it is on the state.

3. A charge that, in order for defendant to set up self-defense, he must show that he was free from fault in bringing on the difficulty, is erroneous.

4. The error is not cured by correct statements in regard thereto in other parts of the charge.

Appeal from city court of Montgomery; A. D. Sayre, Judge.

Len Lewis was convicted of an assault with intent to murder, and he appeals. Reversed.

On the trial of the case the defendant introduced evidence tending to show that the assault which was proven by the state's evidence was committed in self-defense. The only question presented for review on the present appeal was the portions of the court's general charge to which the defendant reserved separate exceptions. In the court's general charge to the jury there were included, among others, the following instructions, which are numbered for convenience of reference: (1) "The burden of proof of self-defense is on the defendant; and, in order for him to be entitled to his discharge, it must be proved by a sufficient amount of evidence to raise at least a reasonable doubt of his guilt." (2) "When stated in that general form, it is true that the burden is on the defendant of proving the plea of self-defense by at least such weight of evidence as will raise in your minds a reasonable doubt of his guilt. But you will recollect that I told you that three things must appear from the evidence in order to make out a case of self-defense, in answer to a charge of felonious assault, and defined them to you, to wit: First, that there was a necessity to strike; second, that there was no reasonable means of avoiding it by retreat; and, third, that the defendant was free from fault. Now, when the plea of self-defense is considered with reference to these elements,

the burden of proof is distributed in this way: The defendant must show that he was under the necessity to strike, and that he could not reasonably avoid it by retreat; and, this being done, the burden rests on the state to show that the defendant was not free from fault." (3) "If, after considering all the evidence,—that tending to show a case of self-defense included,—they had a reasonable doubt as to whether defendant was guilty, or whether he acted in self-defense, they must acquit the defendant." (4) "In order for the defendant to set up self-defense, he must show that he was entirely free from fault in bringing on the difficulty." To the portions of the court's general charge which are above numbered the defendant separately excepted. This indictment was signed by the solicitor of the Twelfth judicial circuit, and the indorsements upon it were in all respects regular. There appeared on it the following entry: "Filed in open court, this, the 30th day of January, 1897. [Signed] O. Worthy, Clerk." The copies of the minute entries offered to be introduced by the defendant were the order of the judge of the criminal court of Pike county adjourning the January term, 1897, of said court, until the first Monday in February, 1897, and continuing all the business not finally disposed of; and the entry upon the minutes of the convening of the court on the first Monday in January, 1897, and the adjourning of said court on that day, there being no business in said court. The state objected to the introduction of said certified copies of the indictment and the minute entries as evidence in the case, on the ground that they were irrelevant. The court sustained this objection, and the defendant duly excepted. Upon the introduction of all the evidence, the defendant requested the court to give to the jury the general affirmative charges in his favor, and duly excepted to the court's refusal to give the same as asked.

Hill & Hill, for appellant. Charles G. Brown, Atty. Gen., for the State.

McCLELLAN, C. J. The court correctly charged the jury that "the burden of proof of self-defense is on the defendant, and, in order for him to be entitled to his discharge, it must be proved by a sufficient amount of evidence to raise at least a reasonable doubt of his guilt." The doctrine that the burden is on the state, where self-defense is relied on, to prove that the defendant was at fault in bringing on the difficulty, is also correctly stated in the general charge given *ex mero motu* by the court. But in another part of the general charge the jury are instructed that, "in order for the defendant to set up self-defense he must show that he was entirely free from fault in bringing on the difficulty." This was a palpable misplacing of the burden of proof on the inquiry as to who was the aggressor, and the statement is so entirely opposed to, so in conflict with,

what is said on this subject in another part of the charge, that the error of it cannot be eradicated by considering the charge as a whole. At the best it could only have been concluded by the jury that the charge contained antagonistic statements on this point, and their adoption of the correct exposition would have been entirely problematical. Reversed and remanded.

(120 Ala. 434)

Ex parte SCUDDER-GALE GROCER CO.
(Supreme Court of Alabama. Jan. 31, 1899.)
MANDAMUS—ANSWER—DISCRETION OF JUDGE—ADEQUATE REMEDY.

1. The answer of respondent to a petition for mandamus, if uncontroverted, must be taken as true.

2. A newly-installed judge continued many cases to another week. It was generally understood that such order included default cases, and the clerk made no default docket for the day fixed by rule of the court for hearing motions for default judgment. A plaintiff moved on such day for such judgment, but the court, being informed that the case would be litigated, continued the case until the next motion day. *Held* not an unreasonable exercise of discretion, so as to warrant issuance of mandamus to compel entry of judgment.

3. A plaintiff moved for default judgment on the regular day fixed by rule for such motions, but the court continued the case until the next motion day, and meanwhile defendant filed pleas. After the latter date, and without invoking further action of the trial court, plaintiff applied for mandamus to compel entry of judgment by default. It did not appear that plaintiff could not have obtained his relief, if entitled to it, in the trial court. *Held* that, as it did not appear that the court had refused to do its duty, mandamus would not issue.

4. Plaintiff in mandamus must show that he has a clear legal right to compel performance of the duty sought to be enforced.

Application by the Scudder-Gale Grocer Company for mandamus to compel A. A. Coleman, judge of the Tenth judicial circuit, to enter judgment by default in favor of petitioner in an action by it. Writ denied.

Sam Will John and W. K. Brown, for petitioner.

SHARPE, J. The application was made to this court on December 2, 1898, and seeks the issuance of a writ of mandamus to compel the judge of the Tenth judicial circuit, holding the circuit court for the county of Jefferson, to enter a judgment by default as of the 5th day of November, 1898, in an action of detainee pending in that court, wherein the petitioner was plaintiff, upon the ground that, the defendant therein being in default, the petitioner, on a day when, by the rules of that court, such motions could be heard, moved the court to enter a judgment by default, which motion the court refused, and passed to a later day. The return of the circuit judge was submitted with this application. It shows, in effect, that

he was inducted into office two days before the motion for judgment was made; that, as incident to a change of officers and an accumulation of business, an order was made by the court continuing many cases to another week of the term; that, when plaintiff's motion for judgment was made, the court was informed by the clerk "that there was no default docket made to be called on that day, and that there was a general impression by the bar that all cases had been passed, to be reset under the order made on Thursday"; and the court was also informed that petitioner's case would probably be litigated. Thereupon the court declined to entertain the motion at that time without consent of the opposite party; stating to plaintiff's attorney, as a reason therefor, the misunderstanding as to the call of such cases, together with the information that the case would probably be defended. The case was then continued to the next motion day, before which time pleas were filed in the cause.

The proper conduct and disposition of the business of nisi prius courts necessarily involves the exercise of some discretion by the court. The precise time at which a cause ready for trial should be entered upon, depending, as it frequently does, upon considerations of convenience, both public and private, can hardly be made the subject of unbending rules, so as to give to a party to a cause the absolute right to demand and require that his case, though ready for trial, shall be immediately entered upon and disposed of. Varying circumstances may arise, which cannot be foreseen, calling for the present use of discretion, which is in the power alone of the trial court. Since it is the only tribunal which can take immediate cognizance of the attending circumstances, the trial court is presumed to be the one most capable of determining the proper action in the given case. Therefore it is an established rule that, though the abuse or arbitrary and unjust use of discretion may be controlled, yet the discretion of the court to which it properly belongs, when reasonably exercised, is not to be supplanted by the judgment of another, though a superior, court; and that, therefore, mandamus will never be used to control such exercise of discretion, even though it may not be in accord with the judgment of the supreme court. *High, Extr. Rem. §§ 154, 156; Ex parte City of Montgomery, 24 Ala. 98; Ex parte South & North Alabama R. Co., 44 Ala. 654; Ex parte Shaudies, 66 Ala. 134.*

The answer to this petition is uncontroverted, and must be taken as true. Its statements and admissions of fact are those upon which petitioner submits his right to relief. *High, Extr. Rem. § 462.* It appears therefrom that the action of the court complained of did not amount to a denial of petitioner's motion, but only to the making of an interlocutory order postponing and fixing the following Saturday for its hearing. As to the propriety of that

¹ Rehearing denied February 10, 1899.

action, we will express no opinion further than to say that, under the facts shown by the return, we are unable to say that such action was without the reasonable exercise of the court's discretion. *Stone v. McCann*, 79 Cal. 460, 21 Pac. 863; *People v. Superior Court of City of New York*, 19 Wend. 701; *High*, Extr. Rem. § 168; *Merrill*, Mand. § 204.

But other sufficient reasons appear why the writ cannot be granted. The petitioner makes this application after the day so appointed for the hearing of his motion, without invoking further action in the trial court. If, under the special practice act of that court, the pleas could have been ignored, no reason appears why he could not have obtained his judgment by default on that day. The right of a defendant, under a similar act, to plead after 30 days from service, was discussed in *Hudson v. Wood*, 102 Ala. 631, 15 South. 356. If, however, the pleas did present an obstacle to judgment by default, the court, unless moved to strike them out, could not legally render such judgment without disposing of them, which might have been by a motion addressed to its discretion. The court will not be required to commit error. *Heard's Shortt*, Extr. Rem. 271; *State v. Judge of Orphans' Court of Macon*, 15 Ala. 740; *Comer v. Bankhead*, 70 Ala. 136.

The existence of another adequate remedy to enforce a right, and the absence of a clear legal right to the writ, are each conditions fatal to an application for mandamus, which issues only in case of necessity. *Merrill*, Mand. §§ 209, 222; *High*, Extr. Rem. § 177; 2 *Brick. Dig.* p. 240, and cases cited. When the duty sought to be enforced is of a private nature, affecting only the right of the relator, when it is not clear that there has been a refusal to act, either positive or by conduct equivalent thereto, on the part of the officer, the writ will be denied; and the reason, as stated in *Merrill*, Mand. § 222, is that "it would be an abuse of justice to convict one of nonfeasance or misdemeanor in neglecting his official duty when he has not refused to do what may be required, and to mulct him in costs when he is not in default." See, also, *Heard's Shortt*, Extr. Rem. 248. In view of the failure of petitioner to invoke the proper action in the circuit court, it does not appear that, at the time of this application, the court is in the attitude of refusing to do its duty.

As to the duty sought to be enforced, the rule is that it must relate to a specific legal remedy, adequate to restore the party complaining to the situation in which he was when the act complained of was done. 2 *Brick. Dig.* p. 240. The specific relief prayed by this petition is to compel the entry of a judgment by default as of the 5th day of November, 1898. It is not claimed that application was ever made to the circuit court to enter such judgment nunc pro tunc, nor are we advised of any authority in that court to so render the judgment, or in this court to command such rendition. A demand depending

for its enforcement upon the invention of such retroactive fiction is not the clear legal right which alone can be aided by mandamus. For the several reasons stated, the writ must be denied.

(122 Ala. 449)

FINNEY v. DENNY.

(Supreme Court of Alabama. Jan. 31, 1899.)

SET-OFF—PLEADING—APPEAL—HARMLESS ERROR.

1. A plea of set-off, alleging that at the time suit was commenced plaintiff was indebted to defendant in a certain sum, by liquidated or by unliquidated demand, as the case may be, amounting to said sum, to wit, a certain date, and due at that date to defendant, is not objectionable as failing to show what the demand is, or when it was due. Code 1886, p. 797.

2. A recital in a judgment that it was shown that the only claim of set-off defendant had was that mentioned in a certain plea, on which there was a verdict for plaintiff, does not show that defendant was not injured by error in sustaining a demurrer to other pleas of set-off.

Appeal from circuit court, Chambers county; N. D. Denson, Judge.

Action by John D. Denny against Charles E. Finney. From a judgment entered on a verdict for plaintiff, defendant appeals. Reversed.

The complaint counted upon an instrument under seal executed by the defendant to the plaintiff. The defendant filed the following pleas: "(1) That he has fully paid off and discharged the instrument sued on before the commencement of this suit. (2) That at the time this suit was commenced the plaintiff was indebted to him in the sum of two thousand dollars, by an unliquidated demand, amounting to five thousand dollars, stated above, to wit, the 25th of December, 1891, and due at that date to the defendant, which he hereby offers to set off against the demand of the plaintiff; and he claims the judgment for the residue. (3) That at the time this suit was brought the plaintiff was indebted to him in the sum of two thousand dollars by a liquidated demand amounting to two thousand dollars, stated above, to wit, the 25th of December, 1891, and due at that date to the defendant, which he hereby offers to set off against the demand of the plaintiff; and he claims the judgment for the residue." "(5) Comes the defendant, and for further answer to said complaint, and as a defense to the action of plaintiff, saith that at the time said action was commenced the plaintiff was indebted to him in the sum of two thousand dollars due for money paid by mistake by defendant to plaintiff, on, to wit, December 25, 1891, which money plaintiff was not entitled to receive, and which, of right, the plaintiff was due to defendant on said date, which defendant hereby offers to set off against the demand of the plaintiff; and he claims the judgment for the residue." To the second and third pleas the plaintiff demurred upon the grounds: (1) The pleas fail

to state what said unliquidated or liquidated demand was; (2) that they fail to state when said demand offered to be offset was due; (3) they fail to show a cause of action by defendant against plaintiff. This demurrer was sustained, and the defendant duly excepted. Upon issues joined on the first and fifth pleas there was verdict in favor of the plaintiff. After reciting the ruling upon the pleadings, and the finding of the verdict by the jury, the judgment entry then recites: "It is therefore adjudged by the court that the plaintiff, John D. Denny, have and recover of defendant, C. E. Finney, the said sum of two hundred and forty dollars as damages, besides the costs of this suit; for which let execution issue. It was shown in this case that the only claim of offset that defendant had against the plaintiff was that claimed in plea No. 5. And, it further appearing to the court that the instrument upon which this suit was brought, and upon which this judgment is based, contains a waiver of exemptions as to personal property, it is therefore adjudged," etc. The transcript contains no bill of exceptions, and on the appeal taken from this judgment the defendant assigns as error the ruling of the court in sustaining the demurrers to the second and third pleas.

E. M. Oliver and Lum Duke, for appellant.
Robinson & Duke, for appellee.

TYSON, J. The pleas of set-off filed by defendant were sufficient under the authority of *Lang v. Waters*, 47 Ala. 624; *Sledge v. Swift*, 53 Ala. 110; *Rosser v. Bunn*, 66 Ala. 89. Form of plea of set-off, Code 1886, p. 797. The recital in the judgment, "It was shown in this case that the only claim of offset that defendant had against the plaintiff was that claimed in plea No. 5," is not conclusive that no injury was suffered by defendant by sustaining the demurrers to his pleas Nos. 2 and 3, if it can be considered by this court for any purpose; non constat, defendant offered no evidence, and very properly, in support of the averments of these pleas. Judgment reversed, and cause remanded.

(120 Ala. 351)

SPEAR v. STATE.

(Supreme Court of Alabama. Jan. 19, 1899.)

RESISTING ARREST—JUSTIFICATION—PROCESS—EXECUTION—TRANSFER OF JURISDICTION—WRIT OF ARREST—DESCRIPTION OF OFFENSE—SUFFICIENCY.

1. An officer charged with the execution of process must do so unless it is void on its face, or the court issuing it is without jurisdiction; but he is not bound to inquire into the regularity of the proceedings prior to its issuance.

2. Acts 1888-89, p. 631, establishes a criminal court in Pike county, and provides that all pending indictments for misdemeanors be transferred, that all indictments preferred by the grand jury be returned by the clerk of the circuit court to the criminal court, that process thereon be issued by the clerk of the latter court, that the clerk of the circuit court shall be ex officio clerk of the criminal court, and

vests in the latter exclusive jurisdiction of such causes. *Held* that, in a prosecution for resisting arrest, an objection that it does not appear that the indictment was filed in the criminal court is untenable, since the act *ex vi termini* conferred jurisdiction on the criminal court, and the failure to indorse on the indictment its filing in that court is immaterial clerical error.

3. An objection that the writ of arrest was signed by the clerk of the circuit court cannot be sustained, since such clerk is ex officio clerk of the criminal court, which accused was bound to know.

4. An accused cannot justify his resisting of a writ of arrest because his initials, and not his full Christian name, were given.

5. Under Code 1896, § 5253, providing that a writ of arrest shall contain a statement of the offense charged by name, a writ of arrest reciting that accused was indicted for the "offense of carrying a concealed pistol" sufficiently designates the offense charged.

Appeal from city court of Montgomery; A. D. Sayre, Judge.

George Spear was convicted of resisting the execution of a writ of arrest, and he appeals. Affirmed.

On the trial of the case the state introduced two deputy sheriffs, who testified to their going to the house of the defendant with a writ of arrest, and seeking to execute it, and that thereupon the defendant presented a pistol at them, and demanded that they leave his house. The state then introduced in evidence the writ of arrest, which was in words and figures as follows: "The State of Alabama, Pike County. To Any Sheriff of the State of Alabama: An indictment having been found at the Sg. term, 1897, of the circuit court of said county against G. Spear for the offense of carrying a concealed pistol, you are therefore commanded forthwith to arrest," etc. This writ was dated January 30, 1897, and signed, "O. Worthy, Clerk of the Circuit Court of Pike County." The defendant objected to the introduction in evidence of said writ of arrest, upon the ground that it was inadmissible, since it was a "writ of arrest issued from the circuit court of Pike county against G. Spear, and not against George Spear, the defendant." The court overruled this objection, and the defendant duly excepted. The defendant, as a witness in his own behalf, testified that he did not resist the execution of the writ. For the purpose of showing that the indictment returned by the grand jury of Pike county, and on which the writ of arrest attempted to be executed on the defendant was issued, had never been returned out of the circuit court to the judge of the criminal court of Pike county, and filed in the criminal court of Pike county, as required by law, but was still pending in the circuit court of Pike county, the defendant offered to introduce in evidence a certified copy of the indictment returned by the grand jury of Pike county, and also the certified copy of the minute entries of the criminal court of Pike county. The certified copy of the indictment above referred to was as follows: "The State of Alabama, Pike County. Circuit Court, Spring

Term, 1897. The grand jury of said county charge that before the finding of this indictment G. Spear, whose Christian name is to the grand jury unknown, carried a pistol concealed about his person, against the peace and dignity of the state of Alabama."

D. A. Baker, for appellant. Charles G. Brown, Atty. Gen., for the State.

TYSON, J. The defendant was indicted, tried, and convicted in the city court of Montgomery for resisting officers in the execution of a writ of arrest issued by the clerk of the criminal court of Pike county. By provisions of the act of the general assembly "to establish a criminal court for the county of Pike" (Acts 1888-89, p. 631), it was made the duty of the judge of the circuit court, within 10 days after the passage and approval of this act, to enter an order upon the minutes of his court directing and requiring the clerk to deliver to the judge of the criminal court all indictments for misdemeanors then pending and entered in said circuit court; and upon the transfer and delivery of the same the jurisdiction of the circuit court ceased, and exclusive jurisdiction was conferred in said cases upon the criminal court of Pike county. And all indictments for misdemeanors preferred by the grand jury after its passage were and are to be returned by the clerk of the circuit court to the judge of said criminal court, and filed in said criminal court, and process thereon to be issued by the clerk of that court. This act further provides that the clerk of the circuit court shall be ex officio clerk of the criminal court.

The only question raised and insisted upon in argument by appellant's counsel is that the writ of arrest undertaken to be executed by the officers upon the defendant was void. It can now be regarded as the settled law of this state that an officer charged with the duty of executing process is bound to do so unless the process is void upon its face, or the court issuing it is without jurisdiction. The officer, in discharging this duty, is not bound to inform himself of irregularities in the indictment or other initial proceedings, made the basis for the issuance of the writ. *Murphy v. State*, 55 Ala. 252. In the case of *Brown v. State*, 109 Ala. 87, 20 South. 109, Chief Justice Brickell stated the doctrine to be: "As a general proposition, it may be stated that the officer is justified in the execution of the process when it proceeds from a court or magistrate having jurisdiction to issue it, unless invalidity appears on its face. He is not bound, and has no authority, to inquire into the regularity or legality in the proceeding prior to its issue."

The first insistence of defendant is that it nowhere appears that the indictment has been filed in the criminal court of Pike county, and that the writ on its face purports to be issued by "O. Worthy, Clerk of the Circuit Court of Pike County," and therefore it must

have been issued upon an indictment for a misdemeanor pending in the circuit court of that county, of which that court had no jurisdiction, it having been ousted by the act above referred to establishing the criminal court. The words of this act *ex vi termini* conferred jurisdiction upon the criminal court, and the mere failure to indorse upon the indictment its filing in that court, if this fact had been made to appear, was a mere clerical irregularity, which could avail the defendant nothing. And again, the fact that the writ was signed by O. Worthy, designating himself as "clerk of the circuit court," cannot affect the validity of the writ. By the act establishing the criminal court he was, by virtue of being clerk of the circuit court, ex officio clerk of the said criminal court; and this the officers and the defendant were bound to know. Indeed, it was unnecessary that he should have added any words descriptive personae after his signature. *Johnson v. State*, 73 Ala. 21. His official relation to these courts was a matter of law, of which all officers, persons, and courts in this state will take notice.

The contention that the writ designated the defendant as "G. Spear," instead of setting out his full Christian name, is without merit. This might have been a good ground for a plea in abatement to the indictment, but, without this plea, if defendant had gone to trial, the conviction would have been legal. *Winter v. State*, 90 Ala. 687, 8 South. 556; *Washington v. State*, 68 Ala. 85; *O'Brien v. State*, 91 Ala. 25, 8 South. 560. It not infrequently happens that an offense is committed and an indictment is preferred against the offender where his name is entirely unknown, and therefore not alleged in the indictment. In such a case the warrant or writ of arrest would contain no name at all, but only such a description of the person charged that would enable the officer executing the writ to sufficiently identify him for the purpose of making the arrest. Any other rule would license strangers, whose true names are unknown, to commit crimes, and, if apprehended in them, legalize their resistance of the officers of the law charged with the duty of enforcing it, and impose upon the officer the burden of knowing, before undertaking the arrest, that the true name of the offender is correctly stated in the warrant. Should he be misinformed in this respect, and notwithstanding he may know that the person upon whom he is undertaking to execute the writ is the person wanted, yet, forsooth, because the warrant designates such offender by his initials, he has the right to resist the officer. This appears from the testimony of the defendant to be this case, at least in so far as his being the person intended to be named in the warrant. It finds no lodgment in any of the adjudications of this court or in sound reasoning and logic.

The only remaining point insisted upon for the invalidity of the writ is that it omitted to state any offense. It contains these words: "An indictment having been found at the

spring term, 1897, of the circuit court of said county against G. Spear for the offense of carrying a concealed pistol, you are commanded," etc. An examination of sections 4601, 5208, and 5253 of the Code of 1896 will show three forms for warrants or writs of arrest. Under sections 4601 and 5208 they are designated as "warrants," and under section 5253 as "writ of arrest." The first two relate and govern proceedings in the county and justice of the peace courts, while the latter relates to proceedings where an indictment has been found. It will be observed that each of these forms contains substantially the same requirements, to wit, the name of the defendant, a statement of the offense charged by name, the county in which it was issued, and to be signed by the officer issuing it. *Johnson v. State*, supra. In the case of *Brown v. State*, 63 Ala. 97, the warrant of arrest issued by the justice charged the defendant with "the offense of failing to work the road." This court held that this was a sufficient designation of the offense, and in the opinion, in speaking of this warrant, said: "A warrant is sufficient if it designates the offense by name, or describes it, or if it employs terms from which the offense may be inferred." In *Brown v. State*, 109 Ala. 86, 20 South. 109, it is said the warrant "must also state the offense, either by name or so that it can be clearly inferred." In *Williams v. State*, 88 Ala. 84, 7 South. 101, it was said: "A warrant of arrest issued by a justice of the peace, commanding the officer to arrest the accused 'to answer the criminal offense of larceny,' has been held to be sufficiently regular on its face to justify the officer in executing it." In *Rhodes v. King*, 52 Ala. 275, it was held that a warrant reciting the offense of obtaining goods by false pretenses need not recite an intent to injure or defraud, though such an intent is an essential constituent of the crime. This case was approved in the case of *Williams v. State*, supra. See, also, the case of *Crosby v. Hawthorn*, 25 Ala. 221. Chapter 135, Code 1896 (article 6, c. 3, tit. 2, Cr. Code 1886), designates the offense as "carrying concealed weapons." These words, we concede, would not be sufficient to support an indictment, yet the same strictness as the cases above quoted and cited show is not required in a warrant or writ of arrest, and we hold that the offense in this writ was sufficiently designated. We find no error in the record. Judgment affirmed.

(122 Ala. 355)

WEBB v. WARD.¹

(Supreme Court of Alabama. Jan. 19, 1899.)

ACTION ON NOTE—ANSWER—AGENCY.

1. A plea, in an action on a note, that it was given on a rescission of a sale made ostensibly to plaintiff, but in fact to one B., and that, after delivery of the note, defendant ascertained that B., his agent, was a party to the purchase,

which was thereby fraudulent, does not sufficiently allege the interest of B., and is demurrable.

2. Plaintiff, being anxious to sell his interest in a certain firm, requested one B. to find him a purchaser. Nothing was said about compensation to B., nor was any authority given to him to sell. Thereafter B. brought a written proposition, which was accepted in writing by the seller. *Held*, that the fact that the purchase was for the joint benefit of the purchaser and B. did not render it invalid, there being no sufficient proof of agency on the part of B.

Appeal from circuit court, Hall county; John Moore, Judge.

This action was brought by Thomas R. Ward, Jr., against Samuel S. Webb, and counted on a promissory note executed by the defendant on November 12, 1896, and payable to the plaintiff on February 7, 1897. The defendant filed three pleas. In the first plea the defendant, "for answer to the complaint filed therein, pleads and says that during the year 1896 the defendant and one W. H. Moore were engaged in the mercantile business in Greensboro, Ala., under the firm name of Moore & Webb; that during the fall of said year the defendant became desirous of selling his interest in said business, and did contract with one J. A. Blunt to make the sale for him; that during the months of October or November, 1896, the said Blunt, acting for and in behalf of the defendant, reported a sale of the defendant's interest in said business to one T. R. Ward, Jr.; that afterwards the defendant requested the said Blunt to have the said sale rescinded, who shortly reported that plaintiff demanded, as a consideration for such rescission, that the firm of Moore & Webb should give him the note of W. H. Moore, indorsed by defendant, for the sum of \$250, and the note of the defendant for the sum of \$250, and which note was to be indorsed by W. H. Moore, the defendant's partner in business; that the defendant, in compliance with said demand, executed and delivered to the plaintiff the note sued on; that at the time of the execution and delivery of the said note the defendant was informed that the sale of his interest in the said business had been made to plaintiff, but that after the delivery of said note defendant ascertained that his agent, J. A. Blunt, was a party to the said purchase, and was interested in the debt evidenced by said note. And defendant avers that this purchase and interest on the part of said Blunt was entirely unknown to the defendant at the time he executed and delivered the note sued on. And defendant further avers that T. R. Ward, Jr., knew at the time of said purchase that J. A. Blunt was the agent of defendant in making said sale. And defendant further avers that he disaffirmed said acts of the said Blunt as soon as he ascertained the facts in the case, and did refuse to pay said note now sued on. Defendant therefore prays judgment on his said plea." The second plea was as follows: "Defendant, for further answer to said complaint, says that in the year 1896 he was one-half owner of a certain mercantile

¹ Rehearing denied February 3, 1899.

business in Greensboro, Ala.; that in the fall of the said year he gave authority to one J. A. Blunt to sell his said interest in said property, and the said Blunt, as his agent, without knowledge or consent of the defendant, entered into a contract with the plaintiff (who knew at the time that the said Blunt was acting for the said defendant, and who was a partner of the said Blunt in the said purchase of such property) to sell the same to the plaintiff, with the understanding between the said Blunt and the said plaintiff that the said Blunt was to share in the profits. And the defendant avers that, without knowledge of these facts, desiring to rescind said sale, the defendant executed and delivered to the plaintiff the note sued on; that some time after the execution of said note he ascertained the fact that his said agent was interested in the purchase of said property, which he was only authorized to sell, and that plaintiff knew of the authority under which the said agent was acting at the time of purchase and of the execution of the note; that immediately upon learning these facts the defendant disaffirmed the said acts of his said agent, and refused to pay said note. And he prays judgment that he ought not to be forced to pay said note, for the reason assigned in this plea." The defendant's third plea contained substantially the same averments as did the second, and set out in detail the facts pertaining to the transaction, and the execution of the note sued on by the defendant, and averred specifically that J. A. Blunt acted as the agent of the defendant in the negotiation of the sale. The plaintiff demurred to the first plea (among others) upon the ground that the plea fails to allege that said Blunt was defendant's agent for a reward, and, further, that said plea, while it denies in general terms that the note sued on was not supported by a valuable consideration, shows on its face that it was supported by a valuable consideration. This demurrer was sustained. The demurrers to the second and third pleas were overruled, and the trial was had upon issue joined upon said pleas. The note sued on was introduced in evidence. The evidence relied on by the defendant to support the averments of his pleas is set forth in the opinion. Upon the introduction of all the evidence, the court, at the request of the plaintiff, gave the general affirmative charge in his behalf, to the giving of which charge the defendant only excepted. There were verdict and judgment for plaintiff. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved. Affirmed.

Thos. E. Knight, for appellant. Ed de Graffenried, for appellee.

SHARPE, J. The pleas filed in this case each set up, in bar of the recovery sought, facts specially pleaded to show a want of consideration for the note sued on, in that it was given upon a rescission of a sale of ap-

pellant's half interest in the goods of Moore & Webb, made through J. A. Blunt ostensibly to appellee, which transactions appellant elected to treat as invalid, upon the ground, alleged to be true, that Blunt was appellant's agent in making the sale, and was a joint purchaser with appellee, of which fact appellant was ignorant until after the note was executed. In plea No. 1, Blunt's interest as a purchaser appeared only by way of recital, in these words: "That, after the delivery of said note, defendant ascertained that his agent, J. A. Blunt, was a party to the said purchase, and was interested in the debt evidenced by said note." This recital falls far short of compliance with the rules of pleading, which require that material facts shall be averred with certainty, and which condemn a mere inferential recital of them as insufficient. 1 Chit. Pl. (16th Ed.) 260. Nor does it appear, even from the recital, in what way Blunt was a party to the purchase or was interested in the note. The demurrer to that plea was properly sustained.

The principle invoked by the defense is that which disables a selling agent, without consent of his principal, to combine in himself the character of seller and buyer. By the submission of the cause to the jury under pleas 2 and 3, appellant obtained the full benefit of that principle, so that its discussion here is unnecessary. The general affirmative charge was given for the plaintiff, presumably upon the conclusion that the pleas were not supported by the proof, and in that conclusion we fully concur.

The evidence chiefly relied on to support the averments of the pleas as to Blunt's agency and his sale of the property appears in the following extracts from appellant's testimony, as shown by the bill of exceptions, upon the construction and effect of which depends the propriety of the charge in question: "About that time I went to J. A. Blunt, who resides in Greensboro, also, and whom I had known for a number of years, and regarded as my friend, and told him that the firm of Moore & Webb was financially embarrassed, and that I desired to sell my undivided one-half interest in the goods, to raise money in order to meet my part of the liabilities of the firm. * * * I told Mr. Blunt that I had concluded to sell my interest, and that I desired him to help me find a purchaser. I conferred frequently with Mr. Blunt about the matter, and asked him on various occasions to find a purchaser for me. About the 1st November, Mr. Blunt told me he thought it was probable that he could find a purchaser, and asked me to tell him what I was willing to take for my interest. I told him I would not take less than 65 cents on the dollar for my half interest, original cost. On November 6th, Mr. Blunt met me at or near Mr. Moslander's store, in Greensboro, and told me that he thought he had a purchaser for my interest in the stock

of goods at 65 cents on the dollar, and that he would see me at my room about it. Shortly after this conversation, Mr. Blunt came to my room, and handed me a written paper. [Here follows a copy of a written proposition to sell, addressed to appellee, and signed by appellant]. This was the first intimation I had that Mr. Ward was the contemplated purchaser. I signed the paper, and Mr. J. A. Blunt signed his name as a witness thereto, and I returned it to Mr. Blunt. This paper was prepared and ready for my signature before I knew of its existence. Blunt did not then tell me, and has not since told me, that he was in any wise interested in said purchase, and Mr. Ward has never so informed me. After I had signed the paper as afore stated, and handed it to Mr. Blunt, he (Blunt) left, and shortly afterwards came back, and handed me Ward's written acceptance of his proposition. * * * In the conversations with Mr. Blunt before the sale took place, I told Blunt I regarded him as my friend, and would do anything that he advised." On cross-examination the witness stated there was no agreement that Blunt should be paid anything for making the sale for him. "Nothing was said about pay, in any way, between us. I stated to several other people besides Mr. Blunt that I was anxious to sell my interest in the stock of goods, but never authorized any one except Mr. Blunt to find a purchaser for me. I did not learn that Blunt was a co-purchaser with Ward of my interest until after the note had been executed." This testimony shows nothing more, in effect, than voluntary and gratuitous, though self-interested, service rendered by Blunt, at appellant's request, in finding him a purchaser, and bringing the parties together upon the terms of the trade, which was finally effected directly between themselves by a written proposition on one side, and a written acceptance thereof on the other side. The fact that the purchase was for the joint benefit of appellee and Blunt does not affect the question of agency. Appellant nowhere testifies that he gave authority to Blunt to sell, but only that, after consulting him as a friend, he requested him to find a purchaser. Such request imposed no obligation upon either party, and it is plain that it conferred no authority to sell. Agency is founded upon contract, either express or implied, and is a legal relation whereby the agent is employed or authorized to represent the principal in the business to be transacted. Mechem, Ag. § 1; 2 Kent, Comm. p. 734; Whart. Ag. § 1. The request in question created no contractual relation between appellant and Blunt, imposed no obligation upon either party, was not even a request to sell, and conferred no authority to do so; nor was the part taken by Blunt in conveying mutual propositions between appellant and appellee the exercise of a power to sell. Finding no error in the record, the judgment of the circuit court is affirmed.

(122 Ala. 188)

WARD v. MATHEWS.

(Supreme Court of Alabama. Jan. 19, 1899.)

ILLEGITIMATE CHILD—DESCENT OF PROPERTY—GUARDIAN AD LITEM—LIABILITY FOR COSTS.

1. Code, § 1460, provides that the mother or kindred of an illegitimate child on the part of the mother, in default of children of such illegitimate child or their descendants, is entitled to inherit his estate. Id., c. 35, art. 1, provides that, on the death of an intestate leaving a parent or parents, his property shall descend to the parents in equal portions, but, in case only one parent survives, then he or she shall be entitled to one half, and the other half shall descend to the brothers and sisters of the deceased. *Held* that, on the death of an illegitimate child intestate, the mother is entitled to one-half of the estate, and the remainder should be divided among the half brothers and sisters of the decedent.

2. Code, § 468, provides that a guardian ad litem may appeal in the name of a minor, but need give no security for costs. Section 469 provides for reimbursements of guardian ad litem for costs of appeal, in the discretion of the judge of probate. *Held*, that a guardian ad litem is liable for the costs of his appeal when the judgment below is affirmed.

Appeal from probate court, Jefferson county; M. T. Porter, judge.

Application of T. J. Mathews, administrator, for a partial settlement. From an order of the court granting the same, W. C. Ward, guardian ad litem, appeals. Affirmed.

In May, 1897, L. F. Henderson, the illegitimate son of Mrs. Lucretia Henderson, died intestate in the city of Birmingham, leaving no children nor wife, but leaving surviving him his mother and three half-brothers and one half-sister, who were grown, and two nieces, the minor children of his deceased half-sister. T. J. Mathews was appointed administrator of L. F. Henderson's estate. Mathews, as such administrator, filed his application for partial settlement, alleging that the decedent had no direct descendants, and that his heirs at law were his mother, his half brothers and sister, and the children of his deceased half-sister. W. C. Ward was appointed guardian for the minor children. The grown half brothers and sister made no objection to the allegation of the administrator that their mother, Lucretia Henderson, who was the mother of both the decedent and other children who are named as heirs, and the grandmother of the minors, but W. C. Ward, as guardian for these minor children, pleaded that, as L. F. Henderson was the illegitimate son of Lucretia Henderson, the kindred of this illegitimate child on the part of the mother, who are first entitled to inherit, were the half brothers and sisters of such decedent or their descendants, and they were entitled to the whole of the property, and Lucretia Henderson was improperly named as one of the parties entitled to participate. To this plea Lucretia A. Henderson, the mother and only surviving parent of the deceased, demurred upon the following grounds: (1) That the fact that the decedent was the illegitimate child of the demurrant does not change her status in law as an heir

of said estate entitled to a distributive interest therein; (2) that said plea does not set forth any facts which show that the demurrant was not entitled to a distributive interest of one-half of the estate of the decedent. This demurrer was sustained, and, in a decree on partial settlement, the court, after hearing the testimony, decided that the mother was entitled to one-half of the estate, and the half brothers and sister and the children of the deceased half-sister of the decedent to the other one-half, and judgment was entered accordingly. From this judgment the guardian appeals, and assigns as error the sustaining of the demurrer to the plea and the rendition of said judgment.

Ward & Houghton, for appellant. Knox, Bowie & Dixon, for appellee.

SHARPE, J. The statute relating specially to the descent and distribution of estates of illegitimates dying intestate, and without descendants, forms section 1460 of the present Code, and is as follows: "The mother or kindred of an illegitimate child on the part of the mother are, in default of children of such illegitimate child or their descendants, entitled to inherit his estate." In the case of *Butler v. Land Co.*, 84 Ala. 384, 4 South. 675, this statute was under the consideration of this court upon a controversy which involved the question here presented, as to the manner of descent and distribution of such estates as between the mother of a deceased illegitimate and her descendants. It was there held that this section, standing alone, was doubtful of meaning as to the persons who should take as well as to the quantity to be taken by each, and therefore that, to ascertain such meaning, reference should be had to the other statutes then existing regulating descent in ordinary cases, treating the subject and the system as one. By the ordinary rule then in force, the brothers and sisters, or their descendants, were preferred to the mother; and the meaning of the particular statute was solved by applying to it the same rule, and thereby the brother of the deceased was held entitled to the property to the exclusion of the mother. The correctness of that decision has not been questioned in any other case in this court. Since its rendition, the ordinary rule of descent and distribution has been changed by the act of January 30, 1891, which, as amended by the act of February 21, 1893 (Acts 1892-93, p. 1055), is as follows: "That hereafter in this state the real and personal property of all persons dying intestate who have no husband or widow or children, or descendants of children, but who leave surviving a parent or parents, shall descend subject to the payment of debts and charges against the estate: First, to the parents in equal portions, and in case but one parent is surviving, then he or she shall be entitled to one half of such estate, and the other half to the brothers and sisters of the

deceased, or their descendants, as now provided by law, and if there be no brothers and sisters and their descendants, then the whole estate shall go to the surviving parent." Such was the statute in force at the death of L. F. Henderson, and which is still in force, being substantially embodied in article 1 of chapter 85 of the present Code. The statute relating expressly to estates of illegitimates remains unchanged, and, standing by itself, is as uncertain as it was found to be in the trial of *Butler v. Land Co.*, supra. We think the mode there adopted to determine its meaning, which was to apply to it the general rule provided by the statute for descent and distribution in ordinary cases, was the correct one. That rule being changed, the result of its application, along with section 1460 of the Code, is also changed. As to the father, the decedent was nullius filius, as at common law. But our statute changes that status, and makes him the son of his mother. She is his only parent, and his only collateral kindred are ex parte materna. As between them, applying the general rule as now existing, and as it existed at the death of L. F. Henderson, the mother is entitled to take one-half the estate, real and personal, and of the remainder the other appellees, who are brothers and sisters of the deceased, are each entitled to one-fifth, and the infant appellants are each entitled to one-tenth. It was so decreed in the probate court, and the decree will be here affirmed.

Upon the affirmance of the decree of the probate court, the judgment of this court adjudged "that W. C. Ward, guardian, etc., for Etha May Edmerson and Hettie Francis Edmerson, pay the costs of appeal of this court and of the probate court." This judgment of affirmance was rendered on January 18, 1899. On February 9, 1899, there was spread upon the motion docket of this court the following motion: "Comes W. C. Ward, who, by the court, upon the affirmance of the judgment in the annexed stated cause, on, to wit, the 20th day of January, 1899, was adjudged to pay the costs of the appeal in said cause, and moves the court to retax the costs, so that he may not be taxed therewith, upon the following grounds: (1) That said judgment was rendered against the said W. C. Ward as guardian, when the record shows that he was only the guardian ad litem of appellants; (2) and for the further ground that he, as guardian ad litem, is in no way chargeable with the costs of the appeal. Wherefore he moves the court that the judgment, so far as the same charges him with the costs of appeal, be vacated and held for naught."

PER CURIAM. This is an application by a guardian ad litem, who prosecuted an appeal to this court in the name of the minors, whom he was appointed in the court below to represent, to vacate the judgment of this

court adjudging him liable for the cost of the appeal. Section 1323 entitles the successful party, in all civil actions, to recover full costs against the unsuccessful party, for which judgment must be rendered, unless in cases otherwise directed by law. Section 468 provides that the next friend, general guardian, or guardian ad litem may, in the name of the minor, take and prosecute an appeal from any final decree of the court of probate, or from any judgment, order, or decree of the judge of probate, but a guardian ad litem is relieved of giving any security for costs. This section had its origin in an enactment entitled "An act to regulate appeals from probate courts," approved December 12, 1857 (Acts 1857-58, p. 244); and this provision of the enactment was carried into the Codes of 1867 and 1876, without change in verbiage, in which a guardian ad litem was required to give bond for that purpose. In codifying the Code of 1886, the only change made was to relieve a guardian ad litem of this requirement. That he is a party to the appeal we entertain no doubt. Section 468, and, indeed, the original act, place him upon the same footing with a general guardian or next friend. No distinction is there made between them except in the particular pointed out. And in the case of *Perryman v. Burgster*, 6 Port. 99, in which this court held that a guardian ad litem is never chargeable with the costs accruing in the cause in the court below, the reason assigned by the court was that a guardian ad litem, under the practice proceedings in the English chancery courts, was an involuntary party, and it would work a hardship upon him to enforce the payment of the costs against him, which he in no wise voluntarily, expressly, or impliedly assumed. The doctrine recognizes him as a party. But that he is not liable for costs in the court below, for the reasons assigned, is a matter of no consequence in the consideration of this question. He is a party, under the statute authorizing him to sue out the appeal to this court, and wherever he avails himself of the authority there conferred he becomes as much a party to the appeal as the general guardian or next friend when the appeal is prosecuted by either of them. That this construction was the legislative one is made manifest by section 469 of the Code, in which provision is made for his reimbursement for all costs of the appeal paid by him, in the discretion of the judge of probate, from the estate of the testator or intestate or minor. It was not until the Code of 1886, notwithstanding he was required to give bond for the costs of the appeal, that this benefit was conferred upon him. To hold that he would be entitled to reimbursement for costs paid by him for which he was not legally liable would be unreasonable. So, the only reasonable construction of section 469 is that the legislature intended that he should be liable, just as executor, administrator, guardian, or next friend, who are also

entitled to the same benefit of reimbursement, are liable. Besides, under this section, no possible loss can come to him by the payment. It is the plain duty of the judge of probate to reimburse him for these costs from the estate of the testator or intestate or minor, where a bona fide appeal is prosecuted. In the case of *Brown v. Williams*, 87 Ala. 353, 6 South. 111, in which a contrary view was held by this court, these statutes were not considered, and the opinion on the point under consideration was based upon the authority of *Perryman v. Burgster*, supra. *Perryman v. Burgster* was declaratory of the common-law rule, and its soundness is not here questioned. But, as we have shown, this rule has been changed by statute. The case of *Brown v. Williams*, not being in conformity to our views, must be overruled. It follows that the application must be denied.

(120 Ala. 403)

BIRMINGHAM BUILDING & LOAN ASS'N v. STATE.

(Supreme Court of Alabama. Jan. 18, 1899.)

TAXATION—EQUALIZATION BOARD—CORRECTION OF ASSESSMENT—MINISTERIAL ACTS—APPEAL.

1. The act to amend the revenue laws, approved February 18, 1895, § 31 (Acts 1894-95, p. 1205), provides that the county board of equalization shall convene on the first Monday in May, and examine the assessment list, and enter any errors on a docket to be kept for that purpose, in each case the state appearing as plaintiff, and the affected taxpayer as defendant, and to issue a notice to the taxpayer stating the substance of the supposed error, citing him to appear on the first Monday in June to show cause why the correction should not be made. *Held*, that these preliminary acts were merely ministerial, and hence failure to perform them strictly at the time prescribed did not prevent the board from proceeding to make corrections.

2. The act amending the revenue laws, approved February 18, 1895, § 33 (Acts 1894-95, p. 1206), provides that, on an appeal from the decision of the county board of equalization in relation to its correction of an assessment, the matter shall be tried anew. *Held* that, on such an appeal, a judgment, based alone on the assessment made by the board, was unauthorized, since the judgment by the board could not be looked to for any purpose.

Appeal from circuit court, Jefferson county; James J. Banks, Judge.

Proceeding by the state against the Birmingham Building & Loan Association to raise its assessment. From a judgment by the county board of equalization for plaintiff, defendant appealed to the circuit court, where the decision of the board was affirmed, and defendant appeals. Reversed.

The Birmingham Building & Loan Association gave in its property for taxes to the tax assessor of Jefferson county for the year 1896 within the time prescribed by law. On July 2, 1896, a citation was issued by the board of tax equalization of Jefferson county, Ala., notifying the Birmingham Building & Loan Association that said board of tax equalization, in regular session, on July 2d,

raised the tax assessment on its property theretofore made by the tax assessor of said county, and that the cause was set down for hearing at the next regular session of said board, on July 10, 1896. This citation was served upon the association, and, by its attorney, it appeared before the board the day it was cited to appear, and made a motion to dismiss the cause. The grounds of this motion and the other proceedings which were had in the case are sufficiently stated in the opinion.

Smyer & Smyer, for appellant. Wm. C. Fitts, Atty. Gen., for the State.

DOWDELL, J. By section 5 of the "Act to amend the revenue laws of Alabama," approved February 18, 1895 (Acts 1894-95, p. 1192), a county board of equalization of taxes in each county is created, in the manner therein specified. Section 31 of said act provides that "said board will convene at the court house of the county on the first Monday in May, and shall rigidly examine each assessment list, and compare all such lists carefully with the book of assessment, and institute inquiry as to the correctness of any assessment of real or personal property, or subject of taxation; and if upon such inquiry any assessment, whether made by the taxpayer, his agent, or by the assessor, is supposed not to be full and complete, or the property assessed at less or more than its actual value, or that property has been omitted that should have been assessed, the said board of equalization shall enter the same on a docket to be kept for that purpose by said board in the name of the state of Alabama as plaintiff and the taxpayer as defendant, and shall issue a notice and copy thereof, addressed to the taxpayer, stating the substance of the supposed error, improper assessment, undervaluation or overvaluation, and citing such taxpayer to appear before said board of equalization on the first Monday in June, to show cause why such error, omission, or undervaluation should not be corrected, and in what respect. A copy of said notice shall be personally served on the said taxpayer, or if he cannot be found, by leaving the same at his residence, by the tax assessor or any person whom he may depute in writing for that purpose, and the date when and how the same was so served shall be indorsed on the original, which original shall be returned to the secretary or any member of said board: provided, that if the taxpayer is a nonresident of the county and his residence is known, then the secretary of said board shall mail a copy of said notice, postage paid, to said taxpayer, indorsing on the original when the copy was mailed and to what address: provided, that in counties paying less than twelve thousand dollars property tax, the said board of equalization at this meeting of the board shall not sit for a longer term than four days in each year. In

counties paying more than twelve thousand dollars and less than twenty thousand dollars property tax, said board shall not sit for a longer term than six days in each year; and in counties paying twenty thousand dollars property tax and over, shall not sit for a longer term than ten days." Section 32 provides as follows: "That the said county board of equalization shall convene a second time at the court house on the first Monday in June, and may remain in session for such length of time as may be necessary to dispose of the cases before it, and for the hearing of such cases as may have been docketed; and the cases shall be called in such order for hearing and disposition as the said board or a majority thereof may see proper. For the purposes of such inquiry or hearing, the said board may subpoena such witnesses, and introduce such oral, documentary, or record evidence as may be necessary to a full understanding of the question, including the abstract duly certified, provided by section 28 of this act, made by the probate judge of any county in the state of Alabama, and the taxpayer may upon application, at any time before the day on which his case is set for hearing, have subpoenas issued for witnesses in his behalf, and may also introduce documentary or record evidence pertaining to the matter under investigation, and the said board of equalization shall have authority to set cases for hearing on such days as it may see proper, and give notice to the defendant and subpoena witnesses for certain days, and may for good cause shown, continue a hearing over to a day to be fixed by said board, but neither the state nor the county shall be required to pay the per diem of a defendant's witness, and the county shall only pay the per diem of two witnesses in any one case, and the mileage shall not exceed four cents per mile each way and one dollar per diem for each witness to be paid by the county treasurer on the order of the chairman of the board. The tax collector shall be present in court at such hearing to represent the interest of the state." By section 33 it is provided that, if the taxpayer appears in person or by attorney, or has had five days' notice, the said board shall proceed to hear the matter, and shall raise or reduce the valuation, or enter the omission, or correct the error, or add such items of taxation, and fix the value thereof, as may have escaped assessment, and fix all values at what the evidence shows to have been the actual cash value of the property on the 1st day of October preceding. It prescribes certain evidences which the board may consider in hearing the case, and provides that, if the matter be contested, the board shall, upon the close of the hearing, render its decision within 24 hours, unless the taxpayer consents to a longer time, which decision must be entered upon the docket and signed by the chairman of the board. From the judgment and decision of the board, any member of the

board or the defendant may appeal in 10 days to the next term of the circuit or city court, when the same shall be tried anew.

In the present case, the board did not, at its May term, take action in the matter of equalizing the appellant's taxes as returned by the assessor, but, so far as appellant's motion to dismiss or pleas show to the contrary, it did, during its regular sitting beginning on the first Monday in June, to wit, on the 2d day of July, take such action, and did enter upon the docket the supposed value of appellant's taxable property, and issue and have served upon it a citation to appear and contest, on the 10th day of July. The appellant appeared before the board on that day (the citation having been served on the 8d), and moved the board to dismiss the proceeding on the ground that its said action in reference to the valuation of its property and issuing the citation was not had at the May term, and not until July 2d aforesaid. The motion being overruled by the board, appellant interposed the same matter by way of pleas. These pleas being disallowed, the board affirmed its previous action raising the taxable values, and appellant appealed to the circuit court. The same motions and pleas were filed in the circuit court, and there also disallowed; the motion to dismiss being overruled, and demurrers to the pleas being sustained. Appellant declining to plead over, the court rendered judgment affirming the decision of the board, and that appellant pay state and county taxes for the year 1896 on \$69,250, that being the sum to which the taxable values had been raised by the board, and rendered judgment for costs against appellant and its sureties. From this judgment the present appeal is taken, and the principal question presented for our decision is whether or not it was essential to the lawful exercise of the jurisdiction which the act confers upon the board that the preliminary ex parte action in reference to raising the assessment and issuing the citation should have been had at the May term, in strict conformity to the statute.

The board is a judicial tribunal, created by the statute, of special, limited jurisdiction, and its judicial action must be supported by substantial compliance with all those requirements which the statute, in all its parts, fairly interpreted, provides as essential to the exercise of its jurisdiction, which compliance must affirmatively appear. It is not questioned, in this case, that all things were done which the statute requires, except that the prescribed time of performing the preliminary requirements, to which we have referred, was not observed. Upon reading the provisions of the act, hereinabove set forth, it is seen that the judicial functions of the board are those which are prescribed by sections 32 and 33 of the act. It will be observed that the acts required by section 31 to be performed are ministerial only. The incorrectness of an assessment which the board is by that section required to enter upon a docket, and give the taxpayer

notice of by citation, is not one which the board has, by judicial processes, actually found to exist, but it is merely a supposed error, improper assessment, or under or over valuation, suggested to the board by such inquiry as it may choose to make, or information it may choose to act upon. The entry to be made upon the docket of the supposed valuation is a sort of pleading, so to speak, having no element of a judicial determination. So that we take it to be clear that these functions are purely ministerial, and their obvious design is to provide a practical and orderly system of bringing before the board, in its judicial capacity, for its judicial action, all such complaints in matters of assessments as might need judicial supervision. Therefore we find the board sits as a court, and exercises its jurisdiction as such, only when, in its June sitting, performing those duties required by sections 32 and 33 of the act to be then performed.

It is a general rule, founded in most obvious reason, that where the statute fixes a time or place for a court to sit and exercise its jurisdiction, it can lawfully do so at no other time or place. *Garlick v. Dunn*, 42 Ala. 404; *Davis v. State*, 46 Ala. 80. But the rule as to time is not universally true in respect of the performance of ministerial acts required to be performed by officers. The general rule as to such acts is to the contrary. We take a correct statement of it from the brief of Judge R. W. Walker, as counsel, in the case of *Commissioners' Court v. Rather*, 48 Ala. 440, as follows: "A statute specifying a time within which a public officer is to perform an official act affecting the rights of others is directory merely, as to the time within which the act is to be done, unless, from the nature of the act or the phraseology of the statute, the designation of the time must be considered a limitation on the power of the officer. *Walker v. Chapman*, 22 Ala. 126; *People v. Allen*, 6 Wend. 486-488; *Pond v. Negus*, 8 Mass. 230, 232; *Fish v. Wright*, 5 Cow. 269; *Stickney v. Huggins*, 10 Ala. 107, 108; *Savage v. Walshe*, 28 Ala. 619; *Dwar. St. pp. 222, 223*; *U. S. Trust Co. v. U. S. Fire Ins. Co.*, 18 N. Y. 200. By this it is not meant that a duty does not rest upon the officer to act within the time, a duty which he may be compelled to perform, but simply that his power to act does not expire with the time. *Stickney v. Huggins*, 10 Ala. 106, 108; *Webster v. French*, 12 Ill. 302. When a statute directs an officer to do a thing in a certain time, without any negative words restraining him from doing it afterwards, the naming of the time will not be construed as a limitation of his authority. *Dwar. St. p. 223*; *Ex parte Heath*, 3 Hill, 42; *People v. Holley*, 12 Wend. 481; *Mead v. Gale*, 2 Denio, 232; *Barnes v. Badger*, 41 Barb. 98, 99; *People v. Cook*, 14 Barb. 290; *Id.*, 8 N. Y. 67; *Miller v. Finkle*, 1 Parker, Cr. R. 374; *State v. Baltimore County Com'rs*, 29 Md. 516."

The authorities there cited from our own

court are clear in support of the principles stated. In the case of *Sfickney v. Huggins*, 10 Ala. 106, there was a statute which provided that, "if any person authorized by law to collect the taxes in any of the counties of this state shall fail to collect and pay the same to the county treasurer within the time prescribed by law, the judge of the county court, if of his own knowledge, or on complaint of the treasurer, shall hold a special court within *twenty days thereafter* to try such delinquent collector; and if it appears that he has so failed to collect or pay over such taxes said court shall enter judgment in favor of the treasurer," etc. (Italics ours.) Construing this statute, Chief Justice Collier, for the court, said: "Although this section addresses itself, in mandatory terms, to the judge of the county court, yet it cannot be understood that, in requiring him to act within twenty days from the time the default is developed, his right to act is limited to that period. Time was not prescribed for the benefit of the collector, but rather to quicken the diligence of the judge, so that justice might be promptly administered and the greater certainty of collections insured. According to all analogies, in directing the proceedings to be instituted within a definite time, the act must be considered as directory merely. It is the duty of the judge to yield a ready obedience to its directions, but, if he fails to do this, his authority to act under it is not gone." For a full statement of similar import to the foregoing, see *Endlich*, *Interp. St.* § 438.

Now, the design of the statutory provisions we are construing, in this case, is plain. It was to secure an equalization of taxes. Methods were provided to render the system practical and easy. The essence of the proceeding was that the board should have before it a docket of the matters to be investigated, showing the supposed errors which might require correction; that it should sit, at the time specified, and judicially hear and determine those matters, and enter its decisions upon the docket. The preliminary requirements which ought to have been performed at the May term were merely to get the matters for investigation upon the docket,—to get the cases in court, so to speak, and to bring the taxpayer into court to represent his interests. It was not essentially material to the taxpayer when the docket of cases was made up, so that he received the statutory five days' notice that he would be required to appear and contest during the time fixed by the statute for that purpose. The citation was only for the purpose of bringing the taxpayer before the board,—to give it jurisdiction of his person,—and, under all the authorities, it may be waived. It does not pertain to jurisdiction of the subject-matter. Appearance, without the issuance of a citation at all, would authorize the board to proceed against him. Our conclusion is that the proceeding was not without the jurisdiction of the board, either of the subject-matter or person, and that the circuit

court was right in refusing to dismiss it, and in sustaining the demurrers to the pleas.

It is objected that the circuit court ought to have instituted a trial *de novo*, and ascertained the value of the appellant's taxable property, instead of rendering the judgment it did, upon appellant's declining to plead over after the demurrers to its plea were sustained. We think this objection is well taken. So far as the record shows, upon the appellant's declining to plead over, after demurrer sustained to the pleas, the circuit court thereupon, without further trial and without any evidence, rendered judgment against the defendant for an amount based upon the raised valuation put by the board of equalization, and from which the defendant had appealed to the circuit court. On this appeal the statute provides that the case shall be tried anew. The judgment rendered by the board could not be looked to by the circuit court for any purpose. This court said, in the case of *Sullivan v. State*, 110 Ala. 95, 20 South. 452: "The real issue on the trial on appeal being, not that the assessment made by the board was a fair, just, and legal assessment, but that the assessment made by the tax assessor was incorrect in certain specified particulars." It was upon the state, by competent and legal evidence, to show the incorrectness of the tax assessor's assessment, and what should have been a proper assessment and valuation, and, until this was done, the circuit court could not render judgment against the defendant. The judgment of the circuit court must be reversed and cause remanded.

The foregoing opinion, in the main, was prepared by HEAD, J.

(123 Ala. 194)

BARRON et al. v. BARRON et al.

(Supreme Court of Alabama. Jan. 17, 1899.)

EJECTMENT—ADVERSE POSSESSION—LIMITATION—MORTGAGES—DESCRIPTION—ASSIGNMENT—VALIDITY—EVIDENCE—INSTRUCTIONS—EXECUTORS—BILL OF EXCEPTIONS—FILING—TRIAL—PLEA IN ABATEMENT.

1. Where a motion for a new trial is made at a regular term, but not disposed of until at an adjourned term, the court may then fix the time for filing the bill of exceptions, and a bill filed within the time so fixed cannot be assailed.

2. Where plaintiff in ejectment claimed under a mortgage executed to B., and acquired his title prior to an ejectment suit against B., in which costs were adjudged against him, defendant's plea in abatement that such costs had not been paid prior to the commencement of plaintiff's suit was properly overruled.

3. A certificate of redemption of land from a tax sale, reciting the assessment, sale, etc., and purporting to vest title in the purchaser as one authorized to redeem, is admissible in ejectment as color of title, under plaintiff's claim of adverse possession, to define the boundaries of the purchaser's actual possession, but not as a muniment of title.

4. Where plaintiff claimed title by adverse possession, it was not objectionable to ask a witness if he did not buy a portion of the land from plaintiff's grantor, since such question is

relevant to the issue of the extent of plaintiff's claim.

5. An objection to evidence is properly overruled where the ground on which it is based is not stated.

6. Where defendant in ejectment showed that the adverse possession of plaintiff's grantor was interrupted by an entry by others, plaintiff may introduce in rebuttal the records of unlawful detainer suits brought against such parties, showing the suits to have been prosecuted to a successful termination.

7. On the issue of plaintiff's adverse possession in ejectment, he may introduce the record of a former ejectment suit against his remote grantor, in which a voluntary nonsuit was taken.

8. A mortgage of land described as "the east half of the southeast fourth of section thirteen, township thirteen, range four east," without giving the state, county, etc., is inadmissible in ejectment for want of a sufficient description.

9. But the land intended to be mortgaged may be identified by parol evidence, and the deficiency in the mortgage thereby supplied.

10. Where defendant in ejectment objected to the introduction of a mortgage because of a defective description of the land, but did not specify the defect claimed, and the bill of exceptions recited that plaintiff offered a writing purporting to be a mortgage of the lands in controversy, it will be presumed on appeal that it was understood by the parties that the land mortgaged was the same as that in controversy, in support of the court's ruling admitting the mortgage.

11. Where a landlord prosecutes successfully an unlawful detainer suit against his tenant, on ascertaining that he was claiming the land adversely, the tenant's possession does not break the continuity of the landlord's possession, which was also adverse.

12. Where the uncontradicted evidence showed that a part of the land claimed by defendant in ejectment was claimed under a sheriff's deed by virtue of a judicial sale against plaintiff's grantor, made subsequent to a mortgage by him, under which plaintiff claimed title, an instruction that, if the jury believed all of the evidence, their verdict must be for plaintiff for the part so claimed, was proper.

13. Where a purchaser of land went into immediate possession, claiming title in fee, his adverse possession begins to run from the date of purchase, though he did not then receive a deed from his grantor.

14. Where plaintiff in ejectment claimed title by adverse possession of himself and his grantors, it is immaterial when such possession commenced, so long as they together held adversely for more than 10 years before suit brought.

15. An actual claim of title to land is sufficient to support adverse possession, whether claimants think their title valid or not.

16. Requested instructions not warranted by the evidence are properly refused.

17. An instruction in ejectment that if the legal title to land was in defendant, in common with others, and she entered thereon, and continued claiming possession, under such title in herself, and not as the wife of B., the jury must find for her and those claiming under the other tenants in common, is misleading and erroneous, since adverse possession must be established, not only by a claim of possession, but by actual occupation.

18. An indorsement on a mortgage by the executor of a deceased mortgagee, transferring the mortgage and debt without recourse, does not operate to convey the title to the land mortgaged.

19. Where the evidence showed that payment to a mortgagee was made in pursuance of a contract to purchase the mortgage, and not in payment of the debt, instructions based on

the theory that such payment operated to extinguish the debt were properly refused.

Appeal from circuit court, St. Clair county; George E. Brewer, Judge.

Ejectment by John T. Barron and others against Rebecca Barron and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

This was a common-law action of ejectment. There were three demises in the complaint. One was laid in John T. Barron; another, in J. W. Moore, as the executor of W. G. Moore, deceased; and the other was laid in the heirs at law of W. G. Moore, deceased. There were several parties defendant, but the principal defendants were Rebecca Barron, Mary McFarland, M. M. Smith, and N. A. Hood; the other defendants being privies of said Rebecca Barron and Mary McFarland, and holding under and through them. The defendants disclaimed title to an undivided two-thirds interest in the lands sued for, and, as to the remaining undivided one-third, they pleaded not guilty. The substance of the plea in abatement, which was stricken from the file on motion of the plaintiff, is stated in the opinion. On the trial of the cause the defendants introduced evidence tending to establish their title to the property, as follows: One J. S. Clements died in 1870, seised and possessed of the lands in controversy. He left, surviving him, a widow, who, together with his children, continued to reside upon the property. In 1871 said lands were assessed for taxes, as the lands of J. S. Clements; and, default being made in the payment of the taxes for said year, the lands were sold therefor. Subsequently, Mrs. Mary Clements, the widow of said J. S. Clements, redeemed said lands by paying double the amount paid at said sale, and the costs, etc., as required by the statute. In September, 1873, the probate judge of the county of St. Clair, wherein the lands were situate, gave to Mrs. Mary Clements a certificate of redemption of said lands. She thereupon went into possession, and set up an individual claim to said lands. Subsequently, during the year 1873, she sold said lands to Jesse H. Barron, but did not execute to him a deed until the year 1879. Immediately upon the purchase of said lands from Mary Clements, Jesse H. Barron went into the possession thereof, and exercised acts of ownership, claiming the lands as his own. On January 14, 1884, Jesse H. Barron and his wife executed a mortgage upon the lands in controversy to W. G. Moore, to secure the payment of an indebtedness due from him to Moore. In December, 1884, Jesse H. Barron brought an action of unlawful detainer against B. B. Barron, the husband of Rebecca Barron, and Benjamin F. Clements, who was the father of the defendant Mary McFarland. B. B. Barron had gone into possession of a part of the lands as the tenant of Jesse H. Barron, and, while so in possession, he and his wife, Rebecca

Barron, set up a claim to said lands. Benjamin F. Clements was in possession of a part of the land, claiming it as his own. In each of the actions of unlawful detainer the plaintiff recovered judgment against the defendants, respectively, and they were ousted under a writ of restitution issued upon said judgment. The mortgage from Jesse H. Barron to W. G. Moore was by the executor of said W. G. Moore (who had subsequently died) transferred and assigned to the plaintiff John T. Barron, the transfer being evidenced by the following indorsement upon said mortgage: "For value received, and without recourse, I hereby assign and transfer this mortgage and the debt it secures to John T. Barron." This transfer was signed, "J. W. Moore, Executor of W. G. Moore, Deceased." Default having been made in the payment of the mortgage debt, the mortgage was foreclosed, under the power of sale; and John T. Barron became the purchaser of the lands in controversy. This sale was made January 16, 1893. The evidence for the defendants tended to show that the lands in controversy belonged to the first wife of J. S. Clements, deceased, and that they were the heirs at law of J. S. Clements' first wife. It was further shown by the defendants that, in 1887, Rebecca Barron and B. F. Clements, whose only heir is the defendant Mary McFarland, brought an action of ejectment against Jesse H. Barron for the lands in controversy, and that they recovered judgment for an undivided two-thirds interest in said lands, with the costs of suit; that, the costs of said suit not having been paid, execution was issued on the judgment, and levied upon the undivided one-third interest adjudged in said suit to have belonged to Jesse H. Barron; that, under this execution, the undivided one-third interest was sold, and the defendant N. A. Hood became the purchaser of said undivided one-third interest. This judgment in the ejectment suit brought by Rebecca Barron and B. F. Clements against Jesse H. Barron was recovered on October 11, 1892, and the sale was made to N. A. Hood on December 12, 1892. It was shown that Rebecca Barron and Mary McFarland, as heir at law of Benjamin F. Clements, in December, 1892, executed a deed to the defendant M. M. Smith, conveying to him an undivided one-third interest in the lands sued for. Upon the plaintiffs offering to introduce in evidence the certificate of redemption of the lands in question, given by the probate judge to Mary Clements in 1873, the defendants objected, upon the grounds that said written instrument was illegal, irrelevant, and incompetent evidence, and that the writing itself showed that it was neither title nor color of title to the lands sued for. This objection was overruled; the certificate was allowed to be introduced in evidence; and to this ruling the defendants duly and separately excepted. One John Thompson, as a witness for the plaintiff, testified that he knew the lands in

controversy, and had known them since 1870; that J. S. Clements owned said lands; and that, after his death, his widow and children lived on them; and that, after 1873, Jesse H. Barron claimed title and ownership to said lands. Plaintiff then asked said witness if he did not buy a portion of said lands from Jesse H. Barron in the year 1879. The defendants objected to this question, upon the ground that it called for illegal, irrelevant, and incompetent evidence, the bill of exceptions stating that "no question was raised, because the deed was not produced." The court overruled the objection, and the defendants duly and separately excepted. The witness answered that he did not buy any of the lands in controversy, but that he bought from said Jesse H. Barron about two acres of the original Clements tract. Upon the examination of one Williams as a witness, he testified upon his cross-examination that he took a mortgage from Jesse H. Barron on a portion of said land, which he had acquired from Mary Clements, the widow of J. S. Clements, to secure a loan made by him (Williams) to said J. H. Barron. Defendants objected to this testimony, and moved to exclude it, on the ground that it was illegal, irrelevant, and incompetent. The court overruled each of these objections, and the defendants duly and separately excepted. The plaintiff offered in evidence the records of an action of ejectment brought by B. F. Clements and Rebecca Barron against Mary Clements, the widow of J. S. Clements, on September 4, 1872, which suit was terminated on October 12, 1874, by the plaintiffs therein voluntarily taking a nonsuit. The defendants in the present suit objected to the introduction of the record of said former ejectment suit, upon the grounds that (1) it was illegal, incompetent, and irrelevant evidence; (2) that said records showed on their faces that the parties to said ejectment suit were other and different parties to the parties to this suit; (3) that the uncontroverted evidence in this case shows that Mary Clements was not in possession of said lands on October 12, 1874, when the nonsuit was taken. The court overruled this objection, allowed said evidence to be introduced, and to this ruling the defendants separately excepted. Upon the plaintiff introducing in evidence the mortgage executed by J. H. Barron to W. G. Moore, the defendants objected, and moved to exclude said mortgage, upon the grounds (1) that it was illegal, irrelevant, and incompetent evidence; (2) because the evidence shows that said mortgage debt was fully paid. The court overruled this objection and motion, and to these rulings the defendants duly and separately excepted. Upon the plaintiff offering to introduce in evidence the records of the suits of forcible entry and unlawful detainer, instituted by J. H. Barron on December 4, 1884, against B. B. Barron and B. F. Clements, the defendants objected to the introduction of said records in evidence, upon

the grounds that they were illegal, irrelevant, and incompetent evidence, and that the parties to said suits, as shown by the records, were other and different parties from those in the present suit. The court overruled each of these objections, and to this ruling the defendants separately and severally objected. The other facts of the case sufficient to an understanding of the rulings on the present appeal are sufficiently stated in the opinion.

The defendants separately excepted to the following separate portions of the court's general charge to the jury: (1) "If the jury find from the evidence that B. B. Barron went into possession of said lands in 1881, under a lease or as tenant of his son Jesse H. Barron, and that Rebecca Barron entered on said lands as his wife, then any claim of the said Rebecca Barron during said tenancy of her husband, to the lands, while she lived on them with her said husband, he having entered on them under a lease from Jesse H. Barron, would not have made a gap or chasm in said Jesse H. Barron's possession while her husband occupied as the tenant of Jesse H. Barron." (2) "If the jury find from the evidence that B. B. Barron went on the lands sued for in 1881, under a lease or as tenant of Jesse H. Barron, and after going on said lands he set up a claim to the lands in his own right or in the right of his wife, Rebecca Barron, while his tenancy lasted, and that said Jesse H. Barron, on ascertaining that said B. B. Barron was setting up such claim to said lands and property, instituted a suit of unlawful detainer against him, and vigorously prosecuted the same, and in such suit recovered possession of said lands, then such possession and claim to the lands by the said B. B. Barron would not make such a gap or chasm in the possession of Jesse H. Barron as would break its continuity, if said Jesse Barron was in the adverse possession of said lands." (3) "That, under the undisputed testimony in the case, the several payments made by John T. Barron to W. G. Moore, and to his executor, J. W. Moore, were not payments on the mortgage debt, but that said payments were made by said John T. Barron as purchaser of said mortgage and mortgage debt." The court, at the request of the plaintiff, gave to the jury the following written charges. (1) "The court charges the jury that, if they believe all the evidence in this case, then their verdict must be for the plaintiff for the undivided one-third interest in the lands sued for claimed by Hood." (2) "The court charges the jury that if they find from the evidence that Jesse Barron bought the lands in the fall of 1873 from Mrs. Mary Clements, and went into actual adverse possession of the lands by himself and by tenant, claiming them as his own from his said purchaser, then his adverse possession would run from that time, although he did not receive his deed from Mrs. Clements till 1879." (3) "The court charges the jury that it makes no difference when the adverse possession of Mrs. Clements and that of Jesse

Barron, respectively, commenced, if the jury find from the evidence that both together held the land adversely for more than ten consecutive years before the 7th day of November, 1887." (4) "The court charges the jury that if they find from the evidence that Mrs. Barron's going on the lands with her husband, and that her husband went on them under contract with Jesse Barron, and Jesse Barron promptly expelled Barnabas B. Barron from the lands when he found out the lands were claimed against him, such going on the lands by Mrs. Barron would not interrupt the statute of limitations, if it had begun to run." (5) "The court charges the jury that if they believe from the evidence that Mary Clements and Jesse Barron had actual adverse possession of the lands sued for, claiming them as their own, and cultivating them, openly and notoriously, for more than ten years before suit was brought for their recovery, in November, 1887, then their verdict must be for the plaintiffs." (6) "The court charges the jury that the actual claim of the lands sued for, without any reference to whether or not the claimants thought the title was good, is all the law requires as an element of claim of adverse possession." (7) "The court charges the jury that if they find from the evidence that Jesse Barron was in the actual adverse possession of the lands, claiming them as his own, for more than ten consecutive years prior to the 7th day of November, 1887, or if they find from the evidence that Mary Clements was in the actual adverse possession of the lands, claiming them as her own, and she sold them to Jesse Barron, and turned her possession over to him, and the actual adverse possession of the two, when added together, covers a period of more than ten consecutive years just prior to the 7th day of November, 1887, then this was sufficient to take the title out of the heirs of James Clements' first wife; and the court further charges the jury that the moving in of third parties on the land would not constitute a break in the adverse holder's possession, if said adverse holder took prompt action in the court to remove them, and did remove them." (8) "If the jury find from the evidence that Jesse Barron, by himself and tenants, was in the actual adverse possession of the lands sued for, claiming them as his own, for more than ten consecutive years prior to the 7th day of November, 1887, then this was sufficient to divest the title out of the heirs of the first wife of James Clements, if they ever had title, and invest the title in Jesse Barron." The defendants separately excepted to the giving of each of these charges, and also separately excepted to the court's refusal to give each of the following charges requested by them: (1) "The court charges the jury that, under the evidence in this case, John T. Barron cannot recover in this action." (2) "If the jury believe the evidence, they must return a verdict in favor of defendants for an undivided one-third interest in the lands sued for." (3) "If the jury believe the evidence in

this case, they cannot find a verdict in favor of the plaintiff John T. Barron, as against Rebecca Barron, Mary McFarland, and M. M. Smith." (5) "If the jury believe the evidence in this case, they cannot find a verdict in favor of J. W. Moore, as executor of W. G. Moore, under demise laid in him in the complaint, as against Rebecca Barron, Mary McFarland, and M. M. Smith." (6) "If the jury believe the evidence, they cannot find a verdict in favor of the heirs of W. G. Moore, deceased, as named in the complaint, under the demises in the complaint as against Rebecca Barron, Mary McFarland, and M. M. Smith." (8) "If the jury believe all the evidence in this case, they must find for the defendants Rebecca Barron, Mary McFarland, and M. M. Smith." (9) "If the jury believe from the evidence that the legal title to the lands in controversy was in Rebecca Barron, B. F. Clements, and Martha Clements in 1881 or in 1882, and that said Rebecca Barron, in 1881 or 1882, entered on said lands, and continued on them, claiming possession under such title in herself and brother and sister, and not as the wife of B. B. Barron, then the jury must find for Rebecca Barron, Mary McFarland, and M. M. Smith." (10) "The court charges the jury that J. W. Moore, as executor of the will of W. G. Moore, deceased, had no authority to sell and transfer the mortgage without an order of the probate court, unless the evidence shows that he had power, under the will, to so sell and transfer; and if they find from the evidence that the Moore heirs, or the executor, J. W. Moore, received the amount due on said mortgage, then the same amounted to a payment of the mortgage debt, which divested the title to lands sued for out of the executor, W. G. Moore, deceased, and out of his heirs at law, and they could not recover in this action." (11) "The court charges the jury that, if they find from the evidence that the mortgage debt was paid before the commencement of this suit, then the legal title was divested out of the heirs of W. G. Moore, deceased, and re-invested in Jesse H. Barron to the extent of his interest therein, and there could be no recovery against the defendant Hood." (12) "If the jury believe from the evidence that there was a transfer of the mortgage by J. W. Moore, as the executor of the last will and testament of W. G. Moore, deceased, and on such transfer he received the amount agreed to be paid or the balance due thereon, then such attempted transfer would be a payment of the mortgage, unless the jury further find from the evidence that J. W. Moore had power, under the will, to sell claims of the estate of W. G. Moore, deceased, and their verdict should be for the defendant Hood, for an undivided one-third interest in the lands sued for." In this court the appellees spread a motion upon the motion docket to strike from the record in the case the bill of exceptions, because it was not signed by the presiding judge within 60 days from the expiration of the October term, 1896, of the circuit court of St. Clair county.

The facts pertaining to this motion are sufficiently stated in the opinion.

M. M. Smith and Inzer & Greene, for appellants. Darch & Martin, for appellees

DOWDELL, J. This is a common-law action of ejectment. The record shows that the cause was tried at the October term, 1896, of the circuit court of St. Clair county. On the 14th day of October, the day of the trial of the cause, a written agreement was entered into by counsel, by which it was agreed that the defendants should have 60 days "from the expiration of this term of the court in which to prepare and have signed a bill of exceptions." On the day following (the 15th), being a day of the term, the defendants put upon the motion docket a motion for a new trial. At a subsequent day, and being the last day of the term, the court made and entered upon the record an order, in all respects regular, for an adjourned term of said court, to begin on the 30th day of November following, to complete the unfinished business of the regular term. The motion for new trial in this cause was not heard at the regular term, and was a part of the unfinished business of that term. On the 4th day of December, being a day of the adjourned term, which began on November 30th, the motion was heard, and by the court overruled; and at that time the court made an order granting defendants 90 days to prepare and have signed a bill of exceptions "in the cause in chief, and also on the motion for a new trial." The bill of exceptions was signed on the 3d day of February following.

A motion for a new trial seasonably made suspends the judgment in the cause, and it does not become final for purposes of an appeal until such motion is disposed of. "The cause is said to be in fieri by reason of the motion; and the court may make any order afterwards that may be proper." *Iron Co. v. Field*, 104 Ala. 471, 16 South. 538; *Pratt v. Kells*, 28 Ala. 396; *Walker v. Hale*, 16 Ala. 27. The adjourned term of a court is but a continuation of the regular term. *Keith v. State*, 91 Ala. 2, 8 South. 353; *Hundley v. Yonge*, 69 Ala. 89; *Van Dyke v. State*, 22 Ala. 57. The court had the right and authority, at the adjourned term, to fix the time for the bill of exceptions to be signed in vacation; the motion for a new trial having been made at the regular term, and not disposed of until at the adjourned term. The motion to strike the bill of exceptions must therefore be overruled.

On the trial the defendants filed a plea in abatement, to the effect that there had been a former trial in ejectment as to the land in question, in which costs had been adjudged against Jesse Barron, through whom plaintiff here claimed title, and that such costs had not been paid. The plea disclosed that the title relied on here by plaintiff was under a mortgage executed to Jesse Barron long prior to the institution of the suit, in which it is alleged the costs were adjudged that remain unpaid. The pres-

ent plaintiff was in no wise connected with that suit, nor was the title here relied on by him derived from Jesse Barron after the pendency of said suit. The plea in abatement was properly stricken by the court on plaintiff's motion to strike the same.

The plaintiff based his right of recovery of the land on his title under the mortgage executed by Jesse H. Barron to one W. G. Moore, bearing date January 14, 1884, and also upon the adverse possession of said land for 10 years by said Jesse H. Barron and his vendor, Mary Clements. Upon the trial the plaintiff introduced evidence which tended to support his theory of the case, showing an adverse possession of the land, beginning with Mary Clements, about the year 1872, and by Jesse H. Barron, who purchased the same from said Mary in 1873, on down to 1887, when the former ejectment suit was begun by Rebecca Barron and Benjamin F. Clements against said Jesse H. Barron.

The court admitted in evidence, against the objection of defendants, a certificate of redemption of the land in question, given by the probate judge of St. Clair county to Mary Clements in 1873, which described the lands according to government survey and numbers. The said certificate recites the assessment of the land to the estate of J. S. Clements, deceased (the husband of Mary), the sale for the taxes, purchase, etc., and then purports to invest the said Mary with the title, as being a person in interest, and having a right to redeem. The certificate was offered in connection with other evidence tending to show an adverse holding by Mary Clements. As a muniment of title it was inadmissible; but as color of title, to show and define the boundaries of an actual possession, it was admissible. *Doe v. Clayton*, 81 Ala. 391, 2 South. 24; *Dillingham v. Brown*, 38 Ala. 311.

One of the issues in the case being as to adverse possession of the land, the objection to the question put by plaintiff to the witness Thompson, "if he [witness] did not buy a portion of said land from the said Jesse H. Barron in the year 1879," was properly overruled by the court, the bill of exceptions reciting that no objection was made for failure to produce the deed. The testimony sought by the question was clearly relevant, as tending to show the nature and character of Jesse H. Barron's possession,—whether he was claiming the same as his own. No greater act of ownership could be exercised over land by a party in possession than that of an absolute disposition of the same by sale. For like reason, the statement by defendants' witness Williams upon his cross-examination by plaintiff, that "he [witness] took a mortgage from said Jesse H. Barron on a portion of said land to secure a loan," was relevant to the issue. Moreover, the objection to this statement was general, no ground being stated, and was for that reason properly overruled.

The defendants introduced evidence tending to show that the adverse possession of the land

by plaintiff's grantor, Jesse H. Barron, had been interrupted and broken by the entry thereon of B. B. Barron and Benjamin F. Clements. This rendered the record in the unlawful detainer suits brought by the said Jesse H. Barron against these parties, and which he prosecuted to a successful issue, putting them off the land, clearly relevant in rebuttal of the theory of the defendants as to a gap or chasm in the continuity of the adverse possession by Jesse H. Barron.

The record of the ejectment suit brought by Benjamin F. Clements and Rebecca Barron against Mary Clements in 1872, and in which the plaintiff took a voluntary nonsuit in 1874, was relevant to the question of adverse possession of the land by Mary Clements, which was one of the issues involved in this case. *Ponder v. Cheeves*, 104 Ala. 307, 16 South. 145.

The description of the land in the mortgage of Jesse H. Barron to W. G. Moore, of January 14, 1884, which was offered in evidence by the plaintiff, being as follows: "The east half of the southeast fourth of section thirteen, township thirteen, range four east,"—without giving the state and county, or whether east of the St. Stephens or Huntsville meridian,—was imperfect and insufficient, and, without aid of identification, would have rendered the mortgage inadmissible in evidence. *Goodwin v. Forman*, 114 Ala. 489, 21 South. 948. But it was competent by parol evidence to identify the land, and thus supply the deficiency in description in the mortgage. *Webb v. Land Co.*, 106 Ala. 471, 18 South. 178; *De Jarnette v. McDaniel*, 93 Ala. 215, 9 South. 570; *Myer v. Mitchell*, 75 Ala. 475; *Chambers v. Ringstaff*, 69 Ala. 140.

It is insisted by appellants that the court below erred in not excluding the mortgage, because the record fails to show that there was any proof that the land was situated in St. Clair county. In making their objection in the circuit court the defendants did not point out or specify this defect in description as a ground of objection, and their bill of exceptions recites: "The plaintiffs then offered in evidence in their behalf a paper writing purporting to be a mortgage given by Jesse H. Barron and his wife to W. G. Moore on the 14th day of January, 1884, in and by which said mortgage said Jesse H. Barron and wife mortgaged the lands in controversy to said W. G. Moore," etc. In the absence of a specific objection in the trial court pointing out the defective description in the mortgage, under the above recital in the bill of exceptions we will presume, in favor of the ruling of the trial court, that it was understood or agreed by the parties that the land in the mortgage and that in controversy was the same, and thus dispensing with parol proof in order to identify.

There was evidence going to show that, in 1881, B. B. Barron, the husband of Rebecca Barron, was moved upon the land by Jesse H. Barron, as the tenant of said Jesse, under

a lease contract, and that the said Rebecca went with her husband, the said B. B. Barron, and, after thus moving upon the land with her husband, set up a claim to it in her own right; and some time thereafter the said B. B. Barron also set up a claim to the land in right of his wife, the said Rebecca, and repudiating the relation of landlord and tenant as between himself and said Jesse, and under which he entered into possession. As soon as this fact came to the knowledge of the said Jesse, he immediately brought his suit of unlawful detainer against the said B. B., and prosecuted the same to a successful termination, dispossessing the said B. B. The said wife, Rebecca, went away with her husband upon his being put out of possession under said suit. Under this state of the evidence, there was no error in that portion of the court's oral charge relating to the going upon the land by the said wife, Rebecca Barron, and which was excepted to by the defendants. The undisputed evidence in the case shows that the payments made by the plaintiff John T. Barron to W. G. Moore and to J. W. Moore, executor of W. G. Moore, were made by him as purchaser of the mortgage, and not as payments on the mortgage debt; and hence the court committed no error in making that statement to the jury in the oral charge.

The evidence, without conflict, shows that the undivided one-third interest in the land claimed by the defendant Hood was held and so claimed by him through a sheriff's deed, under a levy and sale by the sheriff of such undivided one-third interest as the property of the said Jesse H. Barron; and that, long subsequent to the execution of the mortgage by said Jesse to W. G. Moore, and under which the plaintiff was claiming title. This warranted the giving by the court of written charge No. 1 requested by the plaintiff. The propositions of law asserted in the remaining written charges given at the plaintiff's request are correct, and therefore were properly given.

The written charges Nos. 1, 2, 4, 5, 6, and 8, requested by defendants, were, in effect, the general affirmative charge as to the defendants named, and were not warranted under the evidence, and properly refused. The charge No. 9 was properly refused, being not only misleading, but not stating the law correctly. There may be a claim of ownership, but, when it comes to the question of possession, there must be something more than a mere claim,—must be an actual possession.

The uncontradicted testimony of John T. Barron is that he purchased from W. G. Moore, the mortgagee, in his lifetime, the mortgage in question, and which was executed and given by Jesse H. Barron, for an agreed sum or price, and that he (the said John T.) paid said Moore during his life all of said purchase price but about \$60; and this balance of \$60 he paid to J. W. Moore, the executor of W. G. Moore, who thereupon transferred or assigned the mortgage to said

John T. Barron. The assignment or transfer indorsed on the mortgage by J. W. Moore was insufficient to pass the legal title to the lands contained in the mortgage. One of the demises in the complaint is laid in the heirs at law of W. G. Moore. It is contended by appellants that the payments made by John T. Barron operated to extinguish the mortgage debt, and thereby divested the title out of the heirs at law of W. G. Moore, and re-vested the same in Jesse H. Barron, the mortgagor. We think this contention without merit, and unsupported by the evidence or sound reasoning. There is nothing in the evidence to show that the payments made by John T. Barron were intended or contemplated by either Barron or Moore as payments on the mortgage debt, but, on the contrary, were payments made in the purchase of the mortgage. The transfer and assignment indorsed upon the mortgage by J. W. Moore repel the idea of a payment and satisfaction of the mortgage debt. Under this view of the case,—and we have no doubt of the correctness of it,—the written charges Nos. 10, 11, and 12 requested by the defendants were properly refused. We find no error in the record, and the judgment of the circuit court is affirmed.

BURTON v. BROWN.

(Supreme Court of Mississippi. Dec. 5, 1898.)

WILLS—WITNESSES.

A will was signed: "G. W., per H. M. Witness: T. M." *Held*, that H. M. did not sign as a witness, but as amanuensis, in writing the testator's name, and hence there was but one witness to the will.

Appeal from chancery court, Sunflower county; A. H. Longino, Chancellor.

Proceeding by Amanda Brown against Lou Burton to set aside the probate of the will of George Washington, deceased. There was a decree for contestant, and proponent appeals. Affirmed.

On the 11th day of September, 1896, George Washington died, leaving a will, by which he attempted to convey certain property to his wife, Lou. This will was signed as follows: "George Washington, per Rev. H. M. Mingo, Sr. Witness: Rev. Thomas Morgan." Lou, the widow of testator, has since intermarried with one Burton, and in April, 1898, filed her petition for the probate of said will, together with the affidavits of H. M. Mingo, Sr., and Thomas Morgan, to prove and establish the same. The clerk in vacation admitted the will to probate and record. In May, 1898, appellee, Amanda Brown, filed her petition to the court, alleging that she was the daughter of George Washington, deceased, and praying that the probate of said will be set aside, on the ground, among others, that said instrument was not witnessed as wills are required to be by law. This petition was granted by the court, and the probate of said will was set aside, and appellant's petition for probate dis-

missed. From this decree an appeal was prosecuted.

Griffin & Larkin, for appellant. Southworth, Neff & Quinn, for appellee.

WOODS, C. J. There is but one subscribing witness to the instrument propounded as the will of George Washington. The name of the Reverend H. M. Mingo appears only where he signed the name of the deceased, viz. "George Washington, per Rev. H. M. Mingo." A mere inspection of the paper demonstrates that he did not sign as a subscribing witness, but only as the amanuensis of Washington in his signing his (Washington's) name to the instrument. As our statute requires the attestation of two subscribing witnesses to every will, the learned court below properly disallowed the clerk's action in vacation in admitting to probate the will which was subscribed by only one witness. Affirmed.

(40 Fla. 450)

MONTGOMERY v. THOMAS.

(Supreme Court of Florida. Jan. 9, 1899.)

APPELLATE PRACTICE—JUDGMENTS AT LAW—APPEAL—WRIT OF ERROR—PROCEDURE.

Since the adoption of the Revised Statutes, in 1892, there is no such procedure as an appeal from a judgment at law. Such judgments can only be reviewed in the appellate court on writ of error; and where, in such a case, no writ of error has ever issued, an attempted appeal therein will be dismissed.

(Syllabus by the Court.)

Appeal from circuit court, Putnam county; William A. Hocker, Judge.

Action between L. Montgomery and Walter Thomas. From the judgment, Montgomery appeals. Dismissed.

H. O. F. Sanchez, for appellant. Geo. P. Fowler, for appellee.

PER CURIAM. This cause being now reached in its regular order upon the docket for final disposition, and it appearing to the court that the judgment sought to be reviewed is in an action at law, and that no writ of error has ever issued therein or been lodged in the court below, but that an appeal has been attempted to be taken therein, since the adoption of our Revised Statutes, by which to have the said judgment reviewed, it is therefore hereby ordered and adjudged that the said appellate proceedings in said cause are hereby dismissed, and the said cause is hereby stricken from the dockets of this court, at the cost of the appellant.

(40 Fla. 426)

PAGE v. SOUTHERN BELL TELEPHONE & TELEGRAPH CO.

(Supreme Court of Florida. Jan. 9, 1899.)

APPELLATE PRACTICE—AFFIRMANCE ON REQUEST OF PLAINTIFF IN ERROR.

Where a plaintiff in error files in the appellate court a written confession that there is

no error in the judgment from which his writ of error is taken, including therein a request that said judgment may be affirmed, the appellate court will grant such request, and affirm the judgment.

(Syllabus by the Court.)

Error to circuit court, Duval county; Rhodon M. Call, Judge.

Action between William L. Page and the Southern Bell Telephone & Telegraph Company. From the judgment, Page brings error. Affirmed.

M. C. Jordan and John Wallace, for plaintiff in error. John E. Hartridge, for defendant in error.

PER CURIAM. This cause coming on for final disposition upon writ of error, and the plaintiff in error, in writing, having requested the court to affirm the judgment of the court below, confessing that there is no error in the said judgment, it is therefore hereby adjudged that the judgment of the circuit court in said cause be, and the same is hereby, affirmed, at the cost of the plaintiff in error.

(40 Fla. 467)

SIMMONS v. STATE.

(Supreme Court of Florida. Sept. 27, 1898.)

CRIMINAL LAW—APPELLATE PRACTICE—RETURN DAY—WRITS OF ERROR.

When a writ of error is issued on a day within a pending term of the appellate court, and is made returnable to a day within the same pending term, it is void, and does not confer jurisdiction on such appellate court to hear or determine the cause, and it will be dismissed.

(Syllabus by the Court.)

Error to criminal court of record, Duval county; John L. Doggett, Judge.

W. H. Simmons was convicted of crime, and brings error. Dismissed.

W. P. Ward, for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

PER CURIAM. The writ of error in this case is from the criminal court of record of Duval county, and was issued on the 30th day of March, A. D. 1898, and made returnable to the 15th day of May, A. D. 1898, being issued on a day within the January term, 1898, of this court, and made returnable to a day within the same term, which was contrary to law; and, the writ of error being, therefore, void, this court is without jurisdiction to hear or determine the same, and it is hereby dismissed.

(40 Fla. 466)

BROWNING v. STATE.

(Supreme Court of Florida. Oct. 25, 1898.)

CRIMINAL LAW—APPELLATE PRACTICE—WRITS OF ERROR—RETURN.

A writ of error that is issued on a day within a term of the appellate court then pending, and that is made returnable to a day with-

in the same term, violates the provisions of section 1270 of the Revised Statutes, and is void; and a cause attempted to be brought thereby to the supreme court will be stricken from the dockets and dismissed.

(Syllabus by the Court.)

Error to circuit court, De Soto county; Barron Phillips, Judge.

John Browning was convicted of larceny, and brings error. Dismissed.

Isaac H. Trabue, for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

TAYLOR, C. J. The plaintiff in error was convicted and sentenced for the crime of larceny of a domestic animal at the Spring term, 1898, of the circuit court for De Soto county, and seeks a review of his trial by writ of error from this court.

The writ of error in the cause was issued on the 6th day of August, 1898, during the present June term of this court, and is made returnable to the 24th day of September, 1898, a day also within the present June term of this court. Section 2972, Rev. St., provides that writs of error in criminal cases shall be issued and made returnable as the like writs in civil cases. Section 1270, Id., making provision for the issuance, test, service, and return of writs of error in civil actions, prescribes that they "shall be returnable to the first day of the next succeeding term of the appellate court, unless said first day shall be less than thirty days from the date of the writ, when it shall be made returnable to a day in such next succeeding term, more than thirty days and not more than fifty days from the date of the writ." The writ of error in this case, having been made returnable in violation of this law, is void, and, this being true, this court is without jurisdiction to hear or determine it, and the said cause is therefore stricken from our dockets, and dismissed. *Simmons v. State* (decided at the present term) 25 South. 62.

(40 Fla. 390)

SAVANNAH, F. & W. RY. CO. v. SESSOMS.
(Supreme Court of Florida. Oct. 12, 1898.)

APPELLATE PRACTICE—FAILURE TO FILE TRANSCRIPT OF RECORD.

When a plaintiff in error fails to file the transcript of record in the appellate court within the time prescribed by law, and, prior to any application to the court for an extension of the time for filing such transcript, the defendant in error moves for a dismissal because of such failure, such motion will be granted where no good cause is shown for such failure.

(Syllabus by the Court.)

Error to circuit court, Polk county; Barron Phillips, Judge.

Action between W. C. Sessoms and the Savannah, Florida & Western Railway Company. From the judgment, the railway company brings error. Dismissed.

Sparkman & Carter, for plaintiff in error. H. K. Olliphant and Hammond & Brady, for defendant in error.

PER CURIAM. This cause came on to be heard on this day upon motion of the defendant in error to dismiss the writ of error, among other grounds, because the writ of error is made returnable to the first day of the present June term, and no transcript of the record has been filed here in accordance with law, and because no transcript of the record has as yet even been made up or prepared.

The plaintiff in error meets this motion by a counter motion for an extension of time to file the transcript of record that it alleges is now in course of preparation. On the motion for extension of time to file the transcript, it is shown that one of the counsel who had the immediate charge of the preparation of the appellate proceedings in the case was taken sick about the 12th or 13th of August, 1898, and died on or about the 31st of the same month, and that about the 21st of September, 1898, succeeding counsel took the preliminary steps to have the transcript prepared. It appears, however, that the bill of exceptions in the cause was settled and signed by the circuit judge on the 14th day of June, 1898, after which date, up to the said 12th of August, 1898, when the illness of the said counsel began, there were about 60 days in which the transcript could have been prepared and filed, and no reason, cause, or excuse has been shown why, during this time, it was not attended to. In consonance with the former rulings of this court, we have, under these circumstances, no other discretion than to dismiss the cause; and it is hereby ordered that the said cause be, and the same is hereby, dismissed, for failure to file any transcript of record therein as provided by law. *Railroad Co. v. Hayward*, 4 Fla. 398; *Rain v. Thomas*, 12 Fla. 493; *Smith v. Curtis*, 19 Fla. 786; *Williams v. La Penotiere*, 25 Fla. 473, 6 South. 167; *Long v. Herrick*, 28 Fla. 755, 10 South. 17.

(40 Fla. 469)

BROWN v. STATE.

(Supreme Court of Florida. Oct. 18, 1898.)

JURORS—QUALIFICATIONS—EXAMINATION—CRIMINAL LAW—ORDER OF PROOF—INSANITY.

1. Section 1, c. 4122, Laws 1893, approved June 2, 1893, makes all male persons who are over the age of 21 years and citizens of Florida, and who have resided in said state for one year, and in their respective counties for six months, qualified for service as jurors, except those who have been convicted of certain therein enumerated crimes. The exemption from jury service, extended by section 1150, Rev. St., to persons over the age of 65 years, does not have the effect of disqualifying such persons for such service; but it is a personal privilege merely to the juror himself, of which he can avail himself or not, at his discretion; and, if he sees proper to waive the privilege, his age furnishes no legal ground of challenge for cause.

2. Inquiries on the voir dire examination of a juror touching his knowledge of the law of the case, and as to whether he is willing or not to apply such law without instructions thereon from the court, are improper, and can

never be made a test of a juror's competency.

3. Where a talesman, on his voir dire examination, answers that he had formed an opinion of the case from rumor, but that it was not a fixed opinion, and would yield readily to testimony, and that he could try the defendant solely upon the sworn testimony, and that he did not think the opinion he had formed would have any effect upon him, and that he could give the defendant a fair and impartial trial, and render a verdict solely upon the testimony that he heard as a juror, notwithstanding the opinion he had formed, he is a competent juror.

4. Trial courts are intrusted with a discretion in regard to the order of the introduction of evidence and the examination of witnesses. This discretion should be exercised in furtherance of justice; and it must be a strong case, showing that injustice has been done, and that a sound discretion has not been exercised, that will induce an appellate court to disturb the judgment of the trial courts by revising the exercise of that discretion in regard to the relaxation of the rules for the admission of evidence.

5. Sanity being the normal and usual condition of mankind, the law presumes that every individual is in that condition; hence the state in a criminal prosecution may rest upon such presumption without other proof relative thereto. The fact of sanity is presumed to exist *prima facie*; and whoever denies such fact, or interposes a defense based upon its untruth, must prove it. The burden of overthrowing the presumption of sanity is upon the person who alleges insanity.

(Syllabus by the Court.)

Error to circuit court, Pasco county; Barron Phillips, Judge.

Thomas Palmer, for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

TAYLOR, C. J. The plaintiff in error, T. Ben Brown, was indicted at the fall term, 1896, of the circuit court for Pasco county, for murder in the first degree of one John S. Weir. He was tried a year later, at the fall term, 1897, of said circuit court, and convicted of manslaughter, and sentenced to imprisonment in the penitentiary, and on March 21, 1898, sued out a writ of error from such judgment to the present (June) term of this court.

A talesman on the voir dire examination, when questioned as to his age by the defendant's counsel, answered that he was 67 years of age. Thereupon the defendant's counsel challenged him for cause, upon the ground that his age disqualified him as a juror. The challenge was overruled, and the defendant excepted. This ruling constitutes the first assignment of error. There was no error in this ruling. Section 1, c. 4122, Laws 1893, approved June 2, 1893, provides that "grand and petit jurors shall be taken from the male persons above the age of twenty-one years who have resided in this state for one year, and in their respective counties for six months, and who are citizens of the state of Florida; but no person who shall have been convicted of bribery, forgery, perjury, larceny, or other high or infamous crime, unless restored to civil rights, shall be permitted to serve as a juror." Section 1150, Rev. St., exempts various persons and classes, otherwise entirely qualified, from jury service; among

them, "all persons more than sixty-five years of age, and all persons subject to any bodily infirmity amounting to disability." The exemption from jury service given by this law to the person who is over 65 years of age does not have the effect of disqualifying the subject of it for such service, or of rendering him incompetent to serve as such; but it is a personal privilege merely to the juror himself, of which he can avail himself or not, at his discretion; and, if he sees proper to waive the privilege, it furnishes no legal ground of challenge for cause. *Mulcahy v. Reg.*, L. R. 3 H. L. 306; *Moore v. Cass*, 10 Kan. 288; *State v. Wright*, 53 Me. 328; *State v. Forshner*, 43 N. H. 89; *Booth v. Com.*, 16 Grat. 519; *Breeding v. State*, 11 Tex. 257; *Blount v. State*, 30 Fla. 287, 11 South. 547; *Lambright v. State*, 34 Fla. 564, 16 South. 582. The cases of *Kitrol v. State*, 9 Fla. 9, and *Ladd v. State*, 17 Fla. 215, on the same subject, were proper constructions of statutes then in force, but that have long since been repealed.

A talesman, on the voir dire examination, on being asked by the defendant's counsel if he would give the defendant the benefit of every reasonable doubt arising from the evidence, replied that he would if the court said so. He was then asked by defendant's counsel whether he would give the defendant the benefit of every reasonable doubt anyway, if the court should fail or neglect to instruct him so to do; and he replied that he did not know whether he would or not. Defendant thereupon challenged the juror for cause, which challenge the court overruled. This ruling is assigned as the second error. There is no merit in this assignment. The juror, in response to the first question, properly responded that he would follow the court's instructions on the law of the case by giving the defendant the benefit of reasonable doubts if the court so stated the law to be. It was carrying the voir dire examination of jurors beyond all proper limits to go into further inquiry as to whether the juror would of his own accord observe the law of the case, whether such law were given him in charge by the court or not. Whether a juror has knowledge of the law of a case, and is or is not willing to apply such law, without instructions thereon from the court, can never be made a test of his competency.

A talesman, on the voir dire examination, answered that he had formed an opinion of the case from rumor, but that it was not a fixed opinion, and would yield readily to testimony; that he could try the defendant solely upon the sworn testimony; and that he did not think the opinion he had formed would have any effect upon him; and that he could give the defendant a fair and impartial trial, and render a verdict solely upon the testimony that he heard as a juror, notwithstanding the opinion he had formed. He was thereupon challenged for cause by the defendant, but the court overruled such challenge, and such ruling is assigned as the third error. There

was no error here. The juror was competent, as is abundantly sustained in *Andrews v. State*, 21 Fla. 598, *Olive v. State*, 34 Fla. 203, 15 South. 925, and *Lambright v. State*, 34 Fla. 564, 16 South. 582.

At the close of the testimony for the defendant, upon his resting his defense, the state attorney announced his desire to recall Mrs. T. Ben Brown, the wife of the defendant, who had testified on behalf of the defense, for the purpose of cross-examining her further, in pursuance of her direct examination; but, finding that she had left the court for her home, the state consented to proceed with its rebuttal testimony, reserving the right to question her upon her return to the court room. After the state had thus introduced other evidence in rebuttal, it recalled Mrs. Brown to the stand, and cross-examined her as follows:

"Q. This morning or this afternoon you were testifying that at one time your husband took your child, and went with him to Dr. Wallace's, and stayed out with him until late at night. Did I understand you to say that Mr. Brown was drunk? A. I don't know.

"Q. You don't know whether he was drunk or not? A. No, sir.

"Q. Do you know Mrs. T. J. Howard? A. Yes, sir.

"Q. On the morning after that, did you not state to her, at her house, nobody being present but one of her children, that Mr. Brown had been on one of his sprees, and was drunk the night before?"

Counsel for defendant objected to this question as immaterial, improper, and irrelevant, and because the state cannot have any right, after the defense has rested his case, to recall a witness for the defense for the purpose of impeachment. The court overruled the objection, and this ruling is assigned as the fourth error. There was no error in this ruling. The entire testimony of this witness consisted of a detailment of instances of queer and abnormal acts and behavior on the part of the defendant on divers times and occasions, the purpose of which was to sustain his plea of insanity. The effort of the state in rebuttal was to show that all of such unique performances on the part of the defendant were attributable to drunkenness, instead of insanity. From this standpoint the question objected to was entirely proper, relevant, and material. As to that phase of the objection touching the time and order in which the cross-examination of the witness was allowed, it is well settled here, as elsewhere, that trial courts are intrusted with a discretion in regard to the order of introduction of evidence and the examination of witnesses, and this discretion should be exercised in furtherance of justice; and that it must be a strong case, showing that injustice has been done, and that a sound discretion has not been exercised, that would induce an appellate court to disturb the judgment of the trial courts by revising the exercise of that discretion with which they are intrusted

25 So.—5

in regard to the relaxation of the rules for the admission of evidence. *Coker v. Hayes*, 16 Fla. 368; *Burroughs v. State*, 17 Fla. 643; *Ortiz v. State*, 30 Fla. 256 (text, 271), 11 South. 611; *Brown v. Burrus*, 8 Mo. 26; *Freleigh v. State*, Id. 606. We see no abuse of the discretion here.

The court, among other things, charged the jury as follows: "Crimes can only be committed by human beings who are in a condition to be responsible for their acts; and upon this general proposition the state holds the affirmative, and the burden of proof is upon it. Sanity being the normal and usual condition of mankind, the law presumes that every individual is in that state; hence the state may rest upon the presumption without other proof. The fact is deemed to be proven *prima facie*. Whoever denies this, or interposes a defense based upon its untruth, must prove it. The burden, not of the general issue of crime by a competent person, but of overthrowing the presumption of sanity, and of showing insanity, is upon the person who alleges it; and, if evidence is given tending to establish insanity, then the general question is presented to the jury whether the crime, if committed, was committed by a person responsible for his acts; and upon this question the presumption of sanity and the evidence are all to be considered, and the state holds the affirmative; and, if a reasonable doubt exists as to whether the prisoner is sane or not, he is entitled to the benefit of the doubt, and to an acquittal." This charge, that was excepted to, and is assigned as the fifth and last assignment of error, is in accord with the former rulings of this court, and states the law correctly. *Hodge v. State*, 26 Fla. 11, 7 South. 593; *Armstrong v. State*, 27 Fla. 366, 9 South. 1, and authorities cited; *Armstrong v. State*, 30 Fla. 170, 11 South. 618.

The evidence in the record fully sustains the verdict rendered; and, finding no errors, the judgment of the circuit court is hereby affirmed.

(51 La. Ann. 466)

STATE ex rel. COLUMBIA DEBENTURE CO., Limited, v. JUDGE OF DIVISION B, CIV. DIST. CT., PARISH OF ORLEANS. (No. 13,082.)

(Supreme Court of Louisiana. Feb. 20, 1899.)

SUSPENSIVE APPEAL—AMOUNT OF BOND.

To suspend the execution of a decree obtained by the state annulling the charter of a corporation, or enjoining persons claiming to be incorporated from acting as corporators, and appointing a receiver, a bond sufficient in amount to cover costs will suffice.

(Syllabus by the Court.)

Application by the state, on the relation of the Columbia Debenture Company, Limited, for a writ of mandamus and prohibition, directed to the judge of division B, civil district court, parish of Orleans. Mandamus made peremptory.

Ernest T. Florance, for relator. Respondent judge, pro se. Milton J. Cunningham, Atty. Gen., Frank E. Rainold, and Stiff & Madison, for the State.

MILLER, J. In the suit brought by the state to enjoin the relator from exerting its alleged corporate functions, there was judgment decreeing the asserted charter void and null, enjoining the officers of the alleged corporation from acting, and appointing a receiver to take charge of the property. From this judgment the relator applied for a suspensive appeal on a bond for costs, which application the court denied, and fixed the bond at one-half the cash assets of the corporation disclosed by the testimony; the bond being thus fixed at \$48,000.

The law prescribes the amount of the bond to be given for the suspensive appeal from the judgment condemning the appellant to pay a specific sum, and fixes the amount of the bond for such appeal when the judgment decrees the delivery of movable or immovable property. Code Prac. arts. 574-577. The Code then prescribes a bond for costs to serve in other cases. *Id.* art. 578. There being no other rules in the Code of Practice relative to the amount of appeal bonds, our jurisprudence is settled that, in the large class of cases in which the appellant is not condemned to pay money or deliver property, a bond for costs will suffice for a suspensive appeal. *State v. Judge of First Dist.*, 19 La. 167; *Blanchin v. The Fashion*, 10 La. Ann. 845; *Bank v. Fortier*, 27 La. Ann. 243. The relator contends the principle of these decisions governs the amount of the bond to be furnished in this case for a suspensive appeal. The precise question presented to the lower court, and to this court on the application for the mandamus, has never hitherto arisen. Our learned brother of the lower court, after careful consideration, has reached the conclusion that the bond must be for the amount prescribed by article 574. The state is the plaintiff in the suit. It asserts no money demand, nor claims any property. We find great difficulty in applying the rule for the amount of this appeal bond that finds its natural (we do not say exclusive) application when the judgment to be suspended enforces the money demand of the plaintiff, or for the delivery of the property. On this application we must consider the relation of the state to the subject-matter of the controversy. It is in court to procure the decree annulling the pretended charter of the corporation. The proceeding is by the attorney general, under the law authorizing suit by him "when any association or number of persons shall act within this state as a corporation without being duly incorporated" (Rev. St. § 2593, subd. 3); or, if the suit is to be viewed as seeking the forfeiture of a subsisting charter for violation of its conditions or abuse of its privileges, then the decree of forfeiture is the object the suit is to accomplish (Rev. Civ. Code,

art. 447; *Bank v. Dawson*, 18 La. 497; *State v. Attorney General*, 30 La. Ann. 954). In the legislation of 1842 (no longer in force) for the liquidation of insolvent banks, the decree of forfeiture was to be followed by the appointment of commissioners. We have no such legislation now, though there is the provision that when the charter of any corporation shall be decreed forfeited the governor shall appoint a liquidator. Rev. St. § 731. In our view, the state, in court, under the law, to obtain a decree enjoining the defendants from acting as corporators of an alleged corporation, and the decree that they have no corporate capacity, has no interest or right to demand the bond to suspend the decree rendered by the lower court, prescribed by articles of the Code of Practice of ready application, if the judgment sought to be suspended was that in favor of a receiver suing for money or property. If the state had any pecuniary interest in this controversy, we might find room to apply the precedent furnished in an early decision not exactly analogous, but instructive. The plaintiff in injunction in that case furnished a bond for costs to suspend the decree dissolving the injunction. The injunction thus kept in force by the bond for costs only prevented the defendant in injunction from enforcing a large money demand secured by mortgage. The court, on the application for the writ of prohibition to restrain the mortgage creditor from proceeding, sustained the bond for costs, as sufficient for the suspensive appeal, but, in view of the insufficiency of the bond given by plaintiff for the injunction, required the relator to file in this court an additional bond to secure such damages as the mortgage creditor might sustain by the injunction. *State v. Judge of First Dist.*, 19 La. 167. The state in this case has no pecuniary interest to protect, and is not required to interpose to protect shareholders or creditors of an association claimed to be unlawful, and fully competent to protect themselves. It is therefore ordered, adjudged, and decreed that the mandamus herein issued be made peremptory, and that the relator be allowed a suspensive appeal as of the date of the tender of its bond for an amount sufficient to secure costs.

(51 La. Ann. 306)

MUNDAY v. LANDRY et al. (No. 12,972.) (Supreme Court of Louisiana. Jan. 9, 1899.)

APPEAL—REMAND—ASSAULT AND BATTERY—JUSTIFICATION—DAMAGES—MITIGATION.

On Application to Remand.

Affidavit of witnesses for defendants and counter affidavits of witnesses for plaintiff regarding the extent of injury suffered in a case of assault and battery do not present grounds to set aside the verdict and remand the case.

On the Merits.

1. The principal defendant sought reparation from plaintiff, and in this he was joined by his co-defendant. An asserted insulting letter was received a few hours before the difficulty oc-

curred. There was not in the letter, under the law, cause for an assault and battery such as the jury found was committed. Words written or spoken some time prior will not justify a physical attack upon the one by whom they were written or spoken. The law has never gone further than to permit mere provocation to be shown as a palliation for the acts and result of anger. The legal phrase is "in mitigation," not "in justification." The jury must have found ground to mitigate damages, but not enough to justify the act,—a conclusion affirmed by the court. Words written from one, or spoken by him, will not justify a physical attack. As words never constitute an assault, says Mr. Cooley in his work on Torts (page 67), neither will they justify the employment of force in protection against them, however gross or abusive they may be. The preponderance of the testimony sustains the verdict of the jury on this point, fixing the assault and battery upon the defendants. The jury saw and heard the witnesses. To the decision of that body as relates to mere facts, weight is always given. It being a fact established, as we think, from the testimony, that defendants were the aggressors in the difficulty at plaintiff's office, the rule to which we have just referred applies.

2. The next matter in hand for our determination is the amount of the damages. It is a general rule that great provocation may be shown when it immediately precedes the act, and the aggressor is smarting under the provocation. The jury must have concluded that there were some mitigating circumstances which justified them in assessing the damages. Under the rules of law applying, in our judgment, the defendants were liable for some damages. The jury have fixed them at \$1,500. We have not found error that would justify us in reducing the amount, nor are we induced, under the circumstances, to increase the amount.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Calcasieu; S. D. Read, Judge.

Action by John O. Munday against J. A. Landry and another. A judgment was rendered, from which all parties appeal. Affirmed.

Andrews & Hakenyos and Kleinpeter & Kleinpeter, for plaintiff. Pujo & Moss, for defendants.

BREAUX, J. This was an action brought to recover an amount of \$50,000 from the defendants for injuries inflicted by one of the defendants, aided by his co-defendant. The facts are, as developed by the record, that in September, 1897, plaintiff addressed a note to one of the defendants (J. A. Landry), requesting the latter to let the writer know in regard to two amounts (one of \$600 and the other of \$300) owed, the writer stated in the letter, to the firm of Munday and Landry, lost, plaintiff wrote in the letter, in gambling by J. A. Landry about 20 years prior. The business of the firm of Munday & Landry was, we judge, not considerable. The partnership was dissolved after two years of its existence; the defendant J. A. Landry retiring, and receiving for his interest the small amount of \$75. Its capital had always been quite limited. At the time this defendant withdrew from the business and received the amount just stated, nothing was said by

plaintiff about any failure of the defendant to charge up the amounts referred to in his note addressed to J. A. Landry, as just stated, which the defendant claimed should have been charged by Landry on the books; nor was there the least allusion made to any such loss during the many years that followed. Plaintiff and the defendant were on good terms, and the former rendered services as physician to members of defendant J. A. Landry's family. It appears that this defendant obtained a judgment for a small amount, which nettled plaintiff; and moved him to write the letter which the defendant construed as intending to charge him with having embezzled from the old firm to that amount. The defendant to whom plaintiff's note had been addressed wrote a letter in answer to the note. He also wrote a retraction or denial of the charge, to be signed by plaintiff, which he intended to present to the plaintiff for his signature. He disclosed to his brother the cause of the trouble; declared to him that plaintiff's note contained an untruth. It is evident that he was greatly aroused by the tenor of the note, which he took as an imputation upon his name. About five hours after the note of the plaintiff had been received, the defendants repaired to plaintiff's office, and there they announced to him that they desired to see him; and, upon his invitation, they left the sidewalk and walked into the office. After entering, one of the brothers shut the front door, and stood against it. Plaintiff walked to a partition door, and there took a pistol, and placed it in one of his pockets. From this point in the history of the case the testimony of the witnesses is contradictory and conflicting. We do not deem it necessary to insert here comments touching every detail which led to the reading of the letter which one of the defendants had written to the plaintiff. The defendant's account is that he said to plaintiff, "Did you write me a letter?" to which plaintiff replied, "Yes." Further, "Is this the letter you wrote me?" showing him the letter. Plaintiff replied, "Yes," and he then said to him, "Dr. Munday, do me the justice to tell Dan that it is false;" that he made no reply, whereupon he said, "You have asked me for answer, and I have brought it;"—referring to the letter he had written to plaintiff after he had received plaintiff's note. Plaintiff took the letter handed to him in his hands, and talked, instead of reading; whereupon defendant testified that he took it back and read it to him. The letter shows that the defendant by whom it was written must have been greatly excited while writing it. It alludes to the 20 intervening years from the time of the dissolution of their partnership to the date of the offensive letter, recalls facts to prove the falsity of the charge, and ends by using words fiercely denouncing plaintiff. While defendant was reading the letter to plaintiff, defendant's brother said to him that plain-

tiff's son was knocking at the door. "Admit him" was, in substance, defendant's answer (J. A. Landry). After the letter had been read, he a second time sought to get plaintiff to recall what he had written. Upon his refusal he took out the "Lie Bill" (that was the title or heading of the retraction he had written), put it on the desk, and said, "Dr. Munday, you must sign this for me, or make me some reparation." He refused. Plaintiff pulled out his pistol, and was prevented by defendant from using it. A tussle followed, blows were struck, and towards the end of the encounter the defendant J. A. Landry pulled out a cowhide which he had on his person, concealed, and struck him four or five blows with it. The testimony for plaintiff is, in certain particulars, different. There was no attempt made, as we read it, to induce plaintiff, by means at all mild or friendly, to recall the tenor of the note of which one of the defendants complained; but, without much talk or delay, the defendant seized the letter, read it, and called upon the plaintiff to sign the recanting card, which contained expressions greatly humiliating to plaintiff, had he signed it. Plaintiff would not sign, and blows followed, which must prove a permanent injury to plaintiff, the witnesses for plaintiff testify. Defendants having made a motion to remand the case, we insert here a statement of the needful facts for a decision touching that issue: The suit was tried in May, 1898. It appears that defendants contended in the district court that plaintiff had not sustained any injury; that he remained at home, secluded, and feigned to be sick, in order to excite public sympathy, and make better the opportunity for recovering damages. Three experts were appointed, on defendants' motion, to examine into his physical condition. The examination was read to the jury. Plaintiff's testimony was taken at his residence, contradictorily with defendants'. The mental and physical health of plaintiff presented an issue, it is contended, and the reports of the experts, defendants assert, must have influenced the minds of the jury prejudicially to the defendants. They were prejudiced by it because, defendants insist, it was erroneous, to the extent it was stated that plaintiff suffered with a fracture of the occipital bone, causing a compression of the brain. Lately, two of the experts, for reasons stated, have arrived at a different conclusion, and now certify substantially that they, of late (since the trial), from personal observation, have had the opportunity to discover the error complained of, that the plaintiff's physical health is apparently better than it has been for years, and that it is very doubtful that any injury was ever inflicted on his brain. This affidavit is met by counter affidavits of a number of physicians, two of whom are physicians of great experience in treating diseases of the nervous system, who testify that, after examination, they

found plaintiff suffering from neurasthenia, or nervous exhaustion, the result, they asserted in their affidavit, of the shock to his "nervous system from cranial and other injuries sustained on or about September 14, 1897," the date of the trouble. The jury found a verdict for plaintiff in the sum of \$1,500. From the verdict and judgment each (plaintiff and defendants) appealed.

Motion to Remand.

With reference to remanding, we do not think that the verdict should be annulled, and the case remanded, in order to enable the defendants to reopen the note of evidence, that they may introduce evidence to prove that the returns of the experts appointed upon motion of defendants erred in stating in their reports, as experts, that plaintiff's skull had been fractured. A number of witnesses have testified in the case. Letters have been introduced in evidence. The attending physicians have testified as to the condition of the plaintiff. We find no reason in law and jurisprudence that would justify us in setting aside the verdict and remanding the case on the affidavits stated. We are referred to the case of *Schneider v. Insurance Co.*, 30 La. Ann. 1198. The plaintiff in that case sought to recover on a policy of insurance issued in favor of her husband. The supreme court, on the showing made on appeal, had reasons to believe that the husband was not dead, and remanded the case to enable the defendant to prove the one fact which, if true, disposed of the case. Here it is different. Defendants seek to have a case remanded upon affidavits as to facts that cannot have a controlling effect upon the result. The charge of "feigning" is not absolutely a new issue on appeal. The defendants did not succeed in proving it on the trial. Affidavits and counter affidavits offer no good ground to remand the case to inquire further into the matter. The errors we are to consider on appeal are those of the court or jury. In our view the maxim applies here: "It concerns the state that there be an end to lawsuits." The case cannot be remanded consistently with practice and precedents. The motion to remand is denied.

Damages Vel Non.

The question of damages is next in order before us for determination. The defendants severed in their defense, each filing an answer. We do not think, in view of the facts of this case, that we should consider the defenses separately. In our judgment, the two defendants had combined together in pursuit of a common purpose. From all appearances, the brother, Dan Landry, who was called in by J. A. Landry, the principal defendant, after the receipt of plaintiff's letter, entered into the feelings of J. A. Landry. He also was armed, stood by, and prevented interference of any sort. He (Dan Landry), we have seen, shut the door after entering plaintiff's office,

and enjoined, in emphatic words, those on the outside not to come in, except plaintiff's son, who was permitted to come into the office after J. A. Landry had expressed his willingness to let him enter the office. The court has not found it possible, in view of all the facts connected with the case, to conclude that, in law, he is to be held as not having taken any part in the difficulty. He knew of the letter which had greatly excited his brother. They left together, armed, and called on plaintiff together, and during the difficulty he took an active part in disarming the antagonist of his brother, and in preventing the approach of any one. Blows were struck by the brother (J. A. Landry) with the pistol and the whip after D. Landry's interference in the difficulty and active support.

We pass to the question of liability,—more particularly of the active defendant in the case. It was ill advised on the part of plaintiff to send such a letter to the defendant J. A. Landry the day that a judgment recovered by him was recorded against him (the plaintiff) for a small amount. It could serve no useful purpose, and could but excite ill feeling. In this case there is no question but that great resentment was felt by the principal defendant, and that when he called on plaintiff he was greatly smarting under what he construed as an insult. It is unfortunate for the defendant J. A. Landry that he did not control his temper, and rely more upon the good name he bore in the community in which he had lived many years, as testified to by witnesses, and where he has filled satisfactory positions of trust and confidence. This defendant sought to compel redress in a manner which the law does not for a moment sanction. The duty is imposed upon us of applying its well-recognized principles. It is well settled that words do not constitute a legal excuse for an assault and battery. *Goldsmith v. Joy* (Vt.), 17 Atl. 1010. The law abhors the use of force, either for attack or defense, and never permits its use unnecessarily. *Howland v. Day*, 56 Vt. 318, approvingly referred to in the well-considered case just cited. These principles are binding on the courts. For reasons assigned, it is ordered, adjudged, and decreed that the verdict and judgment appealed from be affirmed.

NICHOLLS, C. J., absent.

On Rehearing.

(Feb. 8, 1899.)

As costs must follow judgment, we affirmed the judgment, as usual, without making reference to costs. It happens in this case, on appeal, that both are appellants and both are appellees (plaintiff and defendants). We have not found a precedent upon the question in our books. In the absence of any decision, we concluded to apply the rule of law relating to costs on appeal in the following manner: The plaintiff asked to have the judgment

amended by increasing the amount. The defendants asked to have plaintiff's demand rejected. He recovered judgment to the extent allowed in the district court. The defendants did not recover any part of their demand. As the judgment was not amended, and the defendants did not recover, we conclude that costs should be borne by the latter. Costs are to be paid by the appellees, as above stated, when the judgment is affirmed. The unsuccessful appellees are the defendants. It is therefore ordered, adjudged, and decreed that our original judgment be amended to the extent that the appellees J. A. Landry and Daniel J. Landry will have to pay costs of appeal. Rehearing refused.

(61 La. Ann. 285)

YOUNG v. TEXAS & P. RY. CO. (No. 12,843.)¹

(Supreme Court of Louisiana. June 22, 1898.)

TRESPASSER ON TRAIN — EJECTION — DEGREE OF CARE REQUIRED.

1. A company is liable if a conductor ejects a person from a car improperly, while the train is in motion.

2. A trespasser on a railroad train must be ejected at a place not perilous for one alighting in the nighttime.

3. To a crippled person, though unlawfully on a train, greater care and attention should be shown than to the one who may better protect himself in an unsafe place.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Caddo; A. D. Land, Judge.

Action by James A. Young against the Texas & Pacific Railway Company. Judgment for plaintiff for \$1,500, and defendant appeals. Affirmed.

Wise & Herndon, for appellant. Thatcher & Welsh, for appellee.

BREAUX, J. This was a suit to recover damages. Plaintiff charged that he was ejected from one of the trains of the defendant railroad company; that he was made to fall by the violence of the conductor, who laid his hand upon him, and pushed him out, while the train was in motion, where the track crosses a ravine about 20 feet deep. Plaintiff averred that he had walked to Shreveport Junction, about 10 o'clock p. m., with a friend, to meet the latter's father, who was expected on the train, and to ride back with them on the train to the city of Shreveport. This junction is about one mile west of that city. From it the east-bound train backs into the city. He alleges that persons frequently ride to and from the junction on the train without paying anything. In a short time after he had boarded defendant's train at the junction, in order to ride to the city, he was called upon by the conductor for a fare of 10 cents. His reply to the conductor was that he did not have the fare, whereupon the conductor said

¹ Rehearing denied February 6, 1899.

to him that he would have to get off the train. Being a cripple, plaintiff asserts that, though the train had moderated its speed, he informed the conductor that he could not alight. In the language of the witness at the time he said he was ejected: "I told him I could not; that I was crippled; and he put his hand on my shoulder, and shoved me off of the train, and I went down the embankment; and as I was going down the embankment he, the conductor, said, 'Look out; catch yourself!'" It appears that plaintiff was born crippled. He limped. From a child the large leader from the right foot to the leg, designated the "tendon Achilles," had been shorter than the leader from the left foot to the left leg. A surgical operation was performed, enabling him to walk with less hindrance, but he still had a limp. The conductor's report handed in to the company after the accident sets forth that a white man named Jim Young asserted that he had been pushed off the train between Shreveport junction and Shreveport; that he fell through the bridge, and was injured. He (the conductor) stated, as part of the report: That Young came on the train at the junction, and when he was asked for his fare he said he was only going to Jordan station. He told him he must either pay or get off. He (Young) chose to get off, and he was told to wait until the train stopped at the stock yard. When the train stopped, he got off, as he was told to do. That he did not fall through the bridge, and was not injured. He was not pushed, or even touched. That, as he backed the train from the Union Depot, Young was standing at Jordan street. He ran to the porter as he flagged the crossing, and asked him who the conductor was. A few days after the accident, the conductor was interviewed by the reporter of a newspaper, to whom he stated (the reporter testified) that Young was put off the train that had been brought to a dead stop, in order that he might get out, for nonpayment of fare. He denied that he had resorted to any violence. The conductor, as a witness, states that the reporter's statement was substantially correct; that his train stopped at the stock pen, where the plaintiff got off voluntarily, and was not touched. But he denies that he had said to the reporter that he had put the plaintiff off the car. The evidence discloses that, as alleged, persons did ride free of charge the short distance between Shreveport and the junction, but that, not long prior, orders had been given to collect the 10 cents fare called for by the conductor of the plaintiff. It appears that there were two large bruises on plaintiff's leg; one above, the other below, the hip joint. The hip joint was sprained. Some time afterwards it became apparent that the leg was smaller than it was when examined immediately after the accident. One of the physicians, as a witness, said, in answer to the question: "Q. You stripped Young, and made a physical examination of him? A. Yes, sir. Q. State whether or not,

in his condition, it is necessary for Mr. Young to go with a crutch now, in his condition. A. That's a thing very hard for a physician to say, but I would say that any condition which would cause the muscles of the leg to shrink, or, rather, grow smaller, would also probably impair the functions of those muscles; consequently he might have to use a crutch. A physician can't tell, by a physical examination, whether it is necessary or not." The case was tried before a jury. The verdict found was for \$1,500 damages in favor of plaintiff. From the verdict of the jury and the judgment of the court, defendant appeals.

There being some difference between the allegation contained in plaintiff's petition and the evidence offered by plaintiff to make out his case, defendant urged that one suing for injury growing out of negligence should set forth the material facts relied on as his cause of action, and prove the combination of circumstances upon which he relied in bringing his suit. Thus, the plaintiff having presented the issue that the conductor pushed the plaintiff off the car, while in motion, on a high embankment over a trestle, he should be confined to that issue. There was no objection made to the admissibility of the evidence on the ground here urged. If the evidence supplied the pleadings, and made it appear the plaintiff was forced by the conductor to get down from the train at a dangerous place, at night, plaintiff is entitled to damages for resulting injuries. The facts presented by the record without objection are not to be passed over for the reason that the pleadings indicate a state of circumstances not entirely in accord with the evidence. A waiver is virtually made by the failure to object to testimony not admissible on the trial of a cause because of the insufficiency of the allegation. The evidence admitted was applicable to the issues raised. The court is, in consequence, without authority to refuse to give it effect. There was no inconsistency between the issue brought out by the facts regarding the unsafe place where the car stopped for the plaintiff to alight and the allegations of plaintiff that he was violently pushed out. Inadmissible evidence of facts not alleged should be objected to when offered. *England v. Gripon*, 15 La. Ann. 304; *Holland v. Cammett*, 5 La. Ann. 708.

Manifestly, plaintiff met with an accident on the night in question. It is not so clear that it happened as he alleges, or as he testifies. He, as a witness, is corroborated in essential particulars by two of his witnesses. Highly credible witnesses, who were present, held different views of the facts which came to their notice. Conceding that this difference gives rise to some doubt, we must give some weight to the jury's verdict. The record informs us that the jury, in a body, accompanied by the sheriff in charge, under direction of the court visited the scene where the injuries alleged were received. After having heard the testimony regarding the place at

which plaintiff was made to get off, and after having examined the grounds, it was not difficult to decide where the plaintiff alighted, and whether it was a safe or unsafe place. We infer from the facts of the case that the jury determined that it was an unsafe place. Such a verdict, in our view, is sustained by the facts.

The disagreement in regard to the facts chiefly relates to whether the defendant was pushed off the platform and steps of the car, and whether the car was brought to a stop at the point where plaintiff asserts he was put off. Plaintiff may have failed to sustain his case in the particulars just stated, and yet the question of peril to plaintiff, growing out of the unsafe and dangerous place at which he was made to alight, would still remain for determination. If it be conceded that the jury decided all the grounds against the plaintiff save the last, the evidence, in our judgment, would sustain the verdict, if credence be given to the measurements of distances at the place, and the uncontradicted testimony of witnesses. It was not a place where a person could be put off in safety. It was the duty of the conductor to eject the plaintiff from the train, but he was not warranted in acting with disregard of consequences. A wrongdoer has right as to his person, as well as to his property. He is not to be wantonly injured.

With reference to the amount of the damages, the plaintiff in this court has prayed for an increase. We feel quite certain that it should not be increased. We think the amount allowed by the jury does full justice. It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed.

(51 La. Ann. 262)

DIECK v. NEW ORLEANS CITY & LAKE R. CO. (No. 12,773).¹

(Supreme Court of Louisiana. Nov. 21, 1898.)
STREET RAILWAYS—INJURY AT CROSSING—CONTRIBUTORY NEGLIGENCE.

1. The authorities are numerous and uniform to the effect that a person whose business or pleasure occasions him to use the streets of a city which are traversed by electric cars, and particularly at street crossings, is guilty of negligence if he fails to employ proper precautions for his safety.

2. He is bound to look and listen for the approach of cars, and to exercise ordinary care and caution to avoid possible danger of a collision; and, should he see an approaching car in close proximity, it would be his plain duty to halt until same could pass by, rather than run the risk of an accident by attempting to cross the track in front of it.

3. Failing to take such necessary precautions for his safety, the injured party is guilty of that negligence which deprives him of the right to reimbursement for injury received.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Nicholas H. Rightor, Judge.

Action by George H. Dieck against the

New Orleans City & Lake Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

Denégre, Blair & Denégre, for appellant.
Edgar M. Cahn and Branch K. Miller, for appellee.

WATKINS, J. This suit is by the plaintiff in his own right, claiming damages of the defendant in the sum of \$25,000, as the result of injuries he received in a collision which occurred on Royal street, in the city of New Orleans, on the 8th of April, 1897, between one of the defendant's electric cars and a cart in which he was at the time driving, the same being drawn by a mule. The case was tried by a jury, who rendered a verdict in favor of the plaintiff for \$5,000; and, from a judgment thereon rendered, the defendant has appealed.

There was an extended and elaborate motion for a new trial filed, but same was by the judge a quo promptly overruled, who made this unique observation, viz.: "As I make it a rule in jury cases of this kind not to grant new trials, this application is denied." The plaintiff's petition substantially makes the following statement of the way in which the accident happened, viz.: That he was driving a cart, drawn by a mule, along Congress street, approaching its intersection with Royal street, "intending to cross the latter," and that when his cart "had reached the intersection of said two streets, and was in the act of crossing Royal street, he observed, half a square off, a car of the said company's line, operated on said street, approaching with great rapidity from the direction of Poland street, or downtown"; "that then and there observing that the speed of the car was excessive, and that no signal of approach [was given], nor any attempt to check the same was made by the motorman thereof, [he] turned his mule in the direction of Canal street, in order to escape what seemed to be an impending collision," same being solely due to the fault and negligence of the motorman of said car, "the approach of which having been observed by him when it was at least half a square from the intersection of the said two streets; that said car could have been stopped, or its speed so checked as to avoid injury to the plaintiff, had the motoneer thereof made any attempt to do so; but, on the contrary, no effort was made by the latter to avoid collision with him, or the vehicle in which he was riding, by reason of which the said car, propelled at an unlawful rate of speed, came in violent collision with the said cart, throwing him therefrom to the ground," etc.; that, in falling, one of his arms was caught and held fast in some of the appliances underneath the car, whereby he was dragged for the distance of three-quarters of a square; and that said car continued its rapid motion after the collision, for that distance;

¹ Rehearing denied February 6, 1899.

that he then and there received serious and severe injuries, particularly in his left leg, which was severely lacerated, and was broken, in consequence of which it was amputated; that he then and there suffered serious and great physical and mental pain, which has continued with greater or less severity; that his occupation was that of a laborer, in which his earning capacity has been greatly diminished by the loss of his leg, he being made a cripple for life; that he is a man of family, having a wife and five children, who are solely dependent upon him for a support. The answer is a general denial, coupled with a charge of contributory neglect.

The case presented is that of a man riding in a cart, drawn by a mule, going along a street of the city which is laid at right angles with another street, on which is laid the track of the defendant, and which is traversed, at frequent intervals, by its electric cars; and, in order to arrive at his destination, it had to be driven across the latter, at the point of the intersection of the two streets. The plaintiff, having driven his cart into the street occupied by the defendant, observed one of its electric cars, at a distance of about a half a block, and approaching with great rapidity, and attempted to turn his mule and cart into the street the car was passing, and in the direction of Canal street; and by reason of the great velocity of the car, and the failure of the motoneer to attempt to check the same, a collision between the cart and car took place, whereby the accident ensued, and the serious and irreparable injury was inflicted.

We make the following extracts from the summary of the evidence which plaintiff's counsel gives in his brief, viz.: "Congress and Royal streets are situated at right angles, and cross each other at the point where the casualty occurred. Plaintiff was coming in his wagon along Congress street, from the direction of the lake, towards the river. His course lay across the intersection of the two streets. He was struck by the car a few feet above Congress street, while attempting to avoid being collided with, by turning up Royal street, in a direction the same as the car was coming from. Plaintiff says that, when he approached the corner, he listened to hear if the car was coming. He heard neither sound nor gong, so he continued far enough to look down the street, and see whether a car was in sight. He saw the car in question half a square away, coming at full speed. He was then on the woods side of Royal street, coming out Congress street, towards the river. The head of his mule was then over the rail of the track on the woods side, or towards the direction from which plaintiff was coming. He looked down the street for the car when the head of his mule was over the rail. The car was coming at full speed. He raised his hand, and gave a signal for the car to stop, after which he

headed his mule towards Canal street. He turned up the street because he could not make the crossing in time. The collision occurred. He was knocked off his cart, and was not conscious until some time afterwards. When his senses returned, he found himself holding to the car, underneath, near the hind wheel, three-fourths of a block away from Congress street. He was taken from underneath the car, and carried by the ambulance to the hospital, where his left leg was amputated about three inches above the knee." The further statement is of similar purport, viz.: "As he approached Royal street, he was standing in the cart at a point in the rear of the axle, about the middle of the cart, as drivers usually do. When he first saw the car, he was at the foot of the crossing of Congress street, on the woods side of Royal street. The front foot of the mule was then over the rail. It was there that he changed the direction in which he was going; and, when the collision occurred, the wheels of his wagon were on the crossing. It was not until then that he could look down Royal street, clear of the buildings at the corner. His wagon was struck while it was going towards Canal street, after he had completed or partially completed the turn he intended to make. His left wheel was then on the track. The building on the lower side of Congress street at the corner prevented his seeing the car until he reached the point at which he did see it. He did not stop at the corner before being able to look down Royal street, because he heard no gong sounded. His mule was going in an ordinary walk. He listened for a gong from within half a square of Royal street. There was nothing to have prevented the motoneer from seeing his mule when he cleared the buildings at the corner."

On the other hand, the contention of the defendant's counsel is as follows, viz.: "Defendant, on the other hand, contends that absence of negligence or fault on its part is clearly established. The great weight of the evidence shows (1) that the gong was rung before approaching the crossing; (2) that the car was not running at an unlawful or excessive rate of speed; (3) that the brakes and the equipment provided for stopping the car were in good order; (4) that as soon as the motorman saw, or could have seen, from plaintiff's actions, that he was going to attempt to cross the track, every effort was made to stop the car and prevent a collision, but it was impossible to stop in time to avoid the accident; (5) that, considering the distance of the car from the place of the accident when plaintiff's cart emerged from Congress street, it was impossible to prevent the accident by stopping the car. Defendant claims, moreover, that plaintiff's contributory negligence is demonstrated by the nature of the locality, as shown by the maps and photographs in evidence, and is established, not only by defendant's evidence, but by the testimony of plaintiff and of every one of

plaintiff's witnesses who saw the accident." The following additional extract from the defendant's brief gives measurements and distances, which are instructive, viz.: "The car in question was coming down Royal street towards Canal street. The map gives the dimensions of the streets and banquettes. For instance, from the Royal street property line, on the lower woods corner of Royal and Congress streets, to the street edge of the gutter, is 8 feet 10 inches. From that point to the rail nearer the woods is 10 feet 2 inches. Width of track is 5 feet $2\frac{1}{2}$ inches. From river rail to gutter on river side on Royal street is 11 feet 6 inches, and from gutter to property line is 9 feet. The map marked 'Tutweller 2' shows the same locality, but takes in Royal street for one block of its intersection with Congress street. The important fact shown on this map is that the block below the intersection of Congress and Royal—i. e. the block bounded by Independence and Congress—is a very short block, only 187 feet in length; and that a person on Congress street, 21 feet $6\frac{1}{2}$ inches from the woods rail of the railroad track, could see a car coming down Royal street when it was a block away; that, when the car was half of the block away, it could be seen from a point on Congress street 24 feet $\frac{1}{2}$ inch from the woods rail of the track; and, of course, the nearer the car was to the crossing, the greater the distance from the track it could be seen by one coming out Congress street towards the river. The width of Congress street is 28 feet 1 inch. It is a planked road."

Consequently, the result of the foregoing measurement is that the distance from the property line at the corner of Royal and Congress streets to the rail of defendant's track on the woods side of the street is 19 feet; and, the width of the track between the rails being 5 feet and $2\frac{1}{2}$ inches, it would have been necessary for the plaintiff's wagon to have moved a distance of 24 feet and $2\frac{1}{2}$ inches in order to clear the track, and possibly a distance of 3 additional feet for clearance space,—i. e. a distance of fully 27 feet and $2\frac{1}{2}$ inches in order to have passed beyond a point of possible contact with the car of defendant, and thus avoided a collision. *Shreveport & R. R. V. Ry. Co. v. St. Louis S. W. Ry. Co.*, 51 La. Ann. —, 25 South. 424.

It is claimed, further, that the block below Congress street—that is to say, the block between Congress and Independence streets—is only 127 feet in length; and that a person on Congress street, 21 feet and $6\frac{1}{2}$ inches from the rail of defendant's track on the woods side thereof, could see a car coming down Royal street when it was a block distant; that, when a car is a half a block distant, it can be seen from a point on Congress street 24 feet distant from said rail; that, the nearer the car is to the crossing, the easier it could be seen. From the map in evidence, as well as from other evidence in the record, it appears that Congress street is floored or covered with

plank, and that it is 28 feet in width, and that there is on the downtown side of it a banquette or sidewalk laid with brick, which is 9 feet and 6 inches in width. A diagram, which is in evidence, shows all the foregoing distances, by actual measurement, to be as they are stated in the foregoing extract from the defendant's brief. With this data kept in view, a brief synopsis of the testimony can be more understandingly made.

The plaintiff's statement is: That the collision occurred on Thursday, the 8th of April, 1897, between the hours of 3 and 4 o'clock in the afternoon; that he was proceeding down Congress street in the direction of the river, and, when he got near Royal street, he was listening to hear if a car was coming, and, hearing no gong, he drove on "far enough to look down the street to see whether a car was coming, and, when he looked, he saw a car half a square away, coming at full speed"; that at that time his mule's head was over the woods-side rail of the track, heading towards the river; and that he then signaled the motoneer to stop his car, and at the same time headed his cart towards Canal street, in an effort to avoid a collision with the car. He says that the point of contact was between the hub of the wheel and the mule. "That was the portion of the cart that received the blow." The one he was driving was a two-wheeled cart. It was empty, and he was going to the river for a load. The plaintiff was standing up, driving the mule. "Q. So that your wagon, when you first saw the electric car, was between the two banquettes of Congress street? A. It was between the two banquettes on Congress street. Q. That is where your cart was when you first saw the electric car? A. Yes." He states that his mule was going in a walk at the time. Then the following interrogation occurred, viz.: "Q. Now, at what rate of speed were you going,—in a walk or a trot? A. I was going in a walk. Q. Your mule was walking? A. Yes. Q. And you mean to say you walked your mule right up on the track before you saw the car coming? A. Yes. Q. Now, although you saw the car when it was half a square off, and your mule's head was simply over the track, you say you could not turn to get out of the way? A. No, I could not.

The statement of one of the plaintiff's witnesses is that at the time of the accident he was present, and witnessed it. He said he was working at the corner of Congress and Royal streets, and had just finished some paving, and was going downtown, when he saw an electric car coming in the second block below; that he then walked across the street to where his brother was. "Then Mr. Dieck came out Congress street; and, when the car was about a half a block below Congress street, I halloed at Mr. Dieck to get over the track. Q. Where was Mr. Dieck then? A. He was about three feet from the rail. I don't know whether Mr. Dieck heard me or not. I cannot tell you that. At the

same time the car came on, and Mr. Dieck went ahead; and I saw him turn his mule uptown when the electric car struck him; and Mr. Dieck fell back out of his cart. Q. How far was the electric car from the corner when you saw Mr. Dieck coming out Congress street with his cart? A. About a half a block; and, when Mr. Dieck reached about ten feet away from the track, I hallooed at him. He was about ten feet from the track when I hallooed at him. Q. When you hallooed at him, you say he was ten feet from the track? A. Yes. Q. What I want to know is, how far was the car from the corner when Mr. Dieck's mule and cart reached the track? A. It was about a quarter of a block away." This witness states that the car was running very rapidly, and did not stop, and that he heard no gong rung, and that, after the collision occurred, the car ran the distance of three-quarters of a block before it halted. He says there were two little boys in the wagon, and he saw them tumble out and run away. The following occurred on cross-examination, viz.: "Q. When you first saw the cart, what was it doing? Was it running along? A. Mr. Dieck was in the cart, and was running along, coming towards the river. Q. At what gait was it going? A. He was just walking along the street, just like you drive a mule. Q. Was it walking fast or slow? A. Well, you can make a mule walk fast or slow. Q. Was he walking fast or slow? A. Neither fast nor slow. * * * Q. And you say he was ten feet from the rail when you hallooed at him? A. Yes. Q. Did he not give his mule the whip then? A. No; I never saw him give the mule the whip. * * * Q. Was he not looking straight ahead? A. When I hallooed to him, he was looking straight ahead. * * * Q. You can stop a mule going in a walk within ten feet? A. Yes; or two or three feet, if he goes in a walk. * * * Q. Did you say, when you hallooed at Mr. Dieck, you were within two steps of his cart? A. I was right alongside of the gutter, and he passed in the middle." At that time he was about 10 feet from the track.

The brother of the witness last mentioned, in the course of his interrogation, said, viz.: "Q. Did you notice the cart when the head of the horse had reached the track? A. Yes. Q. How far was the car then to the crossing? A. Well, they were not more than ten feet apart. Q. You are sure of that? A. Yes. * * * Q. Now, when the head of Mr. Dieck's mule was on the track, had the car reached Congress street, or was it ten feet away from Congress street? A. It was about ten feet from the rail, when he was trying to turn the mule. Q. You have stated that the car was ten feet away when Mr. Dieck reached the corner. A. I was there when the whole thing was passing. I was standing right there." This witness having stated on cross-examination that the plaintiff was standing in his cart driving his mule

at a slow walk, with the rim of his hat turned down, at the time he shouted at him, the following interrogation occurred upon his re-examination, viz.: "Q. Now, put your hat on, and show us how Mr. Dieck had on his hat when you saw him on his cart. A. This way (witness putting on his hat, and pulling down the rim). Q. Was Mr. Dieck holding his head down? A. Yes. Q. Just like you are holding it now? A. Yes. * * * Q. You did not notice how he held his head, but you noticed how his hat was turned down? A. I know his hat was turned down." With this the re-examination was concluded.

Another witness for the plaintiff, who was present and witnessed the accident, made this statement, viz.: "Q. How far was the car from the corner when Mr. Dieck reached the corner? A. When I saw the car, he was no more than about eight yards. Q. You did not see it before then? A. No; I was sitting down. The cars go so fast there." Again: "At what rate of speed was the cart going when you first saw it? A. When I saw it? Q. Yes; how fast was the cart going? A. It was walking slow. I told him to stop. Q. Was that before he got to the track when you told him to stop? A. Yes. Q. Was he walking slowly before he got to the track? A. He was walking slow all the time," etc.

The statement of another witness, who was a passenger on the car, is as follows, viz.: "Q. How, then, were you able to see that cart when you were a half a block away? A. I was looking right ahead when the thing happened. Q. Did you see it looking out of the car window? A. No; I saw it through the car door. Q. You saw the driver of this cart when the car was one hundred and fifty feet away? A. Yes; I could see exactly when it was one hundred and fifty feet away. Q. I suppose the driver then could have seen the cart? A. I don't know. Q. If you could see the driver, why could not the driver look along the same line of vision, and see you? A. The man was not looking that way. Q. If he had been looking that way, he could have seen the car? A. Yes; I suppose so." He says there were 12 or 15 other persons in the car besides himself. Again: "Q. Did somebody try to turn the brake in the front part of the car? A. Yes; the motorman, I believe. Q. Now, do you know what was the reason why they attempted to turn on the rear brake? A. To stop the car. Q. You say they did it because they could not stop the car with the front brake; how do you know that? A. It looked that way. Q. State the facts which make you say it looked that way, etc. A. Well, I saw the motorman try to turn the brake, [but] it looked like he could not shut off the power; and, when I walked towards the conductor, I saw somebody turn the rear brake."

Another witness, who was on the car, confirms the statement of the one last mentioned, thus: "Q. How far was that car from the corner of Congress street when Mr. Dieck

reached the corner of Congress and Royal? A. It was fully half a square away. Q. You are sure of that? A. I am positive. Q. What was it you saw a half a square off,—the mule, or cart, or both? A. I saw the mule and cart, and Mr. Dieck and a little boy with him in the cart. Q. Are you positive of what you state now? A. Yes. * * * Q. How many feet was it from the corner when you first saw the motorman try to stop the car? A. One hundred and twenty or one hundred and fifty feet." On cross-examination the following occurred, viz.: "Q. Where was the mule when you first saw it? A. It was near the corner. Q. He had not quite reached the corner when you first saw it? A. Not quite; he was a few feet from the corner. * * * Q. So, he had not yet reached the corner of Congress and Royal streets then? A. No; he was a few feet distant from the corner. Q. So, he had not yet reached Royal street when coming out Congress? A. Yes. Q. From where you were sitting, you could see both the mule and the cart? A. I could see the whole thing. I jumped up when I realized there was going to be a collision. * * * Q. In what direction was [Mr. Dieck] looking? A. Well, at the time that I saw him, I think he saw the car coming. I saw him looking in the direction of the car. Q. Was he going in a walk? A. Yes. Q. And the mule had not reached Royal street? A. Not quite. Q. So that the whole distance from Royal street—that is, from the property line of Royal street to the woods side of the rail—was between him and the track at the time? A. Well, from the time when I saw him, from the mule's head to the rail, I suppose was eight or nine feet. Q. And the mule was going in a slow walk? A. Yes. Q. And Dieck was looking at the car? A. He was looking at the car."

Another passenger on the car stated that, seeing there was about to be a collision, he tried to stop the car by putting down the trolley. "Q. Why did you unloose the trolley? A. Because I had an idea that that would stop the car. Q. Do you know anything else about this collision? A. The motorman could not stop the car."

The foregoing is a very fair analysis of the testimony of the plaintiff's witnesses.

The defendant's testimony shows that the motoneer who was in charge of the car with which the cart came in collision had been in the employment of the defendant in that capacity for a period of two years, and had the reputation of being both competent and careful, and had never had an accident happen to his car before. One of the officers of the company testified as follows, viz.: "Q. What can you say about his character and efficiency as a motorman? A. I consider him a first-class man. His record is extremely good." The testimony shows that, at the locality where this accident occurred, the rules governing the company permit a higher rate of speed in the movement of its cars than at lo-

calities nearer to Canal street; and that, when moving at that rate of speed, a car could be stopped within a distance of 104 feet, or the distance of one-third the length of an ordinary block. The following is the further interrogation of that officer, viz.: "Q. Is there any rule of the company which forbids or makes it the duty of the motoneer to ring his gong in the middle of the square, or is it left to his discretion? A. It is left to his discretion. We have a rule not to sound the gong unnecessarily. Q. You don't require the motoneer, as an absolute duty, to ring his gong when approaching every crossing? A. We have no absolute rule on that point."

A police officer, who was a passenger on the car at the time of the accident, states that, to his knowledge, the motoneer used his best efforts to stop the car by the use of his brake, and that he distinctly sounded his gong about the middle of the block; that it was immediately afterwards that he saw him turning his brake. He said there had been a shower of rain, and the motoneer had on a rubber coat.

A witness who lives in the block adjoining the one where the accident occurred makes this statement, viz.: "I crossed Independence street. I was looking to see if a car was crossing, when I heard the motoneer ring the bell. The car was coming at full speed; and, when I looked towards Congress street, I saw a cart and a mule. Then I saw the motoneer trying his best to stop the car, but he could not stop it. At the same time, I saw a man in the cart trying to pull the mule back; but he could not do it. Q. At what gait was the mule going,—at what speed? A. Just like a slow walk; but he could not pull the mule back. Q. You say you saw the motorman attempting to stop the car? A. Yes; he tried to stop the car, but he could not do it." She says she distinctly heard the gong sounded.

Another witness, who was a passenger on the car, says: "The motorman rang his gong at some place between the street below and the street where the accident happened. I don't know the name of the street. There was a kind of a drizzling rain, and the motorman had on his rubber coat," etc. He said the motorman was trying to put on his brakes. "If he had had steam on, he could not have put it on harder."

The motorman who was in charge of the car which came in collision with the cart makes this statement, viz.: "On my three-o'clock trip, going up Royal street, on reaching [a point] near Congress street, there was a cart coming out Congress street, going towards the river. There was a drizzling rain. I rang the gong about the middle of the square in between Independence and Congress; and, when I noticed the mule's head, it was about sixty feet from the corner, the mule going in the direction of the river,"—that is to say, that, when he first saw the appearance of the mule's head, the car was 60 feet from the corner of Congress and

Royal streets. He said that he at once tried his brake, but the distance was so short that he tried his reverse, but it would not take effect. He said he could not prevent the accident, because the distance was so short. "It was too short a distance to stop any car. Q. What was the speed of the car at the time? A. I don't know; about ten miles an hour. Q. How many notches did you have on? A. Six notches; that is all the cars there run on; six notches is all they have." He said his brakes were in perfect order; that he never had any trouble with the brakes on that car. In the course of that witness' cross-examination, the following was brought out, viz.: "Q. You did all you could to stop the car before you got to Congress street? A. Yes, in order to avoid a collision. Q. Your speed when you began to check up, you say, was about ten miles an hour? A. About that, I am certain. Q. Did your speed increase or diminish from that point when you tried to check the speed of your car? A. As soon as I applied my brake, it checked the speed. Q. You say you shut off the power? A. Yes. Q. Did you do that at the same time when you put on the brake? A. Yes; when I saw that the distance was too short to stop [the car] by the brake, I applied the reverse. Q. All of that would bring the car, when getting to Congress street, going at that rate of speed— You threw off your power first, and then applied the brake? A. Yes. Q. And then you reversed your power? A. Yes. Q. And that would make your car running at what rate of speed when getting to Congress street? A. About half speed. Q. It would run at half speed at Congress street? A. Yes. Q. You could then, by doing what you did, reduce your speed half speed within a distance of sixty feet? A. Yes. * * * Q. You needed a hundred feet, and no less, to make the car stop? A. That is, if you have a dry track. Q. On that day, I understand, the track was slippery, as it had been raining? A. Yes. * * * Q. Mr. Dieck started right across the street? A. Yes; I tried to save him, and avoid a collision. Q. The man in that cart did not change his course? A. How was that? Q. He kept straight across Royal street? A. Yes; he kept straight across Royal street. Q. Do you know whether or not he saw the car? A. I don't know whether he saw the car or not. Q. He kept right straight on across Royal street? A. Yes."

The statement of the conductor of the car, in every essential detail, corroborates that of the motoneer. With this witness' evidence the case was closed, without any testimony in rebuttal, or any attempt being made on the part of the plaintiff to impeach the defendant's witnesses, or to impair the effect of their testimony; for the testimony of the plaintiff, as well as that of the defendant, puts the fault or blame, if any there was, upon the plaintiff, and altogether exonerates the defendant.

On account of the serious character of the injury inflicted on the plaintiff, the large amount of damages claimed, the weight which ought to attach to the verdict of a jury, and the fact that the district judge declined to grant a new trial, we have felt the onerous duty imposed upon us of instituting a more than usually careful examination of this record; and we are fully convinced that the plaintiff has utterly failed to make out even a case of probable fault of the company. Simplified, the case may be thus stated, viz.: The plaintiff, accompanied by a little boy, was driving his two-wheeled cart along Congress street one afternoon, at about the hour of 4 o'clock, in the month of April; his wagon being empty, and he occupying a standing position while engaged in driving. His little cart was drawn by a mule, and he was moving along at a leisurely pace, his business seeming to have been in no wise urgent. As he neared the intersection of Congress and Royal streets, two workmen standing near the banquette, and only a few feet from the plaintiff's cart as he was slowly passing by, called to him, or rather hallooed to him to stop, and at the same time attracting his attention to the car which was rapidly approaching on Royal street, in easy open view; but he appeared neither to have heard them, nor to have seen the car, and did not slacken the pace of his mule, which was headed in the direction of the opposite side of the street-car track and of Royal street. At the time, his face was averted, and the rim of his hat turned down. A rapidly approaching car was about 60 feet away when the plaintiff and his cart came in view of the motorman, who sounded his gong, put on his brakes, reversed his lever, and did all that could have been done to arrest the speed of the car; but all to no purpose, for a collision was unavoidable, the tracks being wet from recent showers of rain.

An analysis of the evidence demonstrates two propositions, both of which are fatal to the plaintiff's claim: (1) That, when slowly approaching the defendant's track at the crossing of the street on which defendant's track is laid, the plaintiff neither looked nor listened for an approaching car, or if he either looked or listened, and either saw or heard the approaching car, he failed to stop his cart, and then caused a collision therewith; (2) that the motorman used every possible effort to avoid a collision, by sounding his gong, putting down his brakes, and shutting off the electric current, just as soon as the plaintiff's mule and cart came within the line of his vision at the crossing of the intersecting street, his car being difficult to control on account of the track being wet and slippery from recent rains. We find full confirmation of the latter in the plaintiff's version of the accident, namely: "When [I] first saw the approaching car, [I] was at the foot of Congress street, on the woods side, the front foot of the mule being over the rail;

and it was then that [I] changed the direction in which I was going." The plaintiff's contributory negligence is thus plainly exhibited, and right of recovery defeated.

The authorities are numerous and uniform to the effect that persons whose business or pleasure occasions them to use the streets of a city which are occupied by steam trains are guilty of negligence if they fail to employ proper precautions for their own safety, and particularly if they fail to look and listen at street crossings for the approach of trains, whether they be pedestrians or driving vehicles. *Schexnaydre v. Railroad Co.*, 46 La. Ann. 248, 14 South. 513; *White v. Railroad Co.*, 42 La. Ann. 990, 8 South. 475; *Herlich v. Railroad Co.*, 44 La. Ann. 280, 10 South. 628. This rule of jurisprudence was well stated in the *White Case*, the evidence disclosing that Mrs. White was driving in a buggy with three young children, on a street in the city of Shreveport, and approached a street crossing of the defendant's track so closely that a passing train frightened her horse so that he ran away and injured them. The court said: "We are bound to hold that Mrs. White did not exercise that degree of care and caution which the law requires of persons approaching the crossing of a railroad track with intention to cross. She was unquestionably bound to look and listen, and to exercise care and caution to avoid possible danger, suggested by the very fact of crossing." The foregoing rule was recently applied to electric cars in the city of New Orleans, in two conspicuous cases,—that of *Hoelzel v. Railroad Co.*, 49 La. Ann. 302, 22 South. 330, and *Hemingway v. Railroad Co.*, 50 La. Ann. 1087 (recently decided) 23 South. 952. In the former case the plaintiff was a pedestrian, who was walking on a path parallel with the street electric car track, at 10 o'clock on a very dark night, and the car rapidly approached him from the rear, and ran over and killed him, as he was attempting to cross the track, the headlight being very dim. In the latter case the plaintiff attempted to drive his cart, in which his two little boys were seated, over the street-car track, in front of a rapidly approaching car, which was in easy open view, at the hour of 3 o'clock p. m., and brought it into collision therewith, whereby he and his boys received serious injuries. In the *Hoelzel Case* we referred to the rule "that one approaching a railway crossing, or attempting to cross a railroad track, must carefully look up and down the track," and observed that the court was called upon to determine whether it applied to an electric car of a street railway, and said: "Greater prudence is required of a pedestrian who crosses a railway track of a steam or electric car in a city." In *Perez v. Railroad Co.*, 47 La. Ann. 1391, 17 South. 869, this court held it to have been negligence on the part of a driver of a trolley to attempt to cross a street-car crossing in front of a rapidly approaching train, at 11 o'clock at night,

and said: "It was the duty of the driver to have looked and listened before attempting to cross the railroad track; and notwithstanding that he did look, and did plainly see the approaching train,—the night being clear, and the headlight of the locomotive being distinctly visible,—the driver rashly undertook to drive his trolley across the track, immediately in front of it, and scarcely a block away, and moving at a confessedly rapid rate of speed." In *Smith v. Railroad Co.*, 47 La. Ann. 833, 17 South. 302, we held that one who, in the nighttime, walks upon the track of a street car, is bound to use his senses to avoid the car; and if, by the exercise of ordinary care, he would have been apprised of the advancing car in ample time to leave the track, and fails to do so, he is guilty of negligence, and cannot recover damages in case of accident. In *Schulte v. Railroad Co.*, 44 La. Ann. 509, 10 South. 811, this court, speaking through Chief Justice Bermudez, said: "The authorities are numerous that, on approaching a street-crossing of a railway track, it is the duty of a traveler to exercise his senses of sight and hearing, and to look and listen for the approaching train or car, and that his failure to do so is negligence, which, in case of collision, prevents the recovery of damages for injuries sustained,"—citing them, and applying same to that case. In our opinion, the facts disclosed by the record bring this case within the rule established in the cited cases, and a like judgment should be rendered, rejecting the plaintiff's demand. It is therefore ordered and decreed that the verdict and judgment appealed from be annulled and reversed; and it is further ordered and decreed that the demands of the plaintiff be rejected, at his cost in both courts.

(51 La. Ann. 299)

WEBSTER v. NEW ORLEANS CITY & L. R. CO. (No. 12,854.)¹

(Supreme Court of Louisiana. Jan. 23, 1899.)
STREET RAILWAYS—INJURY TO PERSON ON TRACK
—EVIDENCE.

1. One who heedlessly attempts to cross ahead of a car properly manned, if injured, has no one to blame but himself.

2. The motorman was not at fault, and none of the negligence charged by plaintiff was shown.

3. He exercised reasonable care to avoid the injury. He paid proper attention, saw the danger, and gave notice or warning, and did all he could to stop his car.

4. There was nothing out of repair about the car or the track, nor anything lacking to increase the danger in which plaintiff, the testimony shows, placed himself.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Nicholas H. Rightor, Judge.

Action by George Webster against the New Orleans City & Lake Railroad Company.

¹ Rehearing denied February 6, 1899.

Judgment for defendant, and plaintiff appeals. Affirmed.

Henry O. Hollander, Octo N. Ogden, and Samuel S. Jones, for appellant. Denégre, Blair & Denégre, for appellee.

BREAUX, J. This was an action for damages arising from injuries sustained by plaintiff on Canal street on the 13th day of November, 1896. The charge is that he was struck on that day by one of the electric cars of that company. He was walking along the neutral ground between Royal and Bourbon streets, and by the blow received his left leg was fractured. He was, in consequence, confined to the Charity Hospital, where he suffered great mental and physical pain. He had not entirely recovered from the effects of the blow at the date of his trial. At the point plaintiff was injured, there was a switch, and as the car came from the switch onto the main track the fender of the car projected over the path. Plaintiff avers that the projection from the car struck him while he was walking on the path; that the evidence shows, from his position before and after he was struck, that he could not have been on the track in front of the car, and that he was on the neutral ground. He charges that the company, by this projecting fender of the car, became a trespasser; that he had a right to be on the neutral ground or path along which he was walking, and he supposed himself in safety at a point beyond the ordinary projection of all electric cars which passed along the track, and that he was not guilty of negligence; that defendant's employé should have guarded against the danger at the point at which he was when he was struck. He also charges that the defendant was guilty of gross negligence, by not having a trolley wire over the switch; thus cutting off the power by which the motorman could have reversed his motor, and stopped the car quickly, and prevented the accident. The evidence shows that plaintiff is a worthy and excellent man; advanced in years, and that his hearing is a little dull; that he has a gift of invention as a mechanic, and is deserving of sympathy and good will. The other witnesses testified that plaintiff was not walking on the neutral ground, but that he was walking on the track in front of the car. Henry Tallaferro said that he was on defendant's track; that he hallooed to him to get out of the way, but that plaintiff did not hear him. Michael Carroll, motorman of the colliding car, testified to the sounding of the gong as his car was advancing; that he saw plaintiff ahead; that he did all in his power to stop the car; that he put on the brake as soon as he saw that plaintiff was in danger. The following are questions propounded to him, and his answers: "Q. You say that, when you first saw this old gentleman, he was walking in the space between the Canal and Claiborne track and the track which you were to come in on? A. Yes. Q. Was he

clear of the track when you first saw him? A. Yes; he was perfectly clear of the track. Q. Then I understand you to say that when you were almost on him he stopped on your track? A. Yes; he never looked where he was going. Q. Answer my question. You saw him swinging around to go on your track? A. Yes; and I did all in my power to save him. Q. What did you do to save him? A. I rang my bell and turned the brakes. Q. Did they act nicely? A. Yes." He also testified that, immediately after the fender of the car struck plaintiff, he jumped out, and caught him before he fell; the car was running slowly, and stopped immediately after plaintiff was struck. He also said that the woodwork of his car projected over the track about a foot each side of the rail. The neutral ground near the track is five feet six inches wide, and in order to get to the Esplanade street car, which he wished to board, he had to cross the car track of the defendant company. James Callahan, another witness, who was on the platform of defendant's car, corroborates the testimony of Carroll. Hingle, the conductor, said that the motorman sounded the gong continuously. Fagan corroborates the other witnesses about the signals given, the slow movement of the car, and the stop made immediately after the accident. He does not, by his testimony, show that plaintiff was not walking in front of the car. The court pronounced judgment for defendant, rejecting plaintiff's demand. Plaintiff prosecutes this appeal.

Plaintiff, we think, in good faith believes that he was not in front of the car at the time the accident happened. But he is not, in this particular, sustained by the testimony of the other witnesses. It may be that plaintiff failed to hear the signal given, and that he was absent-minded at the time, as men of his age will be, who devote many of their moments to particular subjects (as, in this case, in constructing and inventing new devices and appliances), and that in that condition he erred as to the place or precise spot of the accident. Be it as it may, the preponderance of the testimony does not sustain his contention on this point. This was the opinion of the district judge, who heard and saw the witnesses; and it is ours, after a careful reading of the testimony as taken and brought up in the transcript. Upon this particular point,—the place where the plaintiff was walking,—only facts present themselves for consideration. The facts do not show that plaintiff was where he claims he was, but, on the contrary, they prove that he was walking in front of the car. The view at which we have arrived disposes of the questions argued at bar, on the theory that plaintiff was walking, as he alleged and urged, on the neutral ground.

Plaintiff presented other issues for our determination, which have a bearing upon the case, whether plaintiff was walking on the track in front of the car or on the neutral

ground. He charged that the defendant was guilty of gross negligence, by not having a trolley wire over the switch so that the motorman might have controlled and reversed his motor, and stopped the car quickly, and thus prevented accidents. The testimony does not show that this reproach is well founded. It discloses that the car was running slowly, and that it was almost instantly stopped. The motorman says "that he was within a foot of him [plaintiff] when he stepped in danger." The facts shown by other witnesses, in the main, corroborate the statement. As the car was stopped immediately after the blow, it does not appear to us that there was anything wanting to effect a prompt stoppage of the car. The power, when the accident occurred, had not been turned on, and therefore the car readily yielded, as we appreciate, to the effect of the brakes. There was, it was made evident, no difficulty in stopping it. We are not led to infer from the testimony that on this particular occasion the danger to the plaintiff was greater because the defendant did not have any trolley wire on the switch. The burden of proof was on plaintiff. He failed to establish that there was anything out of order about the car, or that any device was wanting, or that the motorman was at fault. The record does not disclose the condition for which the plaintiff contended, and there remains, in consequence, but one alternative; that is, to affirm the judgment. It is true that one on foot has a right to cross the street where he pleases, provided he exercises the right with due caution. It is his duty to use due care. It was negligence per se for plaintiff to attempt to cross ahead of a car under circumstances disclosed by the record. The judgment is affirmed.

(51 La. Ann. 370)

GANN v. VARNADO. (No. 12,991.)¹

(Supreme Court of Louisiana. Feb. 6, 1899.)

MALICIOUS PROSECUTION—PROBABLE CAUSE.

Two country merchants, engaged in business in the same vicinity, having both furnished plantation supplies to a customer who made an insufficiency of cotton to pay their accounts, and one of them, having obtained possession thereof by purchase, in an honest competition, was caused to be arrested by the other on a charge of robbery, and to be incarcerated in jail, and there detained for several days, being fully aware of all the circumstances, *held*, that the proceeding was taken without probable cause, and with malice inferable from the act, and the affiant is liable in damages to the party thus arrested, as having been guilty of a malicious prosecution.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Washington; Robert R. Reid, Judge.

Action by J. M. Gann against I. N. Varnado. Judgment for defendant, and plaintiff appeals. Reversed, and judgment rendered for plaintiff.

Clay Elliott, for appellant. Philip B. Carter and O. P. Amacker, for appellee.

WATKINS, J. This is an action in damages for a malicious prosecution, founded on the following state of facts, as related in the plaintiff's petition (plaintiff's claim being for \$10,000): That on or about September 24, 1895, Varnado made an affidavit before the justice of the peace of Washington parish, wherein both parties resided, charging petitioner with robbery by maliciously and forcibly taking and carrying away one bale of cotton, which he (Varnado) pretended to belong to him, and he caused a warrant to issue thereunder for his arrest, and whereunder he was arrested, and carried to the parish jail, where he was kept in custody by the sheriff until September 28, 1895, when he was released on bond of \$500 for his appearance in court to answer said charge; that at the next jury term of the court a grand jury was regularly impaneled, and said charge against petitioner was investigated by them, and failed to find a true bill, whereupon he was discharged from his bond by order of the court, and the prosecution against him was abandoned by Varnado. Petitioner shows that he has a family dependent upon him for support and protection; that he has also been an honest and upright citizen, and has deservedly attained the good opinion, esteem, and respect of his neighbors in the community in which he lives, and of good citizens of the parish and state, and a reputation among his said neighbors as an upright citizen and business man,—all of which has been ruined by his prosecution on the charge of robbery, and incarceration in jail therefor. Plaintiff avers that he was not guilty of the charge made against him; that the said affidavit is and was false and untrue, and inspired and made by the said Varnado by malice, and without probable cause, and with no object in view other than to injure the good name, social and business standing and reputation of the petitioner, and humiliate and lower him in the estimation of his neighbors and other citizens of the state. He avers that he was arrested at his store in the presence of his clerks and customers. From thence he was taken to jail by the sheriff, and deprived of his liberty for three days. He further avers: That at the term of court following the making of these charges he was forced to leave his family and business, and remain at court more than a week, in order to comply with the law, and meet this charge. That these proceedings were very mortifying and humiliating to petitioner, and have resulted in great damage, annoyance, and injury to him in his business, and for all of which the defendant is responsible in damages. That defendant is a wealthy man, and a prosperous merchant, and resides in the immediate vicinity of petitioner; and that he has sustained at defendant's hands damages in the sum of \$10,000,

¹ Rehearing denied February 20, 1899.

which are itemized as follows, to wit: Fee paid to attorney for legal services in drawing up application for bail, \$20; loss of time and expense while under arrest, \$50; loss of time and expense attending court, \$300; injury to business, caused by these proceedings, \$2,000; for mortification and humiliation as suffered and endured, and for the injury to and loss of his good name, social standing, and character, as abovesaid, \$7,630,—aggregating in all \$10,000. His prayer conforms to the foregoing averments.

The following is the purport of the defendant's answer, viz.: For answer, the defendant denies each and every allegation in the plaintiff's petition, except what is especially admitted. Defendant admits that he made an affidavit before W. A. Burris, justice of the peace, wherein he, from and upon information received, charged plaintiff with robbery of a certain bale of cotton from the custody of one Walker, said cotton being the property of I. N. Varnado & Son; that a warrant was issued by said justice, and the plaintiff was thereunder nominally arrested; but respondent avers that in making said affidavit he had probable cause and reasonable grounds for believing the plaintiff guilty as charged. He specially denies that he was actuated by malice, and avers that he acted under the instruction and advice of an attorney at law and of the justice of the peace in making the affidavit; that plaintiff admitted taking the cotton, branded in defendant firm's name, and declared to a deputy sheriff that he had carried the cotton out of the state; that in a civil action involving the ownership of said cotton, entitled "I. N. Varnado & Son vs. J. M. Gann," the plaintiff was decreed to be the owner of said cotton. He further avers that while under arrest the plaintiff, Gann, was not subjected to any humiliation, annoyance, or harassment, but, on the contrary, was allowed the liberty of the town, and was treated with every consideration. He further denies that the character, reputation, or credit of plaintiff has been in any way injured by the action of this respondent, and avers that plaintiff's demand is unjust, unreasonable, and without warrant or justification, either in law or equity; and he prays that the same may be rejected.

On the issues thus joined, a trial was had before a jury, who rendered a verdict in favor of the plaintiff for the sum of \$500. Upon the defendant's suggesting that the verdict of the jury was contrary to law and evidence, the judge a quo set the same aside, and granted a new trial. Upon the second trial the cause was submitted upon the same testimony, with the exception of the solitary statement which is made by P. B. Carter, one of the attorneys for defendant, who was introduced as a witness for the plaintiff, to the effect that he was present at the court during the progress of the first trial, but obtained permission of the judge to be absent from the court one day on which this case was on trial

on account of sickness in his family, but that he was present during the remainder of the week while the trial was in progress; that at the subsequent term of the court plaintiff's counsel asked permission to withdraw his prayer for trial by jury, and leave to have the case tried before the court, which application was refused by the judge; that subsequently the case came on for trial, and same resulted in a verdict in favor of the defendant, rejecting the claims of the plaintiff; and from that verdict, and the judgment thereon based, the latter prosecutes this appeal.

The following is the purport of the testimony which was adduced on the trial, viz.:

The first witness plaintiff introduced was the justice of the peace before whom the defendant, Varnado, made the affidavit on the 24th of September, 1895, charging the plaintiff, Gann, with the crime of robbery in taking from Walker's gin a bale of cotton he claimed as his; and he gave full and complete details of said transaction, stating that he subsequently sent all the papers before the next grand jury for investigation. Next in order was the deputy sheriff who arrested Gann under a warrant for the crime of robbery, and he gave the particulars of his arrest, incarceration in jail, and detention therein for three or four days. Then the clerk of the court was introduced, and testified that the affidavit Varnado made, and the bond which Gann had given, were turned over to the grand jury; and that they found no true bill, and that Gann's bond was subsequently canceled. The statement of Gann, the plaintiff, was that he has resided in this state for 8 years, and had theretofore resided in Poplarville, Miss., and had been engaged in merchandise there, and at Cedar Grove, in Louisiana, for about 15 years, and that he had, during his residence in Louisiana, been engaged in merchandise at Shady Grove; that during the last three years Varnado has also been engaged in merchandise about two miles distant from Shady Grove, and was well known to him. He relates the transactions which led up to his arrest and false imprisonment, in substance, as follows, viz.: That about the 19th of September, 1895, J. R. Rimes came to his store, and sold him a bale of cotton, and in the evening, late, he sent his wagon to Walker's gin, and had it hauled to his house. That he accompanied the wagon, and so did Rimes; and it was put on his wagon by Rimes and the driver, in the presence of Walker and his two sons. That the deputy sheriff was sent for it on the following day, and he requested him to point out the cotton, but that he refused to do so; stating, "If you can find it, go and get it." That he went away without making any seizure, but returned, a few days afterwards, with the warrant for his arrest. That he was arrested in his store in the presence of his clerks and other persons, and remained in custody while many other persons, who were attracted by curiosity, came in. That he was taken by

the sheriff, openly and publicly, to the town of Franklinton, the parish site, and incarcerated in jail, and kept there until he furnished bail, —some three or four days. That Rimes was indebted to him for supplies, and that he paid him by crediting his account. That Walker's gin is about three-quarters of a mile from plaintiff's store, and one and a half miles from that of Varnado. That he employed no force or duress in getting possession of the cotton, and at the time had no notice of Varnado's claim, other than the statement of Walker that Varnado had directed him to mark the cotton; but that Rimes denied Varnado's right to do so, and told him to put it on his wagon. He stated to Walker that he had sold the cotton to him, and helped the driver put it on the wagon. The following interrogation then occurred, viz.: "Q. Did you have any idea or intention whatever * * * of committing any robbery? A. Why, certainly not. I never thought of such a thing; for Mr. Rimes sold it to me, and I considered it my cotton. He sold it to me, and I thought I had a right to it." He states that he had made advances on the cotton; that at the time of his arrest he carried a stock of \$4,000 or \$5,000, and owned, in addition, a farm of 600 or 700 acres; and the movables on the farm were worth \$5,000. He makes a statement of the damages he sustained, giving full particulars, and which amount, in the aggregate, the sum demanded; and among them are enumerated injury to his social and business reputation, and his credit and financial standing as a merchant, and also his annoyance, vexation, humiliation, and mortification on account of his arrest under so grave and heinous a charge as that of robbery, and being confined in jail for several days. He states that Rimes, his customer, only lives about one-half a mile from Walker's gin; that at the time the bale of cotton was delivered to him by Rimes after his purchase it was branded with a (V), and that Walker told him that he had been instructed by Varnado to place that mark upon it, and that he afterwards put his own mark on it, and marked out or erased the (V); that this same bale of cotton was the subject of a civil suit between him and Varnado, and the court decided that it belonged to Varnado. J. R. Rimes states emphatically that he never sold the bale of cotton to Varnado, but that, on the contrary, he sold it to Gann, the plaintiff, and delivered it to him in the presence of W. F. Walker and his two sons. His statement of what occurred immediately previous to the sale to Gann is as follows, viz.: "When I hauled the cotton that morning to the gin of Mr. Walker, Mr. Varnado came up, * * * and stayed there until I got through unloading; and, after we got through unloading, his son, Scott Walker, brought a sample of the cotton, and showed it to Mr. Varnado. He took it, and asked me what was I going to do with it. I told him I was going to sell it, and he asked me to whom. I said: 'I

am going to give you and Mr. Gann both a chance on it. I first intended to carry it out to Mr. Gann, and then out to your house; and the one who offered me the most [should have it].' He said, 'I want this cotton.' 'All right,' I said, 'if you give me more for it than Mr. Gann, you can get it.' 'By G—d! I must have it,' he said. 'You are fixing to get yourself in a scrape.' I asked him: 'Why? I don't see why I am going to get that way.' He said: 'I want to tell you right now, if I don't get this cotton, I am going to make it cost more than it is worth. Mr. Gann has been monkeying with my business long enough, and, if I don't get this cotton, I am going to make it cost more than its worth.' * * * He said: 'I will tell you what I will do. If you will stick to me, and do what I tell you, we will beat Mr. Gann out of every cent you owe him, and it shan't cost you a nickel.' I said: 'Mr. Varnado, I intend to pay you and Mr. Gann every cent I owe you. I never bore the name of not paying an honest debt.' And he said, 'By G—d! you had better do what I tell you;' and I replied, 'If that is what you want me to do, you have struck the wrong man.' 'Well,' he said, 'I will give you seven and a half cents for that cotton, and you had better take it;' and I told him I would not, until I saw Mr. Gann." He then told him, if Mr. Gann did not give him more than that, he could have the cotton. He then most distinctly corroborates the statement of Gann with regard to the circumstances of the sale and delivery to him of the bale of cotton. The story of Gann and Rimes is fully confirmed by the three Walkers and two other witnesses.

The purport of the defendant's testimony is as follows, viz.: Charles Richardson states that he was deputy sheriff, and had in hand a writ against Rimes for the seizure of the bale of cotton claimed by Varnado, and that on calling on Gann for it the latter said, "As far as the cotton is concerned, it is out of the state;" that he reported this statement to Varnado before he made the affidavit charging Gann with robbery; that while he was, at the time, deputy sheriff, he was under contract with Varnado to begin work for him as clerk in his store on the following Monday.. Steve Burris said Rimes told him that he had sold the cotton to Gann. "Q. Did you see John Rimes at his house on the day of the seizure," etc.? "A. Yes, sir. Q. Did you see him on Saturday following the transaction? A. Yes, sir; I did. Q. Did you have a conversation with him," etc.? "A. Well, Mr. Rimes called there at the store for his mail, and I told him to come in; and as he came in I said to him, 'I suppose you have sold Gann the cotton?' and he replied: 'Yes, sir; I did it to save myself. Gann wanted to sue me and break me up, if he didn't get the cotton.' Q. Did he say whether he had sold it to Varnado? A. I didn't ask the question. It was understood between me and Mr. Varnado that he had bought the cotton."

This witness states that he informed Varnado of Burris' statement before the issuance of the warrant for Gann's arrest. Lucien McMillan makes a similar statement, and says that Rimes told him that he begged Gann to give him a few days' time so that he might see Varnado concerning the cotton, but that he refused, saying that he "had to have the cotton"; that Rimes then said to Gann that he would go with him to the gin, "if he had to have it." "Q. What did he say to go to the gin for? A. To let him have the cotton." That witness was a clerk of Varnado.

The foregoing is a fair synopsis of the testimony of all the witnesses except that of the defendant, and the substance of it is that Rimes was a customer at the stores of both the plaintiff and the defendant, and had an account with each for supplies furnished, but not a sufficiency of cotton to pay both; that the two stores were less than two miles apart, and Rimes lived in their immediate vicinity, and that Walker's gin was quite near to Gann's store; that Rimes hauled his cotton in the seed to the gin, and at that time the rivalry between the two merchants commenced. Varnado, as a witness, says that he "bought the bale of cotton from Mr. Rimes, with the understanding that when it went into a bale, and was weighed by Walker, he was to take it by the gin weights." Consequently the delivery was subject to this condition, which had not yet transpired; and there is no proof that Rimes was present, or assented thereto. On the contrary, all the testimony, other than that of Varnado, is to the effect that he was not present, and did not assent thereto. Therefore the making of the bale with the brand of I. N. Varnado & Son was without any significance, and afforded no indicia of title in that firm, and presented no obstacle to a sale by Rimes to the plaintiff, Gann. The proof is clear that Rimes accompanied Gann to Walker's gin, and, when Walker called their attention to the fact of the bale having been marked in Varnado's name, Rimes at once repudiated his right to do so, in the presence of Gann, the three Walkers, and the wagon driver, and he volunteered to assist the driver to put the cotton on his wagon. And the statement of the deputy sheriff, Richardson, viz.: "I did not ask Rimes whether he had sold the cotton to Varnado. It was understood between me and Mr. Varnado that he had bought the cotton,"—possesses powerful significance in the light of the surrounding circumstances. Not only does this testimony cast a serious doubt upon the claim of Varnado as owner of the cotton, but it makes it perfectly clear that Varnado was fully advised of the dealings between Rimes and Gann with regard to this bale of cotton prior to his making the affidavit charging Gann with robbery, for it was this deputy sheriff who had gone to Gann's store, on the day following his purchase, with a writ of attachment, at Varnado's instance, and he therefore knew it was

in Gann's possession. It is quite true that in a civil suit between I. N. Varnado & Son and Gann the court decided that the plaintiffs were owners, but it does not appear on what evidence their claim was sustained; yet, in so far as the question of ownership in Varnado goes to substantiate the charge of robbery, the decided preponderance thereof is just the other way. It tends not only to show that Gann had bought the bale of cotton lawfully from Rimes, and had obtained the actual possession thereof at least three days prior to the making of the affidavit for his arrest by Varnado, but that the latter knew the facts and circumstances of Gann's purchase and possession at the time he made the affidavit.

In this connection the testimony of Varnado may be appropriately considered, and we have made the following extracts from the transcript as they are quoted in the brief of plaintiff's counsel, after having compared and verified same, viz.: Mr. Varnado, in his direct examination, says: "Q. When did you first learn that the cotton was not carried to your store, but to some other point,—from what source? A. I learned it from Burris [means Steve Burris], the man in charge out there. A negro boy called me out about 2 o'clock in the morning, and said he had a note from Burris. I looked at it, and went and woke Mr. Burris up. Q. What Burris? A. Judge Burris [means W. A. Burris, the justice of the peace at Franklinton]; and got papers to sequester the cotton. Q. Well, do you know who was armed with that writ and execution? A. Chess Richardson. Q. Was any report made, subsequent to that time, to you, by Chess Richardson, as to what occurred between him and Gann? A. Yes, sir. When he returned, and failed to find the cotton, Gann told him that it was out of the state, and, if I got the cotton, I would have to make it out of him; and I then made a statement to Carter about the news Richardson brought me, and what the result of the trip was out there, and he advised me to arrest Gann. Q. Who was present when he so advised? A. Judge Burris. Q. Now, Mr. Varnado, when you made the statement to Carter, state whether or not you made a full statement from the beginning to the end. A. I made it just as clearly as I know how to make it, and all the statement Richardson made to me, and the whole thing. Q. State what you were governed by in filing this affidavit in swearing out this warrant,—whether it was advice of counsel, or Burris, or what. A. Partly by that, and partly by circumstances and statements of Richardson. Q. Did you entertain any malice in filing that affidavit? A. None whatever. I had the same feeling against him in that as any one else that had taken my cotton." Cross-examination: "Q. Mr. Varnado, you had no malice and hatred against Mr. Gann at the time of making this affidavit? A. Just as much as any one else that would take a bale of my

cotton. Q. There was nothing between you before that? A. Any other than I wouldn't have the best kind of feeling for any one that had my cotton, and from information I believed it belonged to me. Q. How did you believe that he had got the cotton? A. I thought that he had went to the mill, and hauled it off without leave. Q. What you believe, who told you that? A. By a letter received from Mr. Burris [Steve Burris]. Q. What was the substance of the letter he wrote you? A. That Mr. Gann had went to the mill, and taken a bale of cotton I had bought from Rimes when I left the mill. When I bought the cotton, I told him that I bought the cotton, and came on home, and instructed him that Walker would send it up Saturday; and when I got home I gets a letter stating that Gann had carried the cotton off. Q. Why didn't you make that affidavit as soon as you received that letter from Burris? A. I didn't have time. I first tried to get the cotton. I thought I would get the cotton in the state. I didn't think it was out of the state at the time. Q. Why didn't you? You say that you thought that Gann took it off without leave or license when the sheriff was over there. A. I supposed that when I sent the sheriff there first, and he would take the cotton, and we would have a civil suit; and when the sheriff returned, and said that the cotton had gone out of the state, and my attorney said it was robbery, I taken it out. Q. Why didn't you sue for the probable value of a bale of cotton? A. I acted under the advice of my attorney. Q. Did you consult an attorney at the time you got out a writ of sequestration? A. Yes, sir. Q. Which one? A. Mr. Carter. Q. How came you not to make the affidavit then? A. I just stated that I hoped to catch the cotton in the state. When I failed to find it, I issued the writ. Q. So you made the affidavit upon the information of Richardson? A. Yes, sir; and upon the advice of Mr. Carter. Q. What explanation did you make to Carter at the time you made the affidavit? What did you tell him? A. I told him that I had been—I told him this first. I didn't tell all at one time. I made two statements. I made a statement when I got out the papers in the civil suit, and he was aware of what had occurred, and at the time of getting the letter from Burris; and then when Richardson returned I believe Mr. Carter came to me, and asked the result, and I told him that I failed to get the cotton, and what Richardson had stated that Gann said to him. Q. And then you made the affidavit? A. Yes, sir. Q. Well, how is it that you told him [Walker], when you left the gin, that if anybody else came for it, not to let them have it? A. Because Gann came out here, and recorded a lien against Rimes, and I notified Rimes that I had a claim on the cotton, and warned Gann not to advance anything on that crop; and also got the clerk of court to write Gann, and state to him that I had a bill against him;

and also made out my account that day, and recorded it in the clerk's office. I stated that I expected to give. I warned him that I claimed that I had furnished supplies to make that crop, and that I expected to hold that crop. Q. And because he got a bale of cotton you made an affidavit? A. No, because he run it out of the state. I attempted at first to get it by civil action. Q. Then did you, at the time you left word with Walker, halfway expect that Mr. Gann would come after the cotton? A. I sorter halfway expected they would attach the cotton, and I left it there till Saturday; not particularly for that, but that was the nearest way to get it away from there without extra labor." Again: "Q. After you made the affidavit, did you go before the grand jury, and testify against Gann? A. I was summoned before the grand jury, and while there I was questioned concerning Gann and Rimes and that cotton. Q. Did you not have other witnesses summoned before the grand jury concerning the charges made? A. I think I did. Yes, sir. Q. Do you know if the grand jury acted in the matter,—found any bill against him? I mean as far as Gann is concerned. A. I don't know further than I stated. Q. Mr. Varnado, where do you live now? A. Osyka, Mississippi. Q. How came you to move away from this state? A. Well, there are so many reasons, I don't know how to go at it exactly," etc.

It is manifest that Varnado's testimony does not materially alter the status of affairs as it is fixed by other witnesses. It is quite clear that Gann had a valid and duly-recorded lien against the crop of Rimes, of which Varnado was duly advised, and against which he protested; and that, soon after having obtained this information, the latter proceeded to have his own claim recorded. The testimony tends to show that this state of affairs produced in the mind of Varnado a spirit of strong business rivalry; and when Rimes hauled the seed cotton to Walker's gin, and he was informed of his intention to permit both merchants to bid on the same when ginned and baled, and to allow the one offering the highest price to take it, Varnado manifested great anger, and told Rimes that he "must have it," accompanying the statement with an oath; that he told Rimes that he "was fixing to get himself in a scrape," and that he was going "to make it cost more than it was worth," if he did not get the bale of cotton; that he declared that "Mr. Gann has been monkeying with his business long enough, and that, if he did not get this cotton, he was going to make it cost more than its worth"; that he then proposed to Rimes that, if he would stick to him (Varnado), and do what he told him, "we will beat Gann out of every cent he [Rimes] owed him, and it should not cost him a nickel"; that this proposition Rimes refused, coupled with the statement that he intended to beat Gann and Varnado, and thereupon the latter replied, with an oath,

"You had better do what I tell you." These statements were made and emphasized by Rimes in the course of his testimony for the plaintiff in chief, and were not denied or disavowed by Varnado when interrogated as a witness in his own behalf. Failing to obtain Rimes' consent to his offer, Varnado gave Walker directions to put the mark of his firm, I. N. Varnado & Son, on the bale when it had been packed, and, if any one came for it, not to let him have it. He instituted an attachment suit against Gann, and, failing to find the bale of cotton, he made the affidavit for his arrest on a charge of robbery. But Gann made a purchase of the cotton from Rimes, and he placed him in actual possession of it, at Walker's gin, in the presence of several persons, at least three days prior to the affidavit being made, and of which Varnado had full notice. There is a total absence of proof of any secrecy or stealth on the part of Gann in the transaction, and none whatever of his having used any force or violence in getting possession of the cotton. The dealings of Gann in respect to the cotton were open, public, and of a speedy businesslike character, and in pursuance of his legal rights; and his arrest and confinement in jail upon a charge of robbery were entirely causeless and unjustified in any view that can be possibly taken of the case. And the contention of Varnado's counsel that he acted upon the advice of counsel is not sustained by the proof. The only witness who testified on the trial in reference to this question was Varnado himself, and, when other witnesses were questioned on the subject, his counsel objected, and his objections were sustained. The attorney who represented and advised Varnado in the civil suit, and counseled him to make a charge of robbery against Gann, was his sole counsel at the trial, and prepared and signed his answer; and the plea of counsel's advice is made conspicuous by the fact that he failed to give the court the benefit of his testimony on the subject. This fact was specially pointed out at the second trial by plaintiff's counsel, having called him as a witness for the purpose of affording him an opportunity of making a statement; but this he declined to do. Indeed, we think Varnado's testimony on this question is conclusively against him, as will appear from the following, viz.: "Q. State what you were governed by in filing this affidavit, and swearing out this warrant,—whether it was advice of counsel, or Burris, or what. A. Partly by that, and partly by circumstances and statements of Richardson." It is difficult for a court of justice to believe that an attorney at law who had been fully informed of the facts surrounding the cotton transaction could have advised Varnado that he was justified in making a charge of robbery against Gann.

The district judge prepared and submitted to the jury a written charge, with which he seems to have taken great pains, and it evidences a close research into the authorities. Therefrom we make the following extracts:

(a) "That probable cause means a reasonable ground of suspicion, supported by circumstances in themselves sufficiently strong to warrant a reasonable, cautious man in the belief that the person accused is guilty of the offense charged." (b) "That, to sustain the charge of malice, the criminal charge must appear by a preponderance of the evidence to have been willfully false." (c) "That, to sustain a suit for a malicious prosecution, the facts ought to be such as to satisfy any unprejudiced mind that the accused had no ground for the prosecution, except his desire to injure the accused." (d) "That the commencement of a criminal prosecution simply for the purpose of collecting a debt or private claim is an abuse of the process of court, and would be conclusive evidence of malice on the part of the person commencing such proceedings, and in such case the advice of counsel would afford no protection." (e) "If you believe from the evidence that when the defendant made complaint before the justice he did not have probable cause to believe that such complaint was true, then you may infer malice, and express malice need not be proved." Our learned Brother of the district court entertained a proper appreciation of the law applicable to malicious prosecution, and instructed the jury with care; and this is apparent from the foregoing extracts from his charge.

An examination of all the authorities makes it plain that, under the evidence adduced, the defendant made the affidavit against the plaintiff, and caused his arrest and confinement, wholly without probable cause. "To maintain an action under this constitution, the plaintiff must prove (1) that he has been prosecuted by the defendant criminally or in a civil suit, and that it is at an end; (2) that it was instituted maliciously, and without probable cause; (3) that he has sustained damage thereby." 2 Greenl. Ev. (10th Ed.) § 453. "Probable cause does not depend on the actual state of the case in point of fact, but upon honest and reasonable belief of the party prosecuting. It must appear that the defendant knew of the existence of those facts which tended to show reasonable and probable cause, because without knowing them he could not act upon them; and also that he believed that the facts amounted to the offense which he charged, because otherwise he will have made them the pretext of prosecution without even entertaining the opinion that he had the right to prosecute." *Id.* § 455. The supreme court in an early case defined probable cause as being "the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted." *Wheeler v. Nesbitt*, 24 How. 544. And in the same case the court stated the want of probable cause thus: "Undoubtedly, every person who puts the criminal law in force maliciously, and without any reasonable and probable cause, commits a wrongful

act; and if the accused is thereby prejudiced, either in his person or property, the injury and loss so sustained constitute the proper foundation of an action to recover compensation." And in furtherance of that view the court referred to the following instruction, which had been given in the lower court to the jury, as follows, to wit: "If, however, the jury find that the arrest was wanton and reckless, and that no circumstances existed to induce a reasonable, dispassionate man to believe that the defendant was guilty of having stolen the horses he had in his possession, then the jury are to infer malice." With reference to this charge the court say: "Clearly, this part of the charge must be taken in connection with what preceded it, and, when so read and understood, it is impossible to hold it is incorrect," etc. In *Behrnes v. Coxe*, 2 La. Ann. 472, the averment of the plaintiff was that "the defendant maliciously intended to injure him, and without reasonable or probable cause charged him, on oath, before a justice of the peace, with having stolen a negro girl slave named Maria, and caused him to be arrested, and taken before a justice of the peace, by whom he was discharged." The proof showed that, while a public sale was about being made of the property of a succession of which the slave Maria formed a part, "she voluntarily left, or was removed from the possession of the defendant, and went to the plantation of the plaintiff's father, and where the plaintiff resided; but through whose agency is not distinctly shown. The defendant thereupon made the oath before the justice of the peace * * * that the slave was stolen and taken away from his premises by the plaintiff." The plaintiff demanded \$5,000 damages, and the jury awarded \$500, and the verdict and judgment were affirmed on appeal. But the plaintiff in that case was not put in jail, and confined therein, as Gann was; and he was afforded a preliminary examination, and speedy release, as Gann was not; and the defendant in that case was in possession of the property, as Varnado was not; and the charge preferred against Gann was far more ignominious, and the circumstances against him altogether free from doubt. In *Cannell v. Michel*, 6 La. Ann. 577, the proof showed that the plaintiff had agreed to build a cistern for the defendant, on whom he was to receive an order for payment; that the order was drawn and dishonored, and the plaintiff took down and carried away the cistern; and the defendant made an affidavit against him charging him with larceny, from which he was subsequently discharged on a preliminary examination by the justice of the peace. The court say: "There was nothing in the conduct of the plaintiff which indicated the felonious intention with which he is charged. The defendant saw and knew that the plaintiff claimed the cistern as his own property, and as a matter of right, until it was paid for. * * * If the defendant really believed he had any claim to the cistern, he could as easily have sued for and sequestered it as

to have caused the arrest of the plaintiff for a larceny, of which the case did not present a single feature. The use of criminal process to enforce a civil claim is an intolerable abuse, even when the claim exists. But, if the claim is unfounded, it shows a recklessness of the rights and character of others which amounts to malice." The jury awarded the plaintiff damages, and this court sustained their verdict. The instant case is an almost exactly parallel case to the one there decided. Both the plaintiff and defendant in *Decoux v. Lieux*, 33 La. Ann. 392, were country merchants, each of whom had advanced his customer, Patin, plantation supplies. The defendant sued Patin, and sequestered his crop ungathered in the field, and the defendant enjoined the seizure; and as a result of those proceedings the crop of cotton was released from seizure. "Patin thereupon," say the court, "proceeded with the gathering of his crop, hauled a part of it publicly, and in the daytime, to a public gin in the neighborhood, where one bale was ginned and baled, and delivered to the plaintiff, Decoux, as agent for his wife, who also, publicly and in daytime, had it hauled to his wife's store, and deposited in the yard. There seems to have been not the slightest attempt at concealment about any of these proceedings." Thereupon the defendant made an affidavit before the parish judge, charging the plaintiff with having stolen the cotton; and thereunder a warrant was issued, the plaintiff arrested, and carried to the court house, where, without examination, he was released on giving bond to appear before the district court. At the session of that court the case was examined by the grand jury, who returned, "Not a true bill, whereupon he was discharged by the court, and his bond canceled. On this state of facts the court made the following observations, viz.: "It is manifest that, under the facts disclosed, Decoux had committed no crime whatever. The cotton belonged to Patin. * * * He had the perfect right to control and dispose of the cotton. * * * Lieux seems to have had no cause for believing Decoux guilty of the crime with which he charged him, except the bare fact that he was in possession of the bale of cotton. The very publicity of that possession and the absence of concealment were badges of innocence which should have put him on inquiry. The slightest inquiry would have developed the truth. * * * It is difficult to conceive of a case more completely lacking in either actual or probable cause. His conduct was rash, reckless, and unreasonable, evincing utter absence of that caution and inquiry a man should employ before making criminal charges against his neighbor. The reputation and liberty of the citizen are privileges too precious to be left at the mercy of such grossly inconsiderate proceedings as these." The jury awarded the plaintiff \$150, and this court increased that allowance to \$500. We have made liberal extracts from the opinion in that case, because we conceive the facts therein detailed to be so perfectly apposite to the facts

of the instant case that the decision of the court therein must exercise a controlling influence over our opinion in this case. Not only so, but the court held that the advice of counsel given to the defendant on the state of facts as represented was so "utterly unfounded" that it was "not entitled to any consideration whatever." The same proposition is very plainly stated by the court in *Glascok v. Bridges*, 15 La. Ann. 672, thus: "The defendant, for the purpose of obtaining possession of the boat, caused the plaintiff to be arrested," etc. "It is very evident that the only object of the defendant was to obtain possession of the boat, and that he acted without probable cause in the matter of the arrest. Under such circumstances the advice of counsel, as contended, will not exempt the defendant from liability for damages to the plaintiff who has been aggrieved by his act." *Grundy v. Hotel Co.*, 38 La. Ann. 974, and *Cointement v. Cropper*, 41 La. Ann. 808, 6 South. 127, are parallel cases. Authorities of similar import might be cited ad infinitum, but we have chosen the foregoing as among the most conclusive, and rest our decision upon them.

After having given this case most careful attention in all of its details, we feel thoroughly satisfied the defendant made the affidavit for the arrest of the plaintiff on the very grave charge of robbery, and caused him to be arrested and incarcerated in jail, where he was detained for three or four days, wholly without probable cause, and with malice, both express and implied; that said arrest was made publicly, in the plaintiff's own store, in the presence of his clerks and customers, and in the near vicinity of his own family and residence. The circumstances under which his causeless arrest and incarceration in jail occurred were most aggravated and humiliating to the plaintiff, and we are entirely confident that the verdict of the jury has not done him justice. Exercising the prerogative vested in this court, though it has been exercised in but few instances, and under exceptional circumstances, our conclusion is, to set aside the judgment and verdict appealed from, and render a judgment in favor of the plaintiff in the sum of \$500. It is therefore ordered and decreed that the verdict and judgment appealed from be annulled and reversed, and it is now ordered and decreed that the plaintiff do have and recover of and from the defendant the sum of \$500, and that he be taxed with all costs of both courts.

(51 La. Ann. 511)

LEVY v. LEVY et al. (No. 12,978.)

(Supreme Court of Louisiana. Jan. 9, 1899.)
COMMUNITY ESTATE—PARTITION—APPEAL—PRESUMPTIONS.

1. The parties in interest could, if they chose, make as basis for settling their rights an amount other than the amount showing total assets of the community, as per official inventory.

2. All the facts regarding the items which

constituted the amount taken as a basis for settlement, and all the facts regarding the sales made in order to effect a partition, not being in evidence, the supreme court will not assume that a double charge was made in the settlement, to the prejudice of plaintiff's interest.

3. In a matter of fact, as related to an item of \$4,433, with which plaintiff was charged, the preponderance of the testimony was against him. In collations by taking less, the donee must take so much less from the surplus of the succession. Rev. Civ. Code, art. 1253.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Lafayette; Charles D. Caffery, Judge ad hoc.

Action by Lazarus Levy against Samuel Levy and others. A judgment was rendered, from which plaintiff appeals. Reversed in part.

Crow Girard and William Campbell, for appellant. Gus A. Breaux, for appellees.

BREAUX, J. This suit was brought by plaintiff to have decreed null, on the ground of fraud, an extrajudicial partition effected between him and his children, and to set aside acts of transfer based upon the act of settlement. Plaintiff's wife died in May, 1894. The inventory shows the property there was in community, and its estimated value. Plaintiff was a merchant, and one of his sons was his bookkeeper for many years. The heirs greatly disagreed with their father about the amount coming to them from their mother's estate. It was the cause of constant quarrels, as we gather from the testimony. After a time, Sam Levy, the bookkeeper before alluded to, made a memorandum of amounts he thought was coming to each heir. They were eight in number. He submitted the memorandum to each of the heirs of age, six in number, and to plaintiff, the father, who represented his two minor children, in addition to his own interest as survivor in community. The memorandum was placed in the hands of their counsel, and he was directed to draw up an act of settlement, with the memorandum as the basis. The paper was written by him (the counsel). It was explained to all concerned, read to them, and duly signed by plaintiff and his children. Plaintiff now avers that he has been imposed upon by his children, who, he says, received more than they had any right to expect. He charges that the heirs of age, who were defendants, were thoroughly conversant with his business, and availed themselves of their knowledge of his affairs to prepare and place in the hands of their attorney erroneous and incorrect statements, showing larger indebtedness than he actually owed to the community. He complains that they withheld from the settlement made, and so managed that the full amount of the inventory was not taken account of; that in the settlement they charged him with \$4,433.80, which he avers he did not owe to the community. He further complains of the charge made against the community of \$13,070, its indebtedness as shown

in the settlement; and lastly he contends that the following amounts should have been collated by the heirs named: Arnaud Levy, \$2,600; Samuel Levy, \$2,500; Hannan Levy, \$1,500. The defendants, in their answer, admit that they and plaintiff entered into an agreement for the settlement of the rights of the heirs in the community existing until lately between plaintiff and Frances Plonskey, his late wife. They aver that it was a fair and just settlement, and that their father had no cause to complain; that the settlements furnished to their attorney were taken mainly from plaintiff's books with which he was familiar. They deny that they circumvented their father in any way, or that they committed any fraud. The judge of the district court rendered judgment for defendants, and rejected plaintiff's demand. He prosecutes this appeal.

We are informed that the defendants positively refused to take the official inventory as a basis for the settlement. They insisted upon a different amount, and would not accept any other amount than that which they asserted it should be. The plaintiff, after a considerable time, and many talks with his children, yielded, and accepted as correct the sum of \$17,240, instead of the total of the official inventory. This was a matter of agreement, and one which plaintiff could well make, and by which, in our view, he is surely bound. He evidently knew the amount at which the property had been appraised in making the official inventory. It was for him to insist upon the amount stated in the official inventory. There is no reason why this agreement made by him with his children should not be binding. As we take it, it was a question of value of property, and all parties concerned arrived at the conclusion that it was not worth the amount at which it had been valued,—an agreement which must be held as legitimate, and binding upon all heirs who are sui juris, unless there was error committed or fraud practiced in some way. We have found neither fraud nor error.

We take up, next in order, the item of \$1,433.80, amount charged to plaintiff in the settlement now attacked by him. One of the objections is that he (plaintiff) is charged with the sum just mentioned as having been collected by him after his wife's death, and no credit was allowed for the value of outstanding accounts. We have not succeeded in finding that the plaintiff has any reason to complain, particularly in view of the fact that he has consented to a settlement without raising any objection, in so far as the record discloses, on that account. Prior to the settlement certain described properties had been retroceded to plaintiff, on which plaintiff now claims he, as head of the community, lost amounts which should be deducted from the item last stated. He must have known that the loss had been made. Why did he consent to the settlement without taking it into account? Moreover, he is concluded by the

settlement as made by him. He agreed upon an amount with his children, to be taken as the value of the whole assets of the community. Unless each item was before us making up that amount (taking in lieu of the amount of the official inventory), and the value placed upon it, we could not well determine that an error has been made as to one of the items which resulted in an overcharge of the plaintiff in the sum of \$3,000 claimed.

Plaintiff also complains as to the amount last stated, on the ground that no deduction was made from lot 2 of the inventory for the \$4,900, appraised value of the outstanding accounts and notes due the store. Plaintiff now takes the position that \$3,000 were worthless, and that to that extent there is a double charge. It appears of record that 30 per cent. was deducted from this item of the inventory. It was \$7,000, but by agreement it was reduced to \$4,900, as just stated; i. e. 30 per cent. less of \$7,000. The father admitted that he collected \$4,433.80 of this item. The testimony does not reveal the error charged.

This brings us to the item of \$13,270.55, debts deducted from the final total of the active mass of the community, of which plaintiff also complains. The testimony of plaintiff as to part of this item, viz. \$7,334.85, given to sustain his objections, is not very plain. We gather from other testimony that plaintiff acknowledged an indebtedness of \$2,000 with which he was charged, and the correctness of other items of indebtedness, amounting, with the \$2,000, to \$7,334.85. The remainder of the \$13,270.55, to wit, \$5,935.70, is made up of \$560 due to one of the heirs, and \$375.70 due to another of the heirs, and \$5,000 claimed to have been collated by five of the heirs who had not previously received anything from the master of community. Our summary, as just made, is based principally upon the following testimony of the learned counsel for the plaintiff, transcribed from the record: "The balance of the debts of \$13,270.55 arose in this way: Mr. Levy had donated to three of his children certain amounts of money,—to Sam Levy, Armand Levy, and Mrs. Mossiker,—which, after discussion among the heirs, was fixed at \$1,000 each. I then, by consent of all parties, allowed \$1,000 to each of the other heirs. After this was added up, Sam Levy contended that the estate owed him \$560, and Victor claimed that his father was owing him \$375.70. * * * These two amounts were allowed, which made the debts amount to \$13,270.55. After that we ascertained the distributive share of each heir, which was \$525.20." By consent, the amount received by three of the heirs was properly fixed, and, as we think, at \$1,000 each. That is the amount each owed. Plaintiff complains of all the items of indebtedness going to make up the amount last stated. Some of the defendants have testified, as witnesses, that they have settled their indebtedness by legal colla-

tion. We have found it out of the question to reach that conclusion, under the law. Three of the heirs owed collation. If this was intended as a donation by taking less, as we think it was, the donee then must take "so much less from the surplus of the succession." Rev. Civ. Code, art. 1253. In our judgment, this should result in the following as correct:

Active Mass.

(1) Amount of the inventory in accordance with agreement....	\$17,240 00
(2) Accounts collected by L. Levy..	4,433 80
(3) Amount due by three of the heirs	3,000 00
	\$24,673 80
Debts	8,270 55
	\$16,403 25
One-half for plaintiff.....	\$8,270 55
	8,270 55

As relates to the sales and acts plaintiff seeks to have annulled, numbered 21,148, 21,149, 21,150, 21,151, 21,152, there is no necessity to annul them at this time. Balances which may be due when settlement will have been made on the basis here expressed may be satisfied without the necessity of a sale. The question of necessity of sale vel non will be remanded for trial before the district court. Therefore the judgment appealed from, rejecting plaintiff's demand, in so far as relates to acts before enumerated, is annulled, avoided, and reversed, and, instead, plaintiff's demand is remanded for trial as stated in the body of our opinion. For reasons assigned, it is ordered, adjudged, and decreed that the case be remanded to the district court, to be proceeded with in accordance with the views before expressed; the costs of appeal to be paid by appellees.

On Rehearing.

(Feb. 6, 1899.)

We modify our decree, and remand the case to ascertain whether or not collation is due, and should be made at all. Under the circumstances, we think that upon the question of collation vel non the case should be tried. We reserve to plaintiff all his rights, and to the defendants theirs, so that they may be considered entirely from point of view of the rights of each—the plaintiff on the one hand, and the defendants on the other—as relates only to collation vel non. With the foregoing modification of the decree, the rehearing applied for is refused.

(51 La. Ann. 285)

CROOK et al. v. TENSAS BASIN LEVEE DIST. (No. 18,024.)

(Supreme Court of Louisiana. Feb. 6, 1899.)

CUSTOMS AND USAGES—CONTRACTS—DURESS.

1. Relying upon custom and usage in the matter of levee building, to the effect that the contractor is entitled to claim extra compensation for stumping and clearing, outside of and in

addition to the calls of the written agreement, plaintiff has no cause of action on that score, if the agreement stipulates that no such claim shall be allowed or paid.

2. Having accepted such a contract, and acted on it, and performed the work and received the stipulated compensation therefor, he cannot plead duress in avoidance of such stipulation, in order to make way to recover such extra compensation by virtue of a parol agreement with the president of the levee board.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Ouachita; W. N. Potts, Judge.

Action by R. L. Crook & Co. against the Tensas Basin levee district. From a judgment for defendant, plaintiff appeals. **Affirmed.**

Wade R. Young, for appellant. E. T. Lamkin, for appellee.

WATKINS, J. On exception of the defendant, this suit was dismissed by the judge a quo, for the reason that, in his opinion, plaintiff's petition disclosed no cause of action; and, from the judgment of dismissal, the plaintiff prosecutes this appeal. The question, then, for the determination of this court, is whether the averments of the petition, taken as true, are sufficient to predicate a judgment upon. The plaintiff's petition is reproduced in full in the brief of defendant's counsel, and, as a matter of convenience, we have made therefrom the following extracts, viz.: "Plaintiff claims of the defendant the sum of \$2,300, for this, viz.: The petition of R. L. Crook & Co., a sole trader, residing in the county of Warren and state of Mississippi, respectfully shows that the Tensas Basin levee district, a corporation chartered by the laws of the state, represented by the board of levee commissioners of the Tensas Basin levee district, and by John P. Parker, president, and having its domicile in your said parish, is legally and justly indebted unto your petitioner in the just and full sum of two thousand three hundred dollars, with legal interest from January 1, 1895, for this, to wit: "That A. P. Martin, the assignor of petitioner, was, and had been for many years, a levee contractor in this state, and, as such, had taken and executed faithfully many contracts for the construction of levees, from the state and the several levee districts, including this one, and that in all such contracts it had always been implied and understood that extra compensation would be paid for the work of stumping and clearing, and bids had always been made for the work upon such understanding, and that, before the grievance of which he complains, such compensation had always been paid without question, for the reason that it was considered to be for the advantage both of the state and of the contractor that such work should not be estimated in the price of the bid; that on the 29th day of December, 1893, the defendant board of levee commissioners for the Tensas Basin levee district, in view of the fact that the building of the Amos bayou levee was of great importance to the people of the district, and that it was

very essential that it should be constructed before the overflow of 1894, and that all formalities of advertising and other delays should be waived, authorized the then president, W. J. Gray, to contract at once, and without advertising, for the building of the levee, to be completed not later than March, 1894, at the least possible price; that the assignor of petitioner, having in mind what had been up to that time the uniform custom of the state and district boards, that extra compensation should be paid for grubbing and clearing, agreed with said president to build said levee for the price of sixteen cents per cubic yard; that in said agreement nothing was said about extra compensation, because it was mutually understood and implied that the compensation for such extra work as grubbing and clearing was not included in the price of the bid, but was to be estimated and paid over and above the price of the bid, at the final taking up of the work; that in view of the urgency of the occasion, and relying upon the uniform custom and the good faith of the board, his said assignor removed his plant to the ground, and entered upon the performance of his contract, without waiting for the execution of the formal written agreement; that after his said assignor had been at work for some time, and while he was at his home, in Waterproof, he received from the office of the state engineers a draft of an agreement containing the special specifications that the grubbing and clearing should be done without extra compensation, and that in view of the fact that no such specifications had ever before that time been inserted in such agreements, and that they were in violation of the uniform custom of the state and district boards, and of the understanding upon which he had bid for and undertaken the work,—that additional compensation was to be paid for such extra work,—he refused to sign such agreement, but changed said specifications so that the written agreement would conform to the parol agreement, and forwarded the draft, with such changes, to the president of the board; that the then president of the board failed to sign the agreement as so changed, but assured your petitioner's assignor that, if he would execute the draft as submitted by the engineers, it should not affect the parol contract, and that extra compensation should be paid for the work of grubbing and clearing, notwithstanding the special specifications to the contrary; that petitioner's assignor had then been at work for near six months, and had embarked his credit and the moneys of his friends in the performance of the contract, and found himself so circumstanced that it was necessary for him either to abandon the work, to the detriment of the public interest, and to his own financial loss, or to execute the agreement with the specifications inserted by the state engineers, and to rely on the good faith of the president of the board; that being a poor man, and having embarked his credit and the moneys of his friends in the work, he was forced to yield,

and to sign the agreement as submitted by the state engineers, relying upon the good faith of the board to do justice in the premises, and that under such duress, and upon such express promise of the president of the board, he did, on the 11th day of June, 1894, sign such agreement; that the then president of the board, W. J. Gray, at all times recognized the justice of his claim for extra compensation for grubbing and clearing, and, after the work was completed and estimated, repeatedly promised to pay the claim now in suit, and would have paid the same but for disagreements and dissensions between the members of the board, not connected in any way with the claim, which resulted, about October 1, 1895, in the formal action of the board prohibiting the president from drawing any warrant without special authority of the board; that petitioner has submitted said claim to the board, and said board, while not denying the justice of the claim, has refused to pay the same, upon the pretext that such contract so executed by petitioner's assignor under such duress, and upon the express promise of the then president of the board that it should not affect this claim, is valid and binding in law. Wherefore, in consideration of the premises, petitioner prays that said contract so executed by him on said 11th day of June, 1894, be annulled and avoided for duress and error and fraud and want of consideration, and that the parol contract between petitioner's assignor and the president of the board, duly authorized by the resolution of the board, be judicially enforced; and that the board of levee commissioners of the Tensas Basin levee district be cited to answer this demand; and that he have and recover judgment against said defendant for the said sum of two thousand three hundred dollars, with legal interest from January 1, 1895, and costs of suit; and for general and equitable relief."

The object of this suit is to recover extra compensation for the work of "stumpage and clearing," as not having been estimated in the price bid for the work, on the grounds that such had been the uniform custom of the state and district boards in accepting contracts for the building of levees; that in this case the defendant had waived the formality of advertising, and authorized its president to make with plaintiff's assignor a contract for the building of the Amos bayou levee, by parol; that, in the verbal agreement between them, nothing was said about extra compensation, for the reason that, according to custom and usage, that reservation was understood, and same was not included in the price agreed upon; that, after said assignor had been at work for some time, he received from the state board of engineers a draft of an agreement, which contained the specification that "grubbing and stumping should be done without extra compensation," but that he refused to sign same, relying upon the aforesaid custom and usage, but, having so altered said draft as to conform thereto, he returned same

to the board; that the then president declined to accept the altered agreement, but assured said assignor that, if he would execute the contract as it was first proposed, it should not affect his prior parol contract, and that extra compensation should be paid him, notwithstanding its stipulation to the contrary; and that he assented to this proposal under protest, and signed same under duress, as it was necessary for him to either abandon the work, to the detriment of the public interest, and his own financial loss, or execute the agreement with said specifications inserted therein. In other words, plaintiff's proposition is that he accepted and signed a written contract with the defendant to do the work, which contained an express stipulation that no charge or extra compensation should be allowed or paid for stumpage and clearing; and, after having enjoyed its benefits and reaped all of its advantages, he seeks to institute suit for the annulment of that provision, so as to enable him to claim extra compensation upon the faith of a parol covenant made with the president, in exact opposition thereto. It requires no argument to prove that such a proposition is absolutely untenable in law. It is evident that the alleged duress under which the assignor signed the agreement was no duress at all; and, if he signed same under duress, the effect of it would be to undo the transaction, and set the whole matter at large. But this is exactly what plaintiff does not propose to do. To our thinking, it is plain, as it seemed to have been to the judge a quo, that plaintiff's petition states no cause of action. Judgment affirmed.

(51 La. Ann. 459)

ST. CHARLES ST. R. CO. v. BOARD OF ASSESSORS et al. (No. 12,754.)

(Supreme Court of Louisiana. June 28, 1898.)

TAXATION — STREET-RAILROAD FRANCHISES — APPEAL — SETTLEMENT — REMAND.

The law requiring franchises to operate street railways to be taxed according to their value makes the earning capacity of the corporation a basis for ascertaining the value at which the franchise shall be assessed, but does not exclude reference to other elements that bear directly on the question of that value. Const. art. 203; Act 1890, No. 106, §§ 1, 28.

On Rehearing.

1. Where a settlement of the matter in controversy since the judgment below was rendered appears from papers presented here, and the fact of such settlement is not disputed, effect may be given by this court to the same.

2. Not deemed necessary in such case to remand.

3. The question whether or not the city of New Orleans can make, or has made, a valid compromise of a tax claim does not properly arise herein.

4. Proper parties raising such an issue are not before the court.

Nicholls, C. J., and Miller, J., dissenting.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Nicholas H. Rightor, Judge.

Action by the St. Charles Street-Railway Company against the board of assessors and others. From a judgment for defendants, plaintiff appeals. Reversed in part.

Harry H. Hall, for appellant. James J. McLoughlin, Asst. City Atty., and Samuel L. Gilmore, City Atty., for appellee city of New Orleans. Francis C. Zacharie, for appellees board of assessors and state tax collector.

MILLER, J. Plaintiff is the appellant from the judgment denying the reduction claimed of the assessments for taxation for the year 1896 of the plaintiff's franchise for operating a street railway. Franchisees, with other property, are subjected to taxation by our law, and the actual value of the property is to be ascertained in the mode pointed out by law and exhibited by the assessment. The revenue act, along with the duty to furnish the assessors with the returns of their business and condition, requires from the railway corporations a sworn statement of their earning capacity, to serve as a basis to estimate the value of the corporate franchise. Const. art. 203; Act 1890, No. 106, §§ 1, 28. In the protest against their franchise assessment of \$658,300, the plaintiff claims that the net earnings of their road for 1896 were \$36,629.85, and contend the amount capitalized to produce, at 6 per cent. interest per annum, the sum of \$36,629, should be deemed the value of the franchise. On this theory, \$610,497 capitalized, yielding, at 6 per cent., \$36,629, is assumed to represent the franchise and all the property of the corporation, and, deducting \$292,800, the value of the property taxed directly, leaves \$317,697, which, it is insisted, should be accepted as the value of the franchise of a corporation with near a million of capital stock, on which it declared a dividend of 6 per cent. It is stated in the briefs for the assessors that the plaintiff made no returns of earnings and expenditures. The assessors ascertained the franchise value by capitalizing the amount sufficient to produce the 6 per cent. on the entire stock paid by plaintiff, deducting the value of the property directly taxed, and treating the residue, \$658,000, as the value of the franchise; in other words, the assessors adopted the capital of the company, \$953,000, as representing franchise and property, deducted the value of the property, \$292,000, because directly taxed, and assessed the residue as the franchise value. The difference between the plaintiff and the assessors arises from the one insisting on the sum capitalized to produce \$36,000 as measuring the value of property and franchise; and the assessors' adoption of the capital \$953,000, producing, at 6 per cent., the dividends paid, as fairly representing franchise and property. The assessors' method gives \$658,000 as the franchise value; that of the plaintiff, \$317,000.

The proposition of the plaintiff that net earnings is the test to ascertain the value of the franchise, it is claimed, is supported by

the revenue statute. Net earnings are an element in the investigation of that value, but, under the statute, are only made "a basis." Dividends imply, or are supposed to represent, profits, not forced by borrowing, or other expedient, to make the sum requisite; and, when actually paid from earnings, the dividends furnish a reliable guide to ascertain earning capacity. That guide the assessors followed in this case; that is, the 6 per cent. dividend paid on \$953,000. We find in plaintiff's brief the statement that the shortage of earnings in 1896 to pay the dividend was supplied by the sales of stock. It is to be inferred that, if one annual dividend is paid by meeting a deficiency of earnings by a sale of the stock of the company, it is because the shortage is accidental, or due to some temporary cause, to account for that departure from the usual course of paying dividends only from earnings of the company. The circumstances under which the stock was sold to pay dividends might not reflect at all on the management of the corporation, or affect the value of its stock or franchise, for the relation between the stock value and that of the franchise is obvious; in the revenue systems of some of the states the excess in the market value of the stock, including the franchise, or stock alone, over the value of the corporate property, being the test to determine the value of the franchise. *Hamilton Co. v. Massachusetts*, 6 Wall. 632. It may well be that the assessors in this case, exercising their best judgment with due regard to all the elements that contribute to franchise value, fixed the valuation exhibited by the assessments. If our law made net earnings the exclusive test, as is contended, we should have to apply it; but the law is careful not to use terms that limit the assessors, in ascertaining the value of a railway franchise with some years to run, to the earnings of one year, whether due or affected by unexpected losses, accident, or other temporary causes. While we attach deserved importance to that influence that actual earnings of the company must exert in fixing the franchise value, and which this court is prepared to enforce, we must recognize that our revenue statute has not imposed on the assessors that inexorable test that excludes cognizance of all the facts that should contribute in determining franchise value, save and except the test the argument insists is exclusive. Our previous decisions have dealt with other questions arising with reference to franchise assessments, have discarded some tests that have been urged, and have accorded due weight to dividends declared, and actually paid from the earnings of the company, but have abstained from maintaining the sole standard the plaintiff's argument seeks to uphold. *New Orleans, C. & L. R. Co. v. City of New Orleans*, 44 La. Ann. 1068, 11 South. 687; *Id.*, 44 La. Ann. 1055, 11 South. 820; *State v. Board of Assessors*, 48 La. Ann. 1157, 20 South. 670.

We have given attention to the argument that the tax of plaintiff's franchise is oppress-

ive, and violative of the rule of equality. No complaint, in this respect, can be urged against the law which requires all franchises to be assessed according to their value, and makes earning capacity a basis to ascertain that value. Const. art. 203; Act 1890, No. 106, §§ 1, 28. The argument rests on the method it is stated the assessors have assessed the franchises of other companies. It is claimed that the assessors, in instances stated in the brief, have not made capital stock, to the full extent of the amount on which dividends have been paid, an element in ascertaining franchise value, and that in determining earning capacity of other corporations the assessors have not deemed interest paid on the bonded debts of such corporations the measure, to any extent, of earning capacity. As to interest on the bonded debt, we find the assessors have given to all these corporations the benefit of exclusion of that element in ascertaining the value of the franchise. Plaintiff has not, it claims, had the same advantage in this particular, because its bonded debt is comparatively small. But it seems to us that these objections to the method of assessing other corporations—in reference to which we feel called on to express no opinion—does not furnish the plaintiff the cause of complaint it urges against the assessment of its franchise based on the proportionate value of the franchise to that total value on which the company paid its dividend. It is therefore ordered, adjudged, and decreed that the judgment of the lower court be, and it is hereby, affirmed, with costs.

BLANCHARD, J. I concur in the decree announced by the majority of the court, and, in the main, in the reasoning by which it is supported, but do not concur in all the positions taken. A case might well arise, for instance, where property of a certain class is assessed by one rule with regard to all the owners of such property save one, whose property is assessed by another, and more onerous, rule. In such case it may be that the owner may have the right to appeal to the courts to compel the assessment of his property by the same rule applied to the other property of the same class; otherwise, the fundamental principle of uniformity of taxation might be glaringly and flagrantly violated. I do not think, however, the facts of the instant case bring it within the principle I contend for herein.

WATKINS, J. I concur in these views.

On Application for Rehearing.

(Nov. 21, 1896.)

It is ordered that the rehearing applied for in this case be granted on the question of the reduction of taxes, in accordance with an agreement claimed to have been entered into by the parties in interest.

Entry Dec. 9, 1898.

It is ordered that the rehearing applied for in this case by the plaintiff be refused so far as it affects the state of Louisiana.

On Rehearing.

(Feb. 20, 1899.)

BLANCHARD, J. Plaintiff company's street-railway franchise was assessed, for the purpose of taxation, at \$858,300, for the year 1897. It contested this assessment, claiming the same was excessive, and prayed its reduction to \$317,697, which it asserted to be its value, or "to such figure" as the court might decide "to be the true and correct value thereof." The court of the first instance rejected its demand, and maintained the assessment at the sum fixed by the board of assessors. An appeal by the corporation followed, and on June 28, 1898, this court handed down its opinion and decree affirming the judgment appealed from; whereupon, in an application for a rehearing, filed by the company, it was pointed out that, pending the submission of the cause, and while the same was under advisement by this court, plaintiff had settled all taxes claimed of it by the city of New Orleans, and that this was made to appear by the tax receipt presented to the court on the 13th of June, and prior to the decision of the cause here. It was further represented that there had been a failure to give due consideration and proper effect to this settlement in the decision of the court, and, because of this, and for other reasons averred, a rehearing was asked. Acting on this application, the court, on November 21, 1898, made the following order: "It is ordered that the rehearing applied for in this case be granted on the question of the reduction of taxes, in accordance with an agreement claimed to have been entered into by the parties in interest." Subsequently, counsel for the state tax collector appeared, and, pointing out that the ground upon which alone the rehearing had been granted applied only to the city of New Orleans, and to the taxes due to said city, and did not in any manner refer to the state, or to the taxes claimed by the state, asked that the state's interest in the case be excluded from the operation of the order granting the rehearing, and that the application for rehearing as to the state be denied. The court granted this motion, as follows: "It is ordered that the rehearing applied for in this case by the plaintiff be refused as far as it affects the state of Louisiana." By this action the judgment of the court, so far as the state was concerned, became final, and what was left of the controversy between plaintiff company and the city of New Orleans alone remained. It is to that we address ourselves.

We find that the comptroller of the city, formally authorized thereto by the city council of New Orleans, has received \$658 in full of balance of city taxes from plaintiff com-

pany for the year 1897, having previously received \$10,000 on account of said taxes for that year, and has receipted the company in full as against all demands for city taxes for 1897. There is no pretense that the city has since rescinded, or attempted to rescind, the action thus taken; nor does it appear that any steps have been taken by it, or by any other interest, to have the same repudiated, overthrown, and annulled. This is not a case wherein the question properly arises whether or not the city can make, or has made, a valid compromise of a tax judgment. When plaintiff company's taxes were paid to the city, there was no final judgment in favor of the city for any specific amount of taxes, nor has the city been enjoined from receiving any money pursuant to any compromise, nor from carrying out the provisions of any compromise. Proper parties to raise these questions are not before the court. The only parties here are plaintiff company and the city, and these two have agreed on a settlement of the taxes in dispute in this case as due the city, and the same have been paid.

The questions of law raised by the city attorney with reference to this settlement of taxes are not considered before us in proper form for our determination.

Nor is the other question that, the rehearing applied for in this case, so far as the state is concerned, having been refused, and the state tax collector eliminated thereby from the case, no question of the reduction of assessment can be considered, since the state tax collector is a necessary party in suits for the reduction of assessments. But, were this question before us, it suffices to say that, the rehearing granted plaintiff, so far as the city of New Orleans is concerned, having been conceded before a rehearing was refused on that part of the case appertaining to the state, it is considered that proper parties appellant and appellee are retained before the court for all purposes necessary to give life and validity to the order granting the rehearing on the city's branch of the case. Surely, it is not expected the court will hold it did a certain thing, made a certain order, and then proceeded to do that which renders vain and nugatory the previous order. While the state is eliminated from further concern in the case by the rehearing refused on its branch of the controversy, the tax collector is retained on the other branch of the case so far as he may be made by the law a necessary party to suits of this character.

Neither can the contention of the city attorney that the tax receipt produced is in the nature of new evidence, not receivable in this court, be maintained. In *White v. Ramsey*, 14 La. Ann. 329, a motion was made to dismiss the appeal on the ground of the appellant's voluntary execution of the judgment by its payment after the appeal was granted. The motion alleged payment, and the fact of payment was sworn to in an affidavit by plaintiff's authorized agent. It was held the

showing of payment could be made in this court, and, as it constituted voluntary execution of the judgment, the right of appeal was extinguished; citing Code Prac. art. 567. So we hold, in the instant case, that the city's tax receipt in full of all taxes it claims against the appellant is admissible here to show satisfaction and settlement, so far as this case, as it now stands before us, is concerned. The city does not deny the payment, and hence there appears to be no reason to remand the case on this ground, to inquire into the fact of payment. Nothing is intended to be decided and concluded herein except that, as the case now stands before us, a settlement of the controversy between the only parties remaining in the litigation appears to have been reached; and, this being so, there is no warrant to maintain the former decree herein handed down against appellant, so far as its tax obligation to the city of New Orleans for the year 1897 is concerned. It is therefore ordered that that decree, in the particular mentioned, be set aside, the judgment appealed from to that extent be reversed and avoided, and the suit, as between plaintiff and the city of New Orleans, be dismissed, at plaintiff's costs in both courts.

NICHOLLS, C. J., and MILLER, J., dissent.

(51 La. Ann. 434)

STATE v. FAVRE. (No. 12,897.)^a

(Supreme Court of Louisiana. Nov. 21, 1898.)

CONSTITUTIONS—ADOPTION—AMENDMENT—CROSS-EXAMINATION OF ACCUSED—JURY—MISCONDUCT—EVIDENCE.

1. A constitutional amendment is a legislative suggestion that certain specified things be done through the instrumentality of a vote of the people, whereby a change is to be effected in the organic law of the state, and not that the constitution shall remain unaltered in certain specified particulars. That the terms of a statute proposing a constitutional amendment are not sweeping and unlimited is of no consequence if the convention is subsequently called upon the lines which are suggested by the legislature, and in exact conformity with the will of the sovereign, as expressed at an election duly held in keeping therewith, and the delegates duly chosen thereat were regularly convened and organized, and thereafter framed and promulgated an instrument which is styled a "Constitution for the State of Louisiana." It is the duty of this court to accept that instrument as the organic law of the state, and not as an amendment to an existing constitution.

2. The accused, who takes the stand as a witness in his own behalf, may be cross-examined by the state, and, for the purpose of laying a basis for his contradiction, he may be recalled for additional cross-examination. *State v. Walsh*, 11 South. 811, 44 La. Ann. 1122, affirmed.

3. While the testimony of jurors will not be received to impeach their verdict, it does not follow that such testimony will not be received to sustain it when assailed. If the jurors are accused of misconduct, they must always show

by their oaths, not only in their own vindication, but in furtherance of justice, that they are not guilty of the misconduct charged against them.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Acadia; Gilbert L. Dupré, Judge.

William Favre was convicted of manslaughter, and he appeals. Affirmed.

E. P. Veazie and Philip S. Pugh, for appellant. Milton J. Cunningham, Atty. Gen., and R. Lee Garland, Dist. Atty., for the State.

WATKINS, J. The defendant was indicted for the crime of murder, convicted of manslaughter, and sentenced to seven years' imprisonment in the penitentiary; and, from the verdict and sentence, he prosecutes this appeal.

1. The first bill of exceptions relates to defendant's motion to quash, which is based on the following grounds, viz.: (1) "Because the pretended constitution of this state of 1898, under which this defendant was indicted and now held for trial, is unconstitutional and illegal, null and void, for this, viz. that it was passed and adopted in contravention of article 256 of the constitution of 1879, which provides that all amendments shall be submitted to the electors for their approval or rejection," etc.; and, further, "that the pretended constitution of 1898 is a mere amendment of the constitution of 1879, and is therefore null and void, never having been submitted to the people as required, as aforesaid." (2) Because—in the alternative the first ground of the motion be overruled—the indictment against him is null and void, for the reason that the grand jury was not composed of sixteen (16) persons, as provided by Act No. 99 of 1896, but was, on the contrary, composed of only 12 persons, which was irregular, null, and void, because article 117, par. 2, had never become executory, as the legislature has made no provision for putting same in force, by providing for the drawing of jurors for the trial of criminal cases in conformity therewith. It appears that the trial judge overruled the motion to quash, on grounds similar to those stated by him in the case of *State v. Wimberly* (now pending before this court) 25 South. 1035; and as the following is given in the bill, which is signed by the judge, as a fair synopsis of those reasons, we will extract same therefrom, viz.: (1) "That the act calling the convention was in the nature of a proposition submitted to the people as to whether or not a convention should be held, and, if held, that it should be held as provided in the act,—a feature of which was that it would not have to submit its work to the people. When, therefore, the people voted to hold a convention, they declared that it should be held and adopted without submission to the people, as had been specially provided for in the act calling same together." (2) "The grand jury indicting the accused was the only grand jury that could have indicted him. That portion of article 117 of the

^a Rehearing denied February 20, 1899.

constitution [relating to grand juries] went into effect upon the adoption of the constitution, as has already been thrice decided," etc.

The first proposition rests upon the hypothesis that the instrument framed by the constitutional convention of 1898 is a mere amendment to the constitution of 1879, and, not having been submitted to the people for their ratification or rejection thereof, same is null and void. If it be an amendment, counsel's proposition is undoubtedly correct; but we think it is manifestly incorrect. The principal contention of counsel in favor of his theory is that the legislative act, which proposed the convention scheme, suggested certain restrictions to be placed upon the delegates to be thereto accredited, when in convention assembled, and that, in consequence thereof, certain provisions of the constitution of 1879 were left in full force; hence the present constitution is essentially an amendment thereof. Taking a comprehensive view of the question, the exact converse of that proposition would seem to be the correct one; for, in general acceptance, a proposed constitutional amendment is a legislative suggestion that certain specified things be done through the instrumentality of a vote of the people, whereby a change is effected in the organic law, and not that the constitution remain unaltered in certain specified particulars. That the terms of the statute proposing a constitutional convention were not unlimited and sweeping would seem to make no practical difference, as the convention was called upon the lines which were suggested by the legislature, and in exact conformity with the will of the sovereign, as expressed at an election duly held in keeping therewith, and the delegates duly chosen thereto were regularly convened and organized, and thereafter framed and promulgated an instrument which is styled a "Constitution for the State of Louisiana." We deem it to be our duty to accept that instrument as the organic law of the state, without any hesitation or resort to any refined distinctions or subtle argument on the question; and, thus accepting same, it is, in our opinion, exactly what it purports to be,—a constitution,—and not an amendment to an existing constitution.

With regard to the second proposition of the motion, to the effect that the grand jury who found and returned the indictment was only composed of 12 persons, in keeping with the provisions of article 117 of the constitution of 1898, and therefore null and void, for the reason that no statute had been enacted putting same in force,—the provisions thereof not being self-operative,—we need only advert to the fact that we have decided otherwise in *State v. Caldwell*, 50 La. Ann. 686, 23 South. 869, wherein Mr. Justice Blanchard, speaking for the court, said: "The article 117 of the constitution is self-operative, as shown by its terms, which declare that its provisions shall go into effect on the adoption of this constitution." We have no doubt of the correct-

ness of the ruling of the trial judge in overruling the motion to quash.

2. The second bill of exceptions relates to certain testimony which was offered on the part of the state in rebuttal, and to which the defendant, by counsel, objected and excepted. The statement made in the bill is of the following purport, viz.: That, after the defense had closed its evidence in chief, the district attorney introduced a witness in rebuttal, by whom he proposed to impeach the credibility of the defendant, who had been interrogated as a witness in his own behalf, by making proof of previous contradictory statements in relation to the subject-matter of the prosecution; and that upon defendant's counsel having entered the objection that this testimony was inadmissible, for the reason that a proper basis had not been laid therefor, by attracting the attention of the witness thereto when he was on the stand, the trial judge sustained the same, and refused to permit the introduction of the incriminating evidence, but no bill of exceptions was retained on behalf of the state thereto. That thereupon the district attorney moved the court to recall the defendant, and replace him upon the stand as a witness, for further and additional cross-examination by the state, so as to enable the state to put him upon due notice of its intention to prove by another witness the aforesaid incriminating facts, by attracting his attention thereto; and to that proceeding the defendant, by counsel, objected, on the following grounds, viz.: (1) Because the attention of the defendant, Favre, was not attracted to the alleged contradictory statements while he was on the stand and under cross-examination as a witness in his own behalf; (2) that it was too late for the state to attempt the introduction of such evidence for the first time in rebuttal, and that it was also too late for the state to recall a witness for the defense, especially the accused, for the purpose of impeaching his testimony. (3) That the incriminating statement that is imputed to the defendant, instead of being merely matter of impeachment, was in the nature and character of a voluntary confession, "because it went directly to qualify the act of killing charged in the bill of indictment, and to show (if it be true) that the defendant acted through malice." (4) Because the state, having subpoenaed "the witness Walter Heath, and he being present in court throughout the trial, and having been examined in chief by the district attorney, and the district attorney being aware of the testimony to be given by the witness, had no right to hold up the particular fact, decline to place it before the jury (in the course of this witness' examination) in chief, and use same in rebuttal after both sides had closed their case in chief." (5) "Because, under article 11 of the constitution of 1898, the state had no right to place the accused on the stand, and compel him to give evidence against himself, in a criminal case of this nature." The trial judge overruled all of the aforesaid objections, and the defend-

ant's counsel retained a bill of exceptions, the following reasons being assigned by him for his ruling, viz.: "Because the evidence was strictly in rebuttal. The state had put Walter Heath on the stand, and he was told to go on and state all he had heard and seen at the difficulty which resulted in the death of the deceased. This the witness did. The state could not anticipate the defense the accused was going to set up. When, however, he took the stand, and testified, in his own behalf, among other things, his regret at what had occurred, his endeavors to relieve the wounded man in caring for him after inflicting the blow from which death was said to have resulted, and other statements of like nature, surely the state had a right to rebut proof of this fact by showing that after the occurrence, when the witness called the attention of the accused to his victim's condition, he employed the remarks which he is said to have made. The district attorney stated at the time that knowledge of the rebuttal evidence had only come to his knowledge since the defendant had testified. It is elementary that, for the purpose of contradicting a witness, he may be recalled in order that his attention be directed to the time and place of the statements or circumstances that are attributed to him. And this rule applies as well to a defendant testifying in his own behalf. He then becomes an ordinary witness, and the alleged prohibition as to his constitutional right cannot avail him," etc. The incriminating statement which is made the subject of this discussion, as it is incorporated in the bill of exceptions, is of the following tenor, viz.: "That, shortly after the alleged fatal blow, he [the witness Heath] had heard [the defendant] Favre say, referring to the deceased, 'D—n him; let him die; I will pray for him.'" From the foregoing statement it appears that the defendant's objections are (1) that the state had not the right to recall him as a witness in rebuttal at all; (2) and, if it be conceded that the state had the right, that it was too late to attempt an exercise of that right on rebuttal for the first time; (3) that the testimony sought to be elicited from the witness was testimony in chief, and should not have been withheld until after the defendant had closed his case. In argument and brief, counsel urge the further objection that the district attorney had failed, in the opening of his case, to make any affirmative proof of malice in the perpetration of the homicide by the defendant; that he sought, by means of the testimony objected to, to supply the want of it on rebuttal, contrary to all rules of evidence; but nothing of that kind appears in the bill of exceptions.

The first two propositions are fully met and answered by the opinion of this court in *State v. Walsh*, 44 La. Ann. 1122, 11 South. 811, wherein the same question was examined and decided. From that opinion we make the following extract, viz.: "One of the defendants had testified. The day after he had been discharged as a witness, he was re-examined by

the state. The district attorney stated to the court that he desired to have the accused called for the purpose of laying a foundation for a contradiction. The defendant's counsel objected, and assigned as reason that the accused had been a witness in his own behalf; * * * that he had testified, and had been cross-examined, and his examination closed; that he could not be recalled to be re-examined." The only objection was "that the assistant district attorney could not place upon the stand an accused person for any purpose, and particularly after said accused had testified and retired from the witness stand." The opinion then makes reference to similar statutes of other states allowing accused persons to testify in their own favor, and says: "It is generally stated that if an accused chooses to waive the constitutional protection in his favor, and become his own witness, he may be recalled as any other witness in this case. He may be examined and cross-examined, impeached and corroborated," etc. That was the interpretation this court placed upon the phrase "that, if the accused avails himself of this privilege, he shall be subject to all the rules that apply to other witnesses," etc. Act 1888, No. 29, § 2.

With regard to the third proposition,—that the testimony sought to be elicited from the witness in rebuttal was evidence which should have been introduced in chief,—it is sufficient to say that the jurisprudence of this court on that question is to the effect that, while that is the general rule of evidence, it must yield in its application to the sound discretion of the trial judge, which will not be disturbed except in extreme cases. *State v. Pruett*, 49 La. Ann. 283, 21 South. 842; *State v. Spencer*, 45 La. Ann. 1, 12 South. 135. The circumstances which are related in the transcript sufficiently support the ruling of the judge, and we approve same.

8. The fourth bill of exceptions relates to the ruling of the trial judge disallowing a motion for a new trial, and the admission of the testimony of a petit juror, the tendency of which was to sustain the verdict, and dispute and deny the correctness of the averment of the motion for new trial. The statement of the bill is that the district attorney, on the trial of the motion, placed on the stand one of the jurors who had participated in the trial of the cause, by whom he sought to disprove the allegation of the motion to the effect that he (the aforesaid juror) had, previous to the trial, made a bet upon the result of the trial, and was therefore "biased, prejudiced, and unfit to serve as a juror"; that defendant, by counsel, objected to any and all testimony by said juror as a witness, on the ground that he could neither impeach nor affirm his verdict. It is conceded that the rule of jurisprudence is that a juror who participated in the trial cannot be listened to, to impeach his verdict; and the argument is that the legal corollary of that rule is that he cannot be heard to testify to the correctness of his verdict when same is attacked; that being charged with incompetency and

unfitness to be a juror is equivalent to charging the illegality of his verdict. We have been cited to no adjudication of this court on this question, and we know of none; but, reasoning from analogy, we are of opinion that the contrary is true. It would certainly be against public policy to allow a juror, by his own sworn statement, to impeach his own verdict, and such is the sense of all authorities. 2 Thomp. Trials, § 2618. But that author states that this rule "does not extend to matters taking place out of court." *Id.* § 2619. He formulates the general rule thus: "While the testimony of jurors will not be received to impeach their verdict, it does not follow that such testimony will not be received to sustain it when assailed. If the jurors are accused of misconduct, they must always show by their oaths, not only in their own vindication, but in furtherance of justice, that they are not guilty of the misconduct charged against them." *Id.* § 2623. *State v. Dumphrey*, 4 Minn. 438 (Gil 340); *Hackley v. Hastie*, 8 Johns. 252; *Taylor v. Greely*, 3 Me. 204; *People v. Hunt*, 59 Cal. 430; *Cannon v. State*, 3 Tex. 31; *Barlow v. State*, 2 Blackf. 114; *Stanton v. State*, 18 Ark. 317; *State v. Underwood*, 57 Mo. 40; *State v. Hascall*, 6 N. H. 352; *Farrer v. State*, 2 Ohio St. 54. The rule seems to very generally obtain in other courts of the country, and we can see no reason why it should not be applied in this court. The particular objection which was urged against the verdict is that one of the jurors accepted a bet on the prospective result of the trial, and was consequently disqualified to participate therein, because he was necessarily biased in judgment; and the argument of defendant's counsel is that the particular juror was disqualified and incompetent to sustain by his own evidence his qualification as a juror, on the trial of an application for new trial on the ground of his disqualification on that account. The trial judge overruled the objection properly.

4. The last bill of exceptions relates to a requested special charge, which is couched in the following terms, viz.: "We ask the court to charge that if the jury believe from the evidence that the deceased died from the effects of wounds caused by falling against a door or against the floor, or from a tumor, or from a fall on the sidewalk, or the jolting in a dray, or from general neglect, or from any or all of the above causes, then you are bound to acquit the accused." The trial judge gave the charge requested, with the following modification, viz.: "But I charge you, in connection therewith, that if you find from the evidence that he [the deceased] died from wounds, or a wound inflicted by Hodges when Favre was acting in concert with him, then they are both guilty; that is to say, Favre is equally guilty as if he had himself dealt the fatal blow, if he was at the time present aiding and abetting Hodges in the giving of the blow from which the deceased came to his death." The objection urged to the foregoing modification of the defendant's requested special charge is that it

was misleading, and not a full and accurate exposition of the law bearing on the subject-matter in controversy. We entertain a contrary view, and regard the same as accurate and sufficient, and approve of the ruling of the judge. An attentive examination of all the bills of exceptions has satisfied us that it discloses no reversible error. Judgment affirmed.

(51 La. Ann. 500).

STATE ex rel. BROUSSARD et al. v. VOORHIES, Judge. (No. 12,990.)

(Supreme Court of Louisiana. Dec. 19, 1898.)

DISTRICT COURTS—APPELLATE JURISDICTION—CERTIORARI—PROHIBITION.

1. Article 126 of the constitution of 1898 only confers appellate jurisdiction on district courts from judgments of justices of the peace in criminal matters.

2. Possessing no appellate jurisdiction over judgments of a justice of the peace for the amount of one dollar or less, a district judge is without constitutional warrant to place an interpretation thereon inconsistent with the plain terms and tenor thereof.

On Rehearing.

1. Article 111 of the constitution of 1898 provides that judgments in civil causes are appealable from magistrates' courts to the district courts, without regard to the amount in dispute.

2. But judgments rendered by justices of the peace more than 12 months prior to the adoption of that constitution are not affected by the provisions of that article, not even where such judgments are involved, or sought to be affected, in proceedings for prohibition and certiorari applied for in the district court since the adoption of the constitution of 1898.

3. A district judge may issue writs of certiorari to justices of the peace only in aid of his appellate jurisdiction, and he transcends his authority when, in a case in which he has no appellate jurisdiction, he interprets the judgment therein rendered to mean that a certain one of the defendants is not liable under the judgment.

(Syllabus by the Court.)

Application by the state, on the relation of R. F. Broussard and another, for writs of certiorari and prohibition directed to the Honorable Felix Voorhies, Judge of the Nineteenth judicial district, parish of Iberia. Writs made peremptory.

Foster & Broussard and J. L. Haase, for relators. Felix Voorhies, pro se.

WATKINS, J. This controversy grows out of the proceeding in the respondent's court entitled "State ex rel. Gonsoulin v. J. A. Babin, Justice of the Peace, et al.," the complaint of relators in this proceeding being that respondent therein, in effect, annulled and reversed judgments of said justice, of which he possessed neither supervisory nor appellate jurisdiction, and in violation of their rights as plaintiffs and appellees in respondent's court. The history of this litigation is fully related in *State v. Voorhies*, 49 La. Ann. 1717, 23 South. 107. It appears from our opinion in that case that relators herein instituted suit and obtained judgment against the relator (in

State ex rel. Gonsoulin v. Babin, Justice) for the sum of \$76, which was appealed to the court of the respondent in this proceeding, and that said respondent first rendered a judgment reversing that appealed from, at plaintiffs' costs, and remanding same for execution, and thereafter so amended said decree as to allow plaintiffs therein (relators here) to make the cane growers parties to the suit, contradictorily with whom the proceedings were to be carried on; this decree closing with the phrase, viz.: "The court therefore grants the new trial for the purpose of remanding the cause to the lower court for further proceedings." It further appears therefrom that, on the return of said cause to the justice court, the plaintiffs therein (relators here) voluntarily discontinued same by entering nonsuit, and immediately thereafter instituted 143 suits before the same justice of the peace, in each of which one of the cane growers, and the original defendant, Gonsoulin, were made co-defendants in solido (the said cane growers being the same persons who are referred to in the respondent's aforesaid decree); that in each one of those suits the amount in controversy was below the lower limit of the respondent's appellate jurisdiction, and in each of same an absolute judgment was rendered by said justice of the peace for the amounts respectively demanded against both defendants in solido, and for costs; that, at this stage of the proceedings, Gonsoulin applied to the respondent judge herein, in the case entitled "State ex rel. Gonsoulin v. Babin, Justice," for writs of certiorari and prohibition, upon the allegation that the respondent Babin, justice, had rendered the aforesaid 143 judgments in direct disregard and violation of his own decree remanding the cause as aforesaid,—alleging that he had enjoined the execution of the judgments in said suits in said justice court, and that his injunction had been dissolved; that, at this stage of the proceedings, relator Babin applied to this court for certiorari and prohibition, on the ground that the respondent's court was without jurisdiction to entertain Gonsoulin's application, because he had no appellate jurisdiction of the suits and judgments he complained of. It further appears from our aforesaid opinion that we held as follows, viz.: "The district court having the power to supervise its own judgments, and the case of R. F. and J. C. Broussard v. Adrien Gonsoulin having been before it, and a judgment therein rendered, we think it was within the competency of that court, on the application to it of the defendant Gonsoulin, declaring that the judgment in question was being executed in a manner different from its terms, or that it was being actively violated by the justice court wherein it originated, and to which it was remanded, to order the justice of the peace to send up his records for examination, with a view of ascertaining what the legal situation was, to the end that such action should be taken as the law and the facts of the case authorized, and that it was the duty

of the justice to comply with that order. Whether the district court would be justified or warranted, after examination, in making writs of certiorari or prohibition, which it caused to issue to the justice, peremptory in a particular case, is a different question from whether it had jurisdiction to simply make inquiry through such writs into the subject-matters complained of. Jurisdiction is the power to judge. It includes the power to judge wrongly as well as rightly. We do not think relator warranted in asking relief at our hands in the present situation of affairs. The district court having power to send writs of certiorari and prohibition to justices of the peace in a certain class of cases, when its jurisdiction to that end has been invoked in a particular case, as being one of that character, they are entitled to issue tentative writs, and to primarily determine whether that jurisdiction legally extends to the ultimate affording of the relief asked. Relator had a right to raise the issue he did as to the power of the district court, and to have that court pass on that exception; but none the less he should have produced and submitted his records as ordered, and made his return or answer, and enabled the issues raised to be determined. Should the [judge] reach an illegal conclusion as to his powers and duties in the particular case, it will be time enough to have recourse to this court. State v. Judge First Dist. Ct., 45 La. Ann. 1206, 14 South. 73." In pursuance of the foregoing instructions, and very careful and guarded interpretation of the law, the respondent herein proceeded with the trial and determination of the aforesaid cause in his court, entitled "State ex rel. Gonsoulin v. J. A. Babin, Justice of the Peace;" and it is of his finding and judgment in that case that the relators, as plaintiffs and appellees in the sundry cases on appeal in his court, make complaint, and demand relief at the hands of this court. They make extracts from the respondent's decree, and broadly allege "that in rendering said judgment the district judge is in flagrant violation of the law and constitution of the state, and after admission on his part that he could entertain no jurisdiction under procedure for writs of certiorari and prohibition, except in aid of his appellate jurisdiction, reversed the judgments of the justice of the peace, and at the same time dissolved his own writs primarily issued."

The portion of the judgment of which the relators complain is as follows, viz.: "A careful examination of the books of the [respondent] shows that the court has made a serious mistake concerning the judgments rendered by [him] in the 143 cases of R. F. Broussard et al. v. Adrien Gonsoulin, the relator, and others. In its former decree the court stated that only two of these cases had been finally adjudicated upon, and that in the 141 remaining cases new trials had been granted. * * * This was error. In all these cases the new trials have been refused, and as a sequence the *original judgments ren-*

dered remain unaltered. A judgment rendered is revised or amended by the granting of a new trial. The refusal to grant a new trial leaves the judgment rendered unchanged. Code Prac. arts. 557, 563. *It follows from this that there is no personal judgment against the relator [Gonsoulin], except for the two per cent. retained by him for his co-defendants against whom only there is an absolute judgment, with costs.* It follows again from this that the [respondent] *has complied with the order of this court by relieving relator [Gonsoulin] of all personal liability in this matter, and that there is no necessity for the writs of certiorari sued out in this case.*" (Our italics.) Particular attention is directed to the italicized portions of the judgment. On this point the statement of the relators Broussard is as follows, viz.: "That, your relators availing themselves of the law, the said case was dismissed by them in the justice court, and new suits instituted, after the costs [of the first suit] had been paid, against Adrien Gonsoulin and the said 143 cane growers, each for the sum due by them under said contract; that before the trial of the said cases the said Adrien Gonsoulin and each of said cane growers appeared in court and filed a general denial; that, upon trial had, judgment was rendered against each of the said cane growers and the said Adrien Gonsoulin in solido, and in favor of your relator, in each and every one of said 143 suits; that in none of said cases was there an amount involved sufficient in law to authorize an appeal to the district court; that, after judgment had [been obtained] by your relators in said 143 suits, the said Adrien Gonsoulin appealed each and every one of them to the district court; * * * that, when attempt was made by relators to execute said judgments, resort was had by said Adrien Gonsoulin to the district court, through writs of certiorari and prohibition," etc.

On this state of the record, relators complain of the respondent's decree, that, notwithstanding he has no appellate jurisdiction of any one of said 143 judgments, and for that reason no jurisdiction to alter, amend, revise, or change any one of them in the slightest particular, he has, under the pretext of interpreting them, actually annihilated them all, altogether, by holding that they do not adjudge Gonsoulin personally to pay said sums and costs, whereas the judgments themselves show an exactly contrary state of facts. In the case of *State v. Voorhies*, 49 La. Ann. 1717, 28 South. 107, from which we have made extracts, the position was taken and response made that the respondent possessed appellate jurisdiction of the original case of relators against Gonsoulin, and that in the exercise of that appellate jurisdiction he had reversed the personal judgment which had been rendered in the justice court, and remanded same to the said court, with instructions to make the 143 cane growers parties

thereto. In the case of *State ex rel. Gonsoulin v. Babin*, Justice of the Peace, in respondent's court, relator's complaint proceeded on the theory that in point of fact the 143 judgments which had been rendered against him were the same as the original judgment. But, from the foregoing extracts from the decree of the respondent in that case, it clearly appears that he abandons that theory altogether, and, admitting that the original suit had been discontinued in the justice court, and 143 distinct and different suits had been instituted therein in its stead, and that separate and unappealable judgments had been therein rendered, and appealed to his court, he places his judgment exclusively upon an interpretation of said decrees; and finding that same are not personal judgments against Adrien Gonsoulin, and for that reason in exact conformity with his decree in the original suit, he dismisses Gonsoulin's writ as unnecessary. In order to see what is the form of those judgments, we transcribe one of them, for the purposes of illustration, viz.:

"State of Louisiana, Parish of Iberia. Third Ward, Justice Court. R. F. Broussard et al. v. Adrien Gonsoulin and Antoine Zepherine. (No. 231.) For the reasons urged in the motion for new trial, the judgment rendered herein is hereby amended so that there be judgment against Adrien Gonsoulin and Antoine Zepherine in solido for sixty-one cents, with costs on both parties. For these reasons, new trial refused. Thus done, read, and signed this 3d day of March, A. D. 1897. J. A. Babin, J. P.

"March 3d motion of appeal made and granted. Appeal bond fixed at \$15.00. J. A. Babin, J. P."

(Our italics.)

An examination of all the other judgments shows that they are exactly identical with the one above quoted, and that they are rendered against the defendants, Adrien Gonsoulin and another, in solido, "with cost on both parties"; the amounts for which judgments are therein rendered varying from 35 cents to 98 cents, the distributive or proportionate shares of the 143 cane growers in the \$76 claimed.

To plainly indicate the precise status of those cases, we make the following extract from the opinion of the respondent as judge in the Gonsoulin case, viz.: "A careful examination of the books produced in court by the respondent [justice] discloses the fact that the 143 suits brought by R. F. Broussard et al. are instituted against the identical parties who have been ordered by this court to be made parties in the case of R. F. Broussard et al. v. Adrien Gonsoulin (No. 76 of the docket of the inferior court), which case was remanded by this court to the inferior court for that special purpose. It is also in evidence that instead of protesting against the judge's action in parceling out the original case, No. 76, into so many cases, and instead of interposing the plea of *res adjudicata* in so

far as he was concerned, the relator filed a general denial and joined issue on the merits of each one of those cases. The amount involved in each one of those cases was not large enough, under the constitution of 1879, to give appellate jurisdiction to this court; but, * * * under the law as it is now (Const. 1898, art. 126), the district court has appellate jurisdiction of these 141 cases." Hence, in the two judgments that the respondent herein rendered in the Gonsoulin case, he not only sought to destroy said 143 judgments in a proceeding to which the relators, as plaintiffs, were not made parties, by a judicial interpretation, as they allege, but he sought to shield said interpretation by the supposed appellate jurisdiction which the constitution of 1898 had conferred upon justices of the peace; but the language employed in said judgments disproves the respondent's decree, to the effect that the justice of the peace had "relieved relator [Gonsoulin] of all personal liability"; and the article of the constitution of 1898, on which he relies, has exclusive reference to criminal matters. It is therefore clear that, possessing no appellate jurisdiction of said 143 judgments, he was wholly without power to annul or reverse them; and, the terms of said judgments being plain and unmistakable, his interpretation of them must yield thereto. Inasmuch as the respondent herein has judicially admitted that the original suit for \$76 had been voluntarily discontinued by the relators, and the 143 suits substituted therefor, and that the defendant Gonsoulin had appeared therein and filed an answer, and was conclusively bound thereby, the theory upon which we decided the case of *State ex rel. Babin v. Voorhies*, Judge, has been materially modified; same being that the relator Gonsoulin complained that the \$76 judgment was being executed in a manner different from its terms, and therefore actively violated, when in point of fact same had been set aside, discontinued, and altogether abandoned, and the 143 suits and judgments substituted therefor. We declined to grant relator Babin relief at that time, and required him to comply with the judge's order, and send up his records, "with a view of ascertaining what was the legal situation, to the end that such action should be taken as the law and the facts of the case authorized," etc. We regarded the case presented as belonging to "that class or character of cases which justified the respondent therein to issue tentative writs, and to primarily determine whether his jurisdiction legally extended to the ultimately affording of the relief asked." But, having fully satisfied ourselves that the respondent exceeded the bounds of his jurisdiction, within the limits fixed, (1) in assigning article 126 of the constitution of 1898 as the source of his appellate jurisdiction; and (2) in placing an interpretation upon the justice court judgments that was wholly unwarranted by their terms, and beyond his constitutional war-

rant, we feel bound to declare his judgment illegal and void in so far as same may prejudice or affect the relators' rights in any way, and to maintain and make peremptory the writs of certiorari and prohibition. It is therefore ordered and decreed that the preliminary writs of certiorari and prohibition be made peremptory, at the costs of respondent.

NICHOLLS, C. J., absent.

On Rehearing.

(Feb. 20, 1899.)

BLANCHARD, J. In the opinion hereinbefore handed down, it was held that the respondent judge exceeded his authority in making inquiry into the proceedings of the magistrate's court culminating in final judgments in the 143 suits brought in that court by relators herein against Gonsoulin and others, for the reason that with respect to those cases the district court in and for the parish of Iberia was not vested with appellate jurisdiction; and it was stated in that connection that article 126 of the constitution of 1898, which alone was cited by respondent as the source of his appellate jurisdiction, did not bear out his contention, since it only confers jurisdiction on district courts from judgments of justices of the peace in criminal matters. It was further held that respondent judge, in inquiring into the proceedings in the magistrate's court, had placed an interpretation upon the judgments rendered there, in the cases mentioned, unwarranted by their terms, and beyond his constitutional authority; and the decree of this court, operating through its writ of certiorari, which had been invoked, declared the action of the respondent judge aforesaid illegal and void in so far as the same prejudiced or affected relators' rights in and to the judgments rendered in their favor in the magistrate's court, or fettered or hindered relators in the due execution of said judgments. Accordingly, to this extent and for this purpose, the writs of certiorari and prohibition, which had issued nisi, were made permanent and peremptory at the cost of the respondent. In his application for the rehearing, which the court granted, he urges that the opinion heretofore handed down misconstrues the judgment he had rendered in the proceeding taken in his court on the application of Adrien Gonsoulin for writs of certiorari and prohibition against J. A. Babin, justice of the peace, and gave to the said judgment an effect and force not intended by him. He insists that the only judgment rendered by him was a decree vacating the writ of certiorari sued out by Gonsoulin, and that this court, in its opinion, mistook part of the reasoning preceding his decree in the Gonsoulin case for the decree or part of the decree itself, and, predicated on this error, has decided the instant case to his prejudice. In this connection his contention is that, by vacating the writ of cer-

tiorari in the Gonsoulin case, he left the justice of the peace free to proceed according to law in the 143 original cases in which judgment had been rendered by said justice of the peace, and that, this being so, he cannot see how it can be held he has prejudiced relators herein, or deprived them of any rights they may have under the constitution and laws. To determine these contentions of our brother of the district court, it is necessary to ascertain just what he did decide in the Gonsoulin case, and whether or not he has interfered with the judgments in the 143 cases in the magistrate's court, or hampered or impeded their execution in any way, and, if so, to what extent. If his determination of the Gonsoulin case affects those judgments, or their execution, then a proper case was presented to this court for its supervisory control; for nothing is clearer than that a district judge may issue writs of certiorari to justices of the peace only in aid of their appellate jurisdiction. *State v. Judge*, 30 La. Ann. 97, 1 South. 281; *State v. Judge of Second City Court*, 37 La. Ann. 285. Under the constitution of 1879, cases where the amount claimed was \$10 or under were not appealable from magistrates' courts to the district courts; and in each of the 143 cases brought by relators herein in the magistrate's court of Justice Babin against Gonsoulin and others the amount was less than \$10. Those cases rest upon the constitution of 1879, for judgments in them all were rendered on March 3, 1897, while that constitution was in force. While the constitution of 1898 (article 111) provides that all judgments in civil causes are appealable from magistrates' courts to the district courts, without regard to the amount in dispute, that constitution did not go into effect until May 12, 1898, or more than 14 months after the rendition of the judgments in the 143 cases aforesaid. It is clear, therefore, that the question whether or not the respondent judge had appellate jurisdiction warranting him in an inquiry into the proceedings in the magistrate's court in the suits against Gonsoulin and others there instituted was to be determined under the constitution of 1879, and not that of 1898. And since, under the former constitution, he was possessed of no appellate jurisdiction in any of those cases, it follows that he could not lawfully issue his writ of certiorari to inquire into the proceedings leading up to the judgments therein rendered, and that having issued the same improvidently, and subsequently realizing this, the only order for him to then make, or judgment to render, was one vacating the writ and dismissing the proceedings before him. Has he done more? We held in the first opinion handed down herein that he had, and a careful review of the case on this rehearing has but served to convince us of the correctness of the position then taken. On the 26th of November, 1898, there was filed in respondent judge's court his final opinion and decree in *State ex*

rel. *Gonsoulin v. J. A. Babin*, Justice of the Peace; being the proceeding wherein he had issued his writ of certiorari to review the action of the magistrate's court in the 143 causes which had been instituted there against Gonsoulin and others by relators herein. In that opinion he distinctly held that in the 143 cases in the magistrate's court no personal judgment had been rendered against Gonsoulin, "except for the 2% retained by him for his co-defendants," and that against these co-defendants only, and not against Gonsoulin, was there "absolute judgment for costs." He distinctly held, further, that the justice of the peace (respondent in that case) had complied with the order which he (the judge of the district court) had theretofore issued, "by relieving relator [Gonsoulin] of all personal liability," and for this reason he decided there was no necessity for maintaining the writ of certiorari. Accordingly he discharged the writ, using this language (being the final sentence of his judgment and decree), viz.: "The former decree of this court, discharging the writs [of certiorari and prohibition] and setting them aside at relator's costs, is therefore correct, and the granting of a new trial is unnecessary for the purpose of confirming the same, inasmuch as the relator [Gonsoulin] not being personally responsible in those 143 cases decided by the respondent judge [the justice of the peace] has no ground for complaint." This was an intimation, a warning, a direction to the magistrate that, in the execution of the 143 judgments rendered by him, he was not to hold Gonsoulin to the full liability which the judgments on their face imported, and thus was an interference with their execution. It is patent that, had the judge not thought Gonsoulin was without personal liability in the judgments rendered in the 143 cases, he would have made the writs permanent. And it is equally apparent that he could not reach a conclusion as to his liability or nonliability without interpreting and passing upon the 143 judgments aforesaid; and this is precisely what, under the law, he had no power to do through the writ of certiorari, for he had no appellate jurisdiction over the cases, and could only resort to the writ in aid of such jurisdiction attaching to his court. The judgments in the 143 cases, as shown in our first opinion, were against Gonsoulin, and the other parties sued, in solido, both for the amounts claimed and for costs; and, when the district judge assumed to say and to hold that such judgments did not condemn Gonsoulin personally for the amounts thereof and for costs, he made himself liable to the writ of certiorari which went forth from this court to supervise his proceedings in the case then before him, and to correct his orders and judgments in those particulars wherein they transcended his authority under the law. For the reasons assigned, it is ordered that the decree of this court hereinbefore rendered remain undisturbed.

(51 La. Ann. 281)

MIGHELL v. KELLY. (No. 18,004.)¹(Supreme Court of Louisiana. Jan. 9, 1899.)
**SUMMARY PROCEEDINGS—LESSEE AS DEFENDANT—
CHANGE OF CHARACTER OF ACTION.**

A lessee made defendant in ejectment proceedings cannot legally change the character of the action from a summary to an ordinary one, and by neither answer nor intervention ingraft new and foreign issues thereupon, nor introduce new parties litigant for the purpose of trying questions which are only legally determinable in an ordinary action.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frank A. Monroe, Judge.

Summary proceeding by Mary A. L. Mighell against John F. Kelly. Fred Bertrand intervened. Judgment for plaintiff. Defendant appeals. Affirmed.

Bernard McCloskey, for appellant. William S. Benedict and R. J. Maloney, for appellee. Lazarus & Luce, for intervener Bertrand, and appellee.

WATKINS, J. This is a summary proceeding by the plaintiff to procure the eviction of the defendant as a contumacious tenant of the premises leased to him, and from a judgment condemning him to deliver up the possession thereof the latter has appealed suspensively. In this court the plaintiff and appellee filed an answer to the appeal, and prayed for the allowance of damages against the defendant on the ground that same was prosecuted for the purpose of delay. This suit is in the ordinary form of summary proceedings, and the petitioner declares that on the 24th of February, 1897, she leased to the defendant the premises No. 841 Canal street, city of New Orleans, for a term of 19 months, commencing on the 1st of March, 1897, and ending on the 30th of September, 1898, at a monthly rental of \$333.33%, payable monthly, for all of which installments notes were given, and a written lease executed. She further represents that more than 15 days prior to the expiration of said lease she gave to the defendant, as her lessee, a written notification to remove from and vacate said premises on or before the 30th of September, 1898, the date at which said lease would expire; that her said tenant refused, and still declines, to render compliance with said demand and notice; and that said delay has expired without his having removed from the leased premises, and he has been placed in default for his not having done so. Petitioner further avers that she has leased the aforesaid premises to another tenant, of which fact the defendant had knowledge, and refuses possession to said new tenant; and that she is desirous of having possession of said premises, in order to deliver same to said new tenant. For answer the defendant admits his lease from the plaintiff upon the terms and conditions stated, and that he received due notice to va-

cate the leased premises; but he represents that on the 29th of June, 1898, plaintiff executed a lease to one Fred Bertrand for a term of 12 months from the 1st of October, 1898, which is annexed and made a part thereof. He further specially avers that the said "leasing of the premises by said Bertrand was for the benefit of your defendant, and, in so doing, said Bertrand, to the knowledge of said plaintiff, and with her consent, was acting for and on behalf of this defendant, and in fulfillment of certain obligations assumed by said Bertrand towards your defendant individually and otherwise, and in liquidation and partial settlement of a certain indebtedness and other business transactions between defendant and Bertrand; that the plaintiff acquiesced in the mutual covenants of defendant and Bertrand, and is therefore bound by the same; that said lease, while ostensibly granted to said Bertrand, was in truth and fact for your petitioner, and should be so decreed; that he has been, and still is, willing and anxious to comply with all his obligations under said new lease." The prayer of his answer is in keeping with the foregoing averments, and coupled with the reservation of his right to sue for damages. The defendant contemporaneously filed an intervention and third opposition, predicated practically upon the same grounds as those assigned in the answer. His prayer is that the plaintiff and Bertrand be cited, and that he have judgment against them, decreeing that the lease of the premises between them "was entered into and executed for and on behalf of intervener herein, and recognizing [him] as sole beneficiary of all rights under said lease for the term therein stipulated," etc. The written lease between the plaintiff and Bertrand which is referred to was annexed to the aforesaid petition of intervention; and, among other things, it contains the stipulation that the "lessee obligates himself * * * to make no sublease, nor transfer said lease, in whole or in part." To this intervention the plaintiff pleaded a general denial, and Bertrand excepted (1) on the ground that, whatever controversy or right arising out of prior relations between Kelly and himself there might be, same can only be determined in an independent proceeding, and cannot be ingrafted upon the present proceeding to eject Kelly as tenant; (2) that, if he be at all accountable to Kelly on account of any prior relations between them, he has the legal right to urge his defenses thereto in such an independent proceeding. He prayed to be hence discharged, with costs. The foregoing exception, having been tried with the merits, was likewise decided with the merits, and sustained, and the intervention dismissed.

During the progress of the trial, Kelly was presented as a witness in his own behalf, and counsel for plaintiff objected to any parol statements by him which tended in any way to vary, contradict, or alter the written contract

¹ Rehearing denied February 7, 1899.

of lease between the plaintiff and Bertrand; and, said objection having been sustained by the court, the defendant's counsel retained a bill of exceptions to the ruling and opinion of the court. An effort having been made to prove by the same witness that he had made the payment of the first installment of the new lease of Bertrand, a similar objection was made, and to a similar ruling a like bill of exceptions was retained by Kelly's counsel. The reasons assigned by the court for its ruling are as follows, to wit: "Counsel for plaintiff stating he desired to make same objections, the court sustains same for the reason that the averments of the petition and the admissions in the answer in this case make it appear that there is a written lease between the plaintiff herein and one Bertrand; and it is not competent by oral testimony to vary, alter, or contradict the terms of that lease by proving the real lessee is the defendant, and not the party named in the lease." Other testimony of like character having been offered and objected to by plaintiff's counsel, the court made the following ruling, viz.: "The court is of opinion that, in so far as relates to the case of the plaintiff as against the defendant, the [proposed] admission is irrelevant and inadmissible, unless the defendant is prepared to show that, by an agreement of a date subsequent to the date of the lease, the plaintiff in this case agreed to accept the defendant as the lessee in lieu of Bertrand, who appears to be the lessee." An examination of the transcript discloses no evidence tending to show that plaintiff, who is a resident and citizen of Mobile, Ala., had any knowledge of the business relations existing between the defendant and Bertrand either before or after the making of the new lease to the latter, or that she had consented to accept Kelly as her tenant in lieu of Bertrand. The brief of Bertrand's counsel places the question determinative of the cause, very plainly and fully, in the following extract, viz.: "The attempt to involve Bertrand in the controversy between Mrs. Mighell and Kelly, and to graft upon this summary proceeding an action for an adjustment of accounts, if any existed, was evidently prompted by the desire, and had for its object the purpose, to postpone the determination of the controversy between Mrs. Mighell and her former lessee. If proceedings such as are resorted to here were countenanced, every tenant whose lease had expired could maintain possession of the premises under lease to another, upon the bald statement that the new lease was executed for his benefit and advantage, and could thus defeat the summary process accorded to landlords for the possession of their premises upon the observance of certain formalities, and convert each case into an ordinary action, the trial of which would cover a period of time beyond the reasonable life of the contract of the lease itself; and it would confer an unfair advantage to the outgoing lessee, and subject the lessor under the existing lease to a contest in a summary proceeding, without the opportunity and advantages

that the law accords him in ordinary proceedings. It would have the effect of depriving him of the possession of premises for which he had incurred all the obligations of a lessor, enjoying none of the advantages resulting from the occupation of the leased premises. It would practically nullify, in its effective operations, the summary proceedings accorded by law to the lessor for the possession of the premises when the lease had expired." A somewhat similar case is stated in *Ward v. Stakelum*, 47 La. Ann. 1547, 18 South. 508, in which the court held that a claim for damages alleged to have been sustained by the defendant lessee through the plaintiff lessor's ejectment proceedings "cannot be grafted on a suit for possession of leased premises." That is, in effect, the attempt made by the defendant. He must resort to independent proceedings for the assertion of his rights. We do not think this a case for damages in favor of the plaintiff and appellee. Judgment affirmed.

(121 Ala. 642)

MIDDLEBROOKS v. BAREFOOT.

(Supreme Court of Alabama. May 17, 1899.)

DEED—EXECUTION—EVIDENCE.

1. Execution of a deed the certificate of acknowledgment to which is insufficient may be proved by the officer who signed the certificate, his signature being taken as that of an attesting witness.

2. A grantor, though fully able to write, may affix his signature to a deed by another, it being in his presence and at his direction.

Appeal from circuit court, Pike county; J. W. Foster, Judge.

Statutory action of ejectment by M. T. Middlebrooks, administrator of J. P. Barefoot, deceased, against G. W. Barefoot. Judgment for plaintiff. Defendant appeals. Affirmed.

The cause was tried upon issue joined on the plea of the general issue. On the trial it was admitted that the plaintiff's intestate had a deed to the land involved in the suit which was prior in date to the date of the deed on which the defendant relied for his claim to the land in controversy. The plaintiff introduced evidence tending to show that, prior to the defendant entering into possession of the lands sued for, the plaintiff's intestate had had possession thereof for 15 or 20 years, cultivating the same, and claiming and exercising acts of ownership over them. The defendant claimed title to the lands under two separate deeds, alleged to have been executed by J. P. Barefoot, the plaintiff's intestate, conveying to the defendant, G. W. Barefoot, the lands in suit. One of these deeds bore the date of March 18, 1892, and was signed by J. P. Barefoot. There was no attesting witness to this deed, and the certificate of acknowledgment, which was attached thereto, was in the statutory form, but did not contain the name of the grantor to the foregoing conveyance. This certificate was signed by R. G. Jackson, notary public

and ex officio justice of the peace. The defendant introduced R. G. Jackson, and, upon exhibiting to him said deed, the witness testified that he was the officer whose name was signed to the certificate of acknowledgment attached to the deed, and that he wrote the deed himself, and also the certificate of acknowledgment, and signed his name thereto. The witness was then asked if said J. P. Barefoot signed and executed the deed in his presence, and whether or not he acknowledged its execution before him as notary public and ex officio justice of the peace. The plaintiff objected to this question, on the ground that the certificate of acknowledgment was defective, and it was incompetent to admit parol evidence to supply the defect. The court overruled this objection, and the plaintiff duly excepted. The witness then testified to the execution of the instrument by the grantor in his presence. The court allowed him to testify thereto as subscribing witness to the deed. The defendant then offered said deed in evidence. The plaintiff objected to the deed being introduced in evidence, upon the ground that its due execution had not been proven, as required by law. This objection was overruled by the court, the deed was admitted in evidence, and the plaintiff duly excepted. The other deed, under which the defendant claimed title to the lands sued for, bore date January 20, 1897, and was signed, "J. P. Barefoot, by Nicholson," and the attesting clause thereto was as follows: "Signed, sealed in the presence of T. J. Nicholson, J. P." Attached to this deed there was what purported to be a certificate of acknowledgment, in words and figures as follows: "State of Alabama, Pike County. I, T. J. Nicholson, a justice of the peace in and for Pike county, certify that J. P. Barefoot, whose name is signed to the within deed, authorized me to sign his name for him, after being informed of the contents, freely and voluntarily of his own free will and accord on the day and date the same bears date, this, the 20th day of January, 1897. T. J. Nicholson, Justice of the Peace." Upon the introduction of said T. J. Nicholson as a witness, he testified that he made the said certificate of acknowledgment, and signed his name thereto as justice of the peace; that said J. P. Barefoot, the grantor in said deed, could write his name, but that, having been sick prior to the date of the execution of said deed, Barefoot told the witness that he was very nervous on account of said sickness, and could not write well, and asked said witness Nicholson to sign his name thereto as grantor; that thereupon he (Nicholson) signed said

Barefoot's name to said deed as grantor in Barefoot's presence, and at his instance and request; that witness then took the acknowledgment of said Barefoot before him in his official capacity, and executed the certificate, and also signed his name to said deed as an attesting witness, all of which was done in the presence of J. P. Barefoot. The plaintiff objected to the testimony of the witness that he signed the name of the grantor to the deed in his presence, and at his request, on the ground that it was incompetent and illegal. The court overruled the objection, and the plaintiff duly excepted. The deed was then offered in evidence. The plaintiff objected to the introduction of said deed in evidence, on the ground that there was no certificate of acknowledgment thereto, or other competent proof of its execution, and further that when a grantor can write it is incompetent for the justice of the peace making the acknowledgment to sign the grantor's name thereto. The court overruled this objection of the plaintiff, allowed the deed to be introduced in evidence, and to this ruling the plaintiff duly excepted. Upon this ruling on the part of the court, the plaintiff took a nonsuit, with bill of exceptions. Judgment was then rendered for the defendant. The plaintiff appeals, and assigns as error the several rulings of the trial court upon the evidence to which exceptions were reserved.

W. H. Parks, for appellant. Foster, Samford & Carroll, for appellee.

MCCLELLAN, C. J. If the certificates of acknowledgment to the deeds were insufficient, it was competent to prove their execution by the officer who signed the certificates, his signature being taken as that of an attesting witness. *Railway Co. v. Hammond*, 104 Ala. 191, 199, 19 South. 935, and cases there cited. And, if the certificates were not defective, the error of proving the signature by the officer involved no injury to the plaintiff. It is quite a mistake to suppose that a grantor can make an efficacious signature of a deed by the hand of another only when he is not sufficiently educated to write his own name. To the contrary, the rule is that he may affix his signature by the hand of another, the subscription being made in his presence and at his direction, however capable he may be mentally and physically at the time of writing his own name. *Lewis v. Watson*, 98 Ala. 479, 13 South. 570; 9 Am. & Eng. Enc. Law, p. 144; 1 Devl. Deeds, §§ 232, 233. The rulings of the trial court were in consonance with these principles, and its judgment is affirmed. Affirmed.

(51 La. Ann. 197)

STATE ex rel. MARCEAUX v. DEBAILLON,
Judge. (No. 13,043.)¹

(Supreme Court of Louisiana. Jan. 23, 1899.)

CRIMINAL LAW—REVIEW BY CERTIORARI—
PROHIBITION.

1. Rulings on a motion to quash an indictment cannot be detached from the case itself, before a trial, and reviewed in the supreme court on an application for writs of certiorari and prohibition.

2. A plea of prescription to a criminal prosecution cannot be made the basis of an application to the supreme court for writs of certiorari and prohibition, before such plea has been presented or acted on by the trial court.

Original application by the state, on the relation of Thelesmar Marceaux, against Judge O. Debailon, of the Seventeenth judicial district court, for writs of certiorari and prohibition. Dismissed.

Louis L. Bourges, for relator. Respondent Judge, pro se.

NICHOLLS, C. J. In relator's application for prohibition he avers that he is about to be tried in the parish of Vermillion upon five papers, purporting to be indictments found against him by what is claimed to have been a grand jury for that parish, but in reality by one which had ceased to have any legal existence; that it was impaneled on May 9, 1898, and went out of existence on the 12th of May, 1898 (date of the going into effect of the constitution of 1898), by the terms of article 117 of the constitution of 1898; that said indictments were null and void, and the district court had no jurisdiction of the said five cases, because the grand jury was composed of 16 jurors, instead of 12, as article 117 of the constitution required; that, immediately after said indictments were found, relator filed motions to quash the said indictments, on the grounds aforesaid, which motions were overruled, and relator reserved bills to the ruling; that, furthermore, prosecution for the acts for which he was about to be tried was barred by prescription, and relator was entitled to be discharged, the court having no jurisdiction, by reason of the effect of said prescription. On these grounds, relator prayed that the records in the five cases be ordered to be sent up under a writ of certiorari; that a writ of prohibition be directed to the judge of the district court for Vermillion parish, forbidding him from proceeding any further in said cases; that, after due proceedings, the said writ be made perpetual, and a decree rendered annulling said pretended indictments, and maintaining the prescription of one year, and discharging relator from the charges. In his return to the writ served on him, the district judge answered that the indictments found against relator were returned by a grand jury

legally organized, on May 10, 1898, under the then existing constitution and laws, and before the constitution of 1898 went into operation; that said grand jury had immense labors before them, and it had not completed its labors when the constitution of 1898 went into operation; that on May 17, 1898, it returned four bills of indictment against relator, and on May 20th (the day on which it completed its labors, and was discharged) it returned a fifth bill against him; that the framers of the constitution did not intend to stop the whole machinery of a court which on the day of the adjournment of the convention was in full operation, and quash all trials and proceedings not at that moment completed, and to begin over again by drawing another grand jury for service at a session begun before the constitution became operative; that the proceedings attacked were protected by article 325 of the constitution of 1898, to the effect that all informations and indictments which had been found or filed, or should thereafter be found or filed, for any crime or offense committed before the adoption of that constitution, might be prosecuted as if no change had been made; that relator raised the same complaints against these indictments which he is now urging in the case against him (State v. Marceaux [No. 12,865] 24 South. 611), in June, 1898, when that case was on appeal before the supreme court, and that he (the judge) had been reliably informed that relator's counsel had formally waived and abandoned the same in open court.

We are of the opinion that the orders heretofore issued in this matter should be set aside, and relator's application for a prohibition and for his discharge should be refused. If true it be, as relator alleges, that the indictments returned against him are null and void, that fact can and will be passed upon and so decreed in due course on appeal taken by relator from an adverse verdict and judgment, should one be rendered against him, unless he should have been found to have cut himself off from the right to urge such objections. Motions to quash, and rulings of court thereon, come up for review in the supreme court on the appeal taken from the final judgment in the cases in which they are made. These motions, and the rulings thereon, cannot be detached from the cases themselves, and made the subject-matter of review by the supreme court, in the exercise of its supervisory jurisdiction. Cases are not to be tried piecemeal in that manner, and issues of that character are to be determined and passed on under our appellate, not our supervisory, jurisdiction. State v. Rost, 49 La. Ann. 1451, 22 South. 421. Relator's application to have this court declare that prosecutions against him for the acts with which he is charged are barred by prescription, and to have us order him discharged is so utterly without foundation as to call for no special mention.

¹ Rehearing denied February 6, 1899.

Prescription is a plea to be presented to and determined by the court of the first instance. The ruling of the court on the plea comes up for review on appeal from the final judgment in the cause. It is not pretended that such plea has ever been presented or acted on by the district court. We are not authorized under our supervisory jurisdiction to take up the question of prescription as an original proposition, and deal with it as such. Had the plea been made and overruled, the same reasons which we have given for not detaching the ruling of the district court on a motion to quash from the main case, and reviewing it under our supervisory jurisdiction, would apply.

For the reasons assigned, it is hereby ordered, adjudged, and decreed that the order heretofore issued be set aside, and relator's application made herein be, and the same is, refused, and his application dismissed.

(51 La. Ann. 251)

GULF STATES LAND & IMPROVEMENT CO. v. WADE. (No. 12,800.)

(Supreme Court of Louisiana. Nov. 21, 1898.)

ESTOPPEL TO ASSERT TITLE—JUDICIAL SALES—DEEDS—EVIDENCE—TAXES.

1. A person cannot cause certain property to be seized and sold as the property of his debtor, receive the price of adjudication from the adjudicatee, deal repeatedly with him afterwards as owner, and afterwards proceed against him by petitory action to recover the same property as being himself the owner under a claim of an ownership antedating the sale. This rule applies to the state in the enforcement of its taxes as well as to a private individual.

2. The provisions of section 2519 of the Revised Statutes, "prohibiting notaries from executing acts of transfer of real estate unless the state, parish and municipal taxes due on the same be first paid to be shown by tax collector's receipt or certificate to that purpose," do not have the effect of cutting off parties claiming rights under an act executed in violation of that prohibition from introducing a copy of the act in evidence. The act, if otherwise regular, should be admitted, leaving its effect to be determined afterwards.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Fred. D. King, Judge.

Action by Mrs. Virginia Wade against the Gulf States Land & Improvement Company for injunction. From a judgment for plaintiff in injunction, defendant appeals. Affirmed.

Charles F. Claiborne, for appellant. A. B. Phillips, for appellee.

NICHOLLS, C. J. Plaintiff, alleging that it had bought certain described property from D. Negrotto, Jr.; that the latter had acquired the said property from the state of Louisiana at an adjudication of the same to him by the state tax collector, acting in the matter of said adjudication under the provisions of Act No.

80 of 1888, in order to pay the taxes of 1881 and 1882 due on said property; that the state of Louisiana itself had had said property adjudicated to it in enforcement of the tax of 1881, as would appear by act of January 17, 1885, by act before Spearing, notary, and for the tax of 1882, as would appear by act before the same notary of February 4, 1885 (the said taxes of 1881 and 1882 having been assessed against said property in the name of Sarah Jane Dunbar),—prayed for and obtained from the civil district court a writ, directed to the sheriff of the parish of Orleans, commanding him to place it in possession of said property after three days' notice to Widow Virginia Wade, the occupant of the property. Execution of said writ was stayed by a writ of injunction from the said court, at the instance of Mrs. Virginia Wade. In her petition for injunction she referred to the allegations of the petition upon which the writ of possession had issued, and averred that the sale upon which the plaintiff declared was absolutely null and void; that it conveyed nothing to the purchaser thereof, for that said property was assessed for the years 1881 and 1882 in the name of Sarah J. Dunbar, and that at that date she was not living. That on the 1st day of October, 1887, the state sold this property to Richard C. Wade, deceased husband of petitioner, and that he and his heirs had paid the taxes ever since. That no notice was ever served upon petitioner of any sale or intended sale on the part of the state to the plaintiff or its vendor. That the sale in 1887 to petitioner's husband canceled all previous taxes due to it. That petitioner and her husband have been in undisturbed possession for more than 10 years prior to the asserted claim of plaintiff. That the taxes of 1881 and 1882 were and are prescribed. Plaintiff in injunction, by supplemental petition, averred that when the assessments for the years 1881 and 1882, in the name of Sarah J. Dunbar, were made, she was dead. That the sale to Negrotto, Jr., was null and void, for that at the time of the same Sarah J. Dunbar had long been dead, and her succession was never opened, and no notice to her was or could be given of said contemplated sale. That she (plaintiff) had had possession continuously of this property under title translatif of property for more than 10 years previous to the institution of these proceedings, and plaintiff's demand is barred by the prescriptions of 5 and 10 years. The Gulf States Land & Improvement Company denied all and singular the allegations of the petition for injunction, and averred that it disclosed no cause of action. It prayed, in the event that its title be annulled, it have judgment in its favor for \$50.27, with 10 per cent. interest from June 20, 1889, until paid, for the further sum of \$123.67, with 10 per cent. interest from date of payment until paid, and for the further sum of \$5.00,

with 2 per cent. per month interest from payment until paid; alleging that it had paid \$50.27 as the price of the sale to him, and had paid the city the taxes for the years 1885 to 1891, both inclusive, and the state the tax of 1891, the sum of \$5.60, to whose rights it was subrogated. The district court rendered judgment in favor of the plaintiff in injunction, Mrs. Virginia Wade, and against the defendant in injunction, the Gulf States Land & Improvement Company, perpetuating the preliminary injunction, and enjoining defendant in injunction and the sheriff from further proceeding in the seizure, and from disturbing the said plaintiff, Widow Virginia Wade, in her possession of the property described in the suit (describing it). It further decreed that the title set up by the Gulf States Land & Improvement Company be annulled. It further decreed that the Gulf States Land & Improvement Company have judgment against Mrs. Virginia Wade for the sum of \$173.94, with 10 per cent. interest upon \$50.27 thereof from June, 1889, until paid, and with 10 per cent. per annum interest upon \$123.67 thereof from the date the portions thereof were paid to the city of New Orleans for the city taxes for the years 1885 to 1891, inclusive, and for the further sum of \$5.60 for state tax of 1891, and for \$48 for city taxes of 1894, 1896, and 1897, with interest as above. The Gulf States Land & Improvement Company moved for a new trial, alleging that there was an error in the calculation in the judgment rendered, in omitting to reimburse to it the state tax of 1891, \$5.60; the city tax of 1894, \$16; the city tax of 1896, \$16; the city tax of 1897, \$16; and that said judgment in other respects was contrary to law. This motion being overruled, the company appealed.

On November 16, 1880, Mrs. Sarah Jane Dunbar, a resident of the state of New York, by public act before Andry, notary, made a donation to Mrs. Sophia Dunbar, widow of Richard Wade, of the usufruct, during the life of the donee, of a certain lot of ground fronting on Erato street, in the square bounded by Erato, Ohio, Liberty, and Franklin streets; the donation being on the condition that Mrs. Wade should keep the property in good repair, and pay the annual taxes upon it. The donee took possession of the property donated. It is admitted that Mrs. Dunbar's succession was opened in New York, in 1884. We find in the record two acts of adjudication and transfer of this property by the state tax collector to the state of Louisiana. The first of these acts was by notarial act before Spearing, notary, of date of the 17th of January, 1885, in which it is recited that, acting under Act No. 77 of 1890, he had, on the 14th day of June, 1884, adjudicated the same to the state in enforcement of the taxes assessed on said property, in the name of Sarah Jane Dunbar, due on the same for the year 1881; that the total amount for which the same was adjudicated to state, including taxes of 1881, interest on same to date of adjudication, costs,

fees, commission, advertisement, etc., was \$17.44. The second act was by notarial act bearing date 4th of February, 1885, before the same notary, in which it is recited that the state tax collector, acting under Act No. 96 of 1882, had, in enforcement of the taxes on this property for the year 1882, assessed, in the name of Sarah Jane Dunbar, adjudicated the same to the state on the 22d day of November, 1884; that the total amount for which the property was adjudicated, including the taxes of 1882, interest on same to date of adjudication, costs, commissions, advertisement, etc., was \$14.04. On the 1st day of October, 1887, by act before Spearing, notary, the state tax collector executed a deed of adjudication and transfer of this same property to R. C. Wade. The act recited that said property was so adjudicated on the 14th May, 1887, in the enforcement by him, under Act No. 96 of 1886, of the taxes for the year 1886, in the name of Widow Sophia Wade (usufruct); that the property was adjudicated to R. C. Wade, he being the last and highest bidder, for the sum of \$16.88, the same being the total amount of state taxes due on said property for the year 1886, interest, commission, etc. The state tax collector acknowledged to have received payment of the price of adjudication. In the act the purchaser assumed and promised to pay all taxes, with interest and costs thereon due, by or on account of said property, still remaining unpaid, whether state, city, or otherwise. The adjudicatee took possession of the property, and he, his widow, and heirs have been in possession thereof for about 12 years. On the 15th of October, 1891, by act before Wolfson, notary, the state tax collector executed a deed of adjudication of this same property to D. Negrotto, Jr. The act recited that the tax collector made said adjudication under the provisions of Act No. 80 of 1888. The act recited that, within two months after the expiration of the year in which the property could be redeemed, the tax collector had made out a complete list of all immovable property bid in for and adjudicated to the state for taxes for the year 1880 and subsequent years, as shown by the records in the conveyance office or in the office of the recorder of mortgages, which had not been otherwise disposed of by the state, and not redeemed within the time prescribed by law; that he had transmitted this list to the auditor for comparison with the record of the property adjudicated to the state on file in his office, and said list had been returned to him (the collector) approved; that he had thereupon proceeded to advertise for sale all property appearing upon said list which had been theretofore bid in for and adjudicated to the state for the unpaid taxes of 1880 and subsequent years, which had not been redeemed within the time prescribed by law; that the property was advertised by a condensed description, containing the name of the party in whose name the property was adjudicated to the state, or only the name of the party who claimed to be the owner thereof,

and the year for which adjudicated, and the amount of adjudication; that, having complied with all the requirements of the law, he had offered all these properties, among which was this particular property, for sale, and had adjudicated this property on the 20th of June, 1889, to D. Negrotto, Jr., he being the last and highest bidder, for the sum of \$42.27, the said price bid and paid for said property being in full and final payment of all state taxes for the years 1881 and 1882, for which the property was adjudicated to the state, together with all costs thereon due and exigible at the time the property was adjudicated to the state, the purchaser taking the property subject to all subsequent taxes, state, parish, and municipal. The tax collector acknowledged to have received \$42.27 from D. Negrotto, and proceeded, in the name of the state, to transfer the property to him, "giving him an absolute and perfect title, without any claim thereto by any former owner, and free from all mortgages, liens, privileges, and incumbrances whatsoever, except all unpaid municipal taxes and all state, parish, and municipal taxes which had become due and exigible subsequent to the adjudication of the property to the state. The purchaser declared in the act that he assumed and promised to pay all the state and municipal taxes on said property which had become due and exigible subsequent to the date of the adjudication. The act recited that, under the terms and provisions of Act No. 80 of 1888, the property was advertised and offered for sale, as stated, to enforce the provisions of said act, and for cash, payable in current money of the United States at the time of adjudication, for an amount not less than the total amount for which the property was adjudicated to the state, together with 20 per cent. thereon, and all costs of enforcing said Act No. 80 of 1880, which were as follows:

	Dollars	Cents	Dollars	Cents
Total amount of adjudication to the state.....	42	27	42	27
20% thereon.....	8	45	8	45
Costs and advertising.....	1	00	1	00

In the body of the act it was declared that the property transferred was the same property acquired by Sarah J. Dunbar from P. H. Keenan, and the same property acquired by the state under Acts No. 77 of 1880 and No. 96 of 1892, as would appear by acts of sale of June 14, 1884, November 22, 1884, January 17, 1885, and February 24, 1885. In the record is a receipt bearing date New Orleans, June 28, 1887, signed by D. Negrotto, Jr., in which he declared that he had received from R. C. Wade \$25 on account of \$41.88, and the balance of \$16.88 to be paid by the said Wade on or before the 28th of September, 1887, in consideration of which he would then transfer, sell, and assign unto the said Wade all his "right, title, and interest in and to one lot of ground and improvements in the First district of this city, in the square No. 324, bounded by Franklin, Liberty, Ohio, and Erato

streets, being the same property acquired at state tax collector's sale May 14th, 1887. [Signed] D. Negrotto, Jr. Balance due, sixteen **/100 dollars." No explanation is given of this receipt, but it will be seen that the sum of \$16.88 is the same amount which is mentioned in the act of transfer of October 1, 1887, from the state to R. C. Wade, as being the price of the adjudication of this property to R. C. Wade, and therein acknowledged to have been received by the tax collector from R. C. Wade. The probability is that Negrotto was the actual adjudicatee of the property at the sale of the 14th of May, 1887, but in consideration of the payment to him of \$25, and the payment by Wade of the price of adjudication, \$16.88, Negrotto permitted the transfer to be made by the tax collector directly to Wade.

The special feature of this case is that the state, after having caused the property to be adjudicated to itself on January 17, 1885, and February 4, 1885, for the taxes of 1881 and 1882, assessed in the name of Sarah Jane Dunbar, subsequently ignored the adjudications to itself, and the title acquired thereunder, and proceeded as a creditor or quasi creditor against this same property for the taxes of 1886, as assessed in the name of Sophia Wade, and sold this property to a third person, R. C. Wade, who, under the title so conveyed, took possession of the property, and has held it ever since. The evidence of this fact is shown by a copy of the act of transfer to R. C. Wade, annexed to a bill of exceptions reserved by plaintiff in injunction to the refusal of the district court to allow said act to be introduced, on objection made that the act did not show on its face a recital that all the taxes then due on the property had been paid, as required by section 73. We think the act should have been permitted to be introduced in evidence, leaving its effect to be ascertained afterwards. It was unquestionably true that it was under the adjudication so made, whether rightly or wrongly made, that R. C. Wade took, and has ever since held, possession of the property, and that the act evidences correctly the facts stated therein. If the facts stated left the adjudication without effect to convey title, still it left defendant's subsequent possession to rest on color of title; and that he was permitted to show by and through the act. As the basis or commencement of defendant's claim, she was authorized to show it and have it passed on. The question is whether the state, having caused this property to be transferred to a third person, a vendee, by proceedings directed by itself against this property as a creditor for taxes assessed in 1886, not in the name of Sarah J. Dunbar, but of Sophia Wade, could, after permitting the vendee to take possession under his title, to pay taxes on it for several years under this title, suddenly, without notice to the vendee of the existence of prior taxes, or any demand upon him or notice of intended sale, have the property advertised and sold, not for any taxes due by

the vendee, R. C. Wade, or Sophia Wade, but by Sarah J. Dunbar, as far back as 1881 and 1882, the payment of which very taxes the state had enforced by sale and adjudication made to itself a number of years before. It will be perceived that the transfer to R. C. Wade was made through proceedings as a creditor, acting as against a third person's property, while the transfer by it to Negrotto was in the capacity of an owner, selling property belonging to it to recoup itself for a payment of the taxes in lieu of which it had been forced to take the property. If the state had sold this property to R. C. Wade in 1887, acting avowedly in so doing as an owner, as it did subsequently in attempting to sell to Negrotto, the position of affairs would be very different from that which is presented now. R. C. Wade took possession of the property, "under color of title," at least, through proceedings inaugurated by the state itself, substantially against a declared debtor to the state. It has been held in undisturbed possession ever since, until disturbed by a party claiming "ownership" of the same, under an "ownership" thereof by the state at the time of the sale to R. C. Wade. This particular proceeding was initiated by a demand for "possession" of the property, but the action is clearly a "petitory" one, directed against the party in possession. The petition of the Gulf States Land & Improvement Company contains none of the allegations essential to a "possessory" action. Plaintiff demands possession based upon an asserted title. The title is based upon an extrajudicial proceeding to which the defendant was in no way privy, and she cannot be deprived of her rights by summary proceedings for mere possession. The plaintiff, like any other plaintiff in a petitory action, must rely upon the strength of his own title, not upon the weakness of that of his adversary. We do not think that the title he advances can stand, based, as that title is, upon an assertion of ownership of the same property in the state on the 20th of June, 1889. We do not think the state can legally disregard its own proceedings in 1887. It is true the state cannot be called directly into a suit in warranty, but where it has undertaken to transfer or convey to a third person rights inconsistent with, and clashing with, rights already conveyed, through its own instrumentality and action, to another, and this transferee attempts, by petitory action, to enforce these rights so attempted to be conveyed, he can be successfully held in check through the maxims "*Quem de evictione tenet actio*" and "*Nemo plus iuris*." A person is not permitted to seize certain property as belonging to his debtor, sell it to a third person, receive from the purchaser the price of adjudication, deal with him afterwards repeatedly as owner, and then afterwards, either personally or through some one holding under him, bring a petitory action to recover the property on the ground that, at the time of the seizure and sale, the property already belonged to him,—and all this without

any attempt to bring about a *restitutio in integrum*.

There are two facts to be additionally noted in connection with what we have said. The first is that the act of 1886, under which the property was sold to R. C. Wade, did not call for the assumption by the purchaser of antecedent taxes, as does the act of 1888. Payment of price of adjudication conveyed title. The second is that the act of 1888, under which this property was attempted to be sold to Negrotto after Wade had acquired title in 1887, limits the sales to be made under it to properties which had been adjudicated to the state and not disposed of by it. This property had unquestionably been disposed of by the state when attempted to be sold, as owner, in 1891,—not disposed of, it is true, as owner, but as a creditor. The mere method of disposition did not take the property out from its position of nonliability to sale under the provision of the act of 1888. We think the judgment correct, and it is hereby affirmed.

On Application for Rehearing.

(Feb. 6, 1899.)

When the state has become the adjudicatee of property sold at tax sale, it is not obliged to take immediate possession, but may permit the original owner or others to hold possession of it. If the former owner does not redeem it, the state may, under legal authority, sell this property, as any other owner could do, on such terms and conditions as it sees fit. The act of 1888 authorizes it to sell at auction the properties held by it as adjudicatee, upon the condition that the purchaser shall pay all taxes, state, parish, and municipal, existing on them at the time of the sale of the same, and making the vesting of title in the purchaser conditioned upon the fact of payment. Sales of this kind are sometimes spoken of as "tax sales"; but the term is misapplied. A tax sale is a sale made of property, proceeded against by the state as belonging to some one other than itself, in enforcement of taxes due by that property and its owners. The sales in question, though they may result in placing in the treasury an amount equal to the amount of taxes which would have been on it had the property belonged to some one else, are not made in the enforcement of taxes; for there are, in reality, no taxes upon it, as the property of the state itself is not taxed. The declaration in the advertisement of sale that the purchaser should pay all the taxes upon it at the time of the sale is nothing more than a declaration as to the amount the property must bring at the sale, and the character of the sale is not other or different than it would have been had the tax collector made a calculation of the amount of these taxes, and, omitting all reference to taxes, had declared that the purchaser should pay that particular amount as a condition to obtaining title. Had the state, being, as it was, the adjudicatee of this prop-

erty through the sales made in enforcement of the taxes of 1880 and 1881 as the property of Mrs. Sarah Dunbar, sold the property, as owner, to R. C. Wade, and had he failed to make payment as required by the terms and conditions of the sale at which he purchased, and had the state then, as being owner of the same, sold the property to Negrotto, we would have had before us a case identical with those of *Martinez v. State Tax Collectors*, reported in 42 La. Ann. 677, 7 South. 796, and *Remick v. Lang*, reported in 47 La. Ann. 914, 17 South. 461, and our decision would have been controlled by the principles announced in these cases; but the state did nothing of the kind. Instead of selling the property as being the owner thereof, it proceeded as a quasi creditor against it as being the property of Sophia Wade, and as owing under her ownership the taxes of 1886, and caused the property to be adjudicated to R. C. Wade, a third party, so far as the record shows. It gave a deed of the property to R. C. Wade, who went into possession as owner under this title, and has (himself and his heirs) held possession ever since, paying taxes, which the state received. This title has never been set aside or attacked, nor has it been shifted back from Wade to the state by any proceedings whatever. After vesting title in Wade under proceedings thus taken out by itself, the state, ignoring this title, undertook to sell the property, as if these proceedings had never taken place, and as if it had been continuously the owner of the property, to Negrotto, who thereupon instituted this petitory action against Wade. Wade met the attack by setting up and showing the fact that he held title to this property under proceedings which the state (Negrotto's own vendor) had itself instituted and carried on as a quasi creditor against it as the property of Sophia Wade, and which proceedings culminated in a sale at which he had bought; and he contended that this title, antedating that of Negrotto, effectually disposed of any title subsequently attempted to be made by the state to its prejudice, under a claim of ownership as existing at the date of his purchase. In our original opinion we held this contention to be well founded, and rejected plaintiff's demand. We were of the opinion that the situation was that of a person who, having a claim against B., should cause certain property to be seized as belonging to him, and, having caused it to be adjudicated to C., should thereafter sell the same property to D., under the pretense that, at the time of the adjudication to C., it was itself the owner thereof, and D. should bring a petitory action for the property under a title so conveyed to him. We held that the seizing creditor himself would be estopped from claiming ownership adversely to C. under such circumstances,—that his action would be repelled by his own obligations as a warrantor, and that the same estoppel which would bar any claim on his part would bar

any claim of a person holding under him. We see no reason to doubt the correctness of that conclusion. Rehearing refused.

(51 La. Ann. 228)

STATE v. FOURCHY. (No. 12,895.)

(Supreme Court of Louisiana. Feb. 6, 1899.)

EMBEZZLEMENT—AMOUNT—JURY—COMPETENCY—CHALLENGES—EVIDENCE—REBUTTAL—ARGUMENT OF COUNSEL—HARMLESS ERROR.

1. An instruction given by the court in the case of a person charged with embezzlement that, "if any part of the funds charged to have been embezzled has been proven to have been embezzled beyond a reasonable doubt, the jury must convict," is not erroneous. Neither the commission of nor the punishment for the crime of embezzlement depends upon the amount or value of the thing embezzled, and the charge was authorized to be given by section 1061 of the Revised Statutes.

2. The district attorney is not called upon to know or anticipate the special defenses which a defendant may set up. He has to await their development on the trial, and repel them if he can. It does not follow, because testimony offered by him for that purpose may have a tendency to incidentally strengthen the state's own case, that it is any the less rebuttal testimony.

3. While a prosecuting officer has the right to press upon the jury any view of the case fairly arising from the testimony, he should not seek to have the jury accord to testimony which he himself had offered, and had not received for a limited, specific purpose, an effect entirely beyond that which he had declared would be its legitimate scope. His doing so will not, however, be ground for reversal, unless the court is satisfied that defendant has been prejudiced thereby.

4. If the court erroneously overrules defendant's challenges for cause, and thereafter he excludes the obnoxious jurors by peremptory challenges, he can assign the ruling of the court for error, if it appear that, before the jury was sworn, his quiver of peremptory challenges was exhausted. In such case there is room for the presumption that the ruling of the court may have resulted in leaving upon the panel one or more obnoxious jurors whom he might, but for the ruling, have excluded by peremptory challenge.

5. Answers given finally by a juror on his voir dire to questions propounded to him by the district judge, differing from those first given, and which had shown him utterly incompetent, are entitled to little weight when they have been changed after the judge has threatened the juror with proceedings for contempt of court, because of his original answers. Such a juror should not be placed upon the panel.

Blanchard, J., dissenting.

(Syllabus by the Court.)

Appeal from criminal district court, parish of Orleans; James C. Moise, Judge.

Paul L. Fourchy was convicted of embezzlement, and he appeals. Reversed.

The defendant was indicted for embezzlement, convicted, and sentenced to imprisonment at hard labor for two years. He appealed. His grounds of complaint are embodied in six bills of exception.

The first error urged is the action of the court in refusing to maintain defendant's challenge for cause of the eighth juror drawn from the box, one J. Barrere; thus compelling a peremptory challenge. The bill of exceptions

having reference to this matter is as follows: "After the state and the defendant had announced to the court that they were ready to proceed with the cause, it was then ordered that the crier of section B of said criminal district court proceed to draw a jury from the box, and in open court, from the panel of jurors duly impaneled for the May term of said section B; and the said jurors, as drawn from said box and in open court, were each sworn on his voir dire touching his qualifications as a juror in this cause; and one J. Emile Barrere was drawn as the eighth juror from said box, was duly sworn on his voir dire, and, after being examined by the assistant district attorney, the said juror was tendered by the state to the defendant, and thereupon the defendant, by his counsel, cross-examined the said juror, and propounded to him the questions which, with the answers of said juror, are annexed hereto, and made a part of the bill of exceptions, and are as follows, to wit: 'J. Emile Barrere, after being examined by the state on his voir dire, and tendered by the state, was then cross-examined by Mr. Henriques, of counsel for the defendant, as follows: Q. If you were taken as a juror in this case, would you require the state to prove his guilt, or would you require the accused to prove his innocence? A. Well, I would require him to prove his innocence. Q. Do you mean that you would require him to prove that he was not guilty? A. Yes, sir. Q. Well, the law says that every man who is charged with an offense is presumed to be innocent, and the state, who brings the charge, must prove the guilt of the accused, and must prove his guilt beyond reasonable doubt. A. Well, if the state proved it, all right. Q. Now, that being the law, if you were taken as a juror in this case, would you require the state to prove his guilt, or would you require him to prove his innocence? A. I would have to see him prove his innocence. Q. You would require him to prove his innocence? A. Yes, sir; fully. Q. And you know the meaning of your answers? A. Yes, sir. Q. Then, unless he proved his innocence to you, you would not render a verdict in his favor, would you? A. No, sir; I could not. Q. You could not? A. No, sir. Q. And this principle of law, which is law, and I have stated to you, would have no effect with you at all? You would require him to prove his innocence? A. Yes, sir. (Challenged for cause.) By the Court: Q. Would you render a verdict in this case according to the law as given you by the court, and the evidence you heard from the witnesses? A. Yes, sir. Q. Because your answer just now indicated that you would not do that. A. I mean that, if the evidence found him guilty, I would find him guilty. Q. I ask you, if you were to take your oath to try this cause according to the law as given you by the court and the evidence of the witnesses given on the trial, would you do it? A. I said he would have to prove his innocence. Q. Then you would not act according to law? A. No,

sir. Q. I will have to send you down for contempt if you talk that way to me. A. I mean to say— Q. I expect you are dodging to get off this jury. A. No, sir; I am not. Q. I do not see how you can say you would try this case according to law and the evidence, and then say he would have to prove his innocence. A. I mean to say I would do what is right, to the best of my ability. I mean to say that the accused should be proved not to be guilty. Q. I am telling you what the law is. The law is that the state must prove the guilt of the accused, and that he is not required to prove his innocence. That is the law. Now, when the court gives you that law in charge, I ask you if you can render a verdict according to that law, and according to the evidence you hear on the trial of the cause. A. Yes, sir. Q. I thought you would go according to your opinion, and not according to law? A. I was ignorant of that fact. Q. Now, you know the jury must render a verdict according to law. That is the oath you take. Can you do it? A. Yes, sir; I would give the accused a fair trial. Q. I am not speaking about that. I am speaking now of the law and the evidence. You understand now that you must render a verdict, under your oath, according to the law as given you by the court, and the evidence you hear from the witnesses. I tell you the accused is not required to prove his innocence; is not required to put a single witness on the stand; and if, after the evidence is all in, the state fails to prove his guilt beyond a reasonable doubt, the jury must bring a verdict of not guilty. Can you do that? A. Yes, sir. The Court: I believe that the juror was under a misapprehension, and that he is a competent juror. Mr. Henriques: I challenge him for cause. The Court: Challenge for cause is overruled. Mr. Henriques: I challenge him peremptorily, and reserve bill to your honor's ruling, and make the testimony of the juror a part of this bill.' " The bill having been made, these recitals proceeded further, as follows: "The juror Emile Barrere was the eighth juror tendered to defendant for acceptance or rejection. When this juror was tendered, defendant had not exhausted his peremptory challenges, but, before the jury was completed in the cause, and before the last juror was sworn therein, the defendant had exhausted his challenges." The judge's statement added to the bill was as follows: "Per Curlam. The entire examination of the juror is not in the record. He had previously answered all questions of the district attorney and counsel for the defendant, disclosing his fitness and competency and freedom from all bias or prejudice. It was only when a question of law—the rule as to the burden of proof—was put to the juror that he answered wrong, and persisted in the error, after the instruction of the court, in a manner to arouse in the mind of the court a suspicion that he was deliberately attempting to evade jury duty. A further examination of the juror

dispelled this suspicion, and convinced the court that the answer was more from ignorance than a desire to evade jury duty, and this was quite natural, since the question propounded was one of pure law, requiring instruction and explanation."

Second Bill.

Defendant's second bill of exceptions was reserved to the action of the district court in respect to a witness named Mirabel Le Blanc. The bill recites: That, after the defendant had gone to trial upon a plea of not guilty, the district attorney, in support of the prosecution, placed two witnesses—first, Emile J. Le Blanc, and, next, Charles J. Theard—upon the stand, and, after said witnesses had been examined in chief and cross-examined by the defense, the case closed. That thereafter the defendant, in his own behalf, placed the witness Mandeville on the stand, and subsequently testified himself, and then announced that he rested his case. That this witness Mirabel Le Blanc was then sworn as in rebuttal by the state, and he was asked "whether he knew of any business transaction between accused and his son, Emile J. Le Blanc" (the party whose money was alleged to have been embezzled). That the defendant objected that in so doing the district attorney was not proceeding regularly; that he could not divide up his case; that he should have put the accused in possession of all the evidence he had, so as to let him know what he would be called upon to defend; that he could not put in evidence in rebuttal that which might be evidence in chief. That thereupon the court stated that the question was put in that way to show it was rebuttal. That defendant's counsel replied "that the question was not shaped properly," whereupon the court permitted the district attorney to ask the witness "if he remembered that transaction between his son and Mr. Fourchy." That thereupon the defendant submitted to the court "that the evidence sought to be elicited from the witness was not rebuttal testimony." That the district attorney replied "that the defense set up here was that it was a loan." That the court then asked, "What does the state propose to prove by this witness?" and the district attorney replied, "To prove that it was not a loan." That the witness thereupon answered the question propounded to him, and defendant reserved a bill to the question, and to the answer thereto, and to the court's question to the district attorney. That all this took place in presence of the jury. Defendant's objection to the question propounded by the court to the district attorney was that the witness had not testified; that the matter submitted to the court was whether the question propounded to the witness by the district attorney was a legitimate one or not; that the court's question and the district attorney's answer might have a tendency to influence the jury, and prejudice the case of the

defendant. The court's statement on this point is that the objection urged by the defense was that the question asked was not shaped so as to obtain evidence in rebuttal; that it would open some new question. The court assumed the first question objected to was propounded merely as preliminary, to lead the witness to the particular facts to be ascertained as evidence in rebuttal. The question by the court to the prosecuting officer was for the purpose of determining whether or not the facts sought to be proved were really evidence in rebuttal. To determine this, the court had either to hear the evidence of the witness, or, by the more convenient method, to secure the information from the district attorney. The other objections urged by defendant in the bill were that the question propounded did not seek to rebut any evidence offered on behalf of defendant; that, if the object of the inquiry or question propounded to the witness was to contradict the defendant, who was the only witness that had testified in his own behalf, then the proper foundation should have been laid by interrogating him as to the time, place, and circumstances connected with the alleged conversation or statement that is now attempted to be disproved by this witness. In respect to the other objections the court stated: "The defendant swore as a witness in his own behalf that the money he received from Le Blanc was a personal loan to himself, without security, and not for investment in mortgage paper. He swore he never used the word 'mortgage.'" In his testimony the following questions were asked, and answered by him as follows: "Q. Did you get that money from him stating that you intended to invest it in mortgage paper? A. I never told him anything of the kind; never told him a word of mortgage paper. It was a loan to me. He pretended to have confidence in me, and he made that offer. Q. At the time you received this money from Mr. Le Blanc, what was the understanding between you and him about this money? A. It was a loan to me. Q. Did you at any time tell Mr. Le Blanc or offer him a mortgage on the Sazarac or Absinth House? A. Never did in the world. Don't know anything about the title to either property. I don't know absolutely what the gentleman referred to. At that time I used to own a property on the bayou. Q. Did you say anything to him about a loan on a piece of property in the neighborhood of yours, worth three thousand dollars? A. Never in the world. Q. At the time you received this money from Mr. Le Blanc, what was the understanding? A. About the money? Q. Yes. A. That the money was to be returned to him in one year. Q. Who was it loaned to? A. It was loaned to me. Q. To you personally? A. Yes, sir. Q. At the time you got this money, was anything said about the money being invested in mortgage paper? A. Not a word, sir; not a particle of it, sir." Mr.

Mirabel Le Blanc's testimony, as far as it goes, tends to rebut these statements. It was too insignificant to have been offered in chief, and was properly offered in rebuttal. To show this, the entire testimony taken on the trial is made part of this bill.

Third Bill.

In defendant's third bill of exceptions he complains of the district attorney's making use in his opening argument before the jury of the expression that "honest men do not be indicted by the grand jury." The bill recites: That, as soon as these words were uttered, counsel for defendant requested the court to have said words so uttered stricken out. That, before the court ruled on the question, the district attorney, addressing the court, said, "I refer, if your honor please, to the facts as I find them now;" and the court, in presence of jury, then, and in answer to the objection made by counsel for defendant, said: "The court declines to interfere in this matter on the ground that the argument of the district attorney does not refer to the question of the guilt or innocence of the accused, but refers to the question of his veracity." In reference to this matter the court states that the stenographer's official report of what transpired was made part of the bill. That all of Mr. Finney's argument was not taken down. That when a single isolated sentence, standing alone, was urged as an objection, and the court did not have the benefit of the shading, tonings, and modifications which preceded the remark, it presented a more formidable showing. That, at the time the statement was made, Mr. Finney was arguing defendant's credibility as a witness. His remarks were temperate, and free from invective or vituperation. The statement made was an inference drawn from facts in the record, the defendant having admitted that he was five times indicted for embezzlement, and the cases were still pending against him in the criminal district court. His counsel offered and introduced one of these in evidence. These various indictments were offered for the purpose of impeaching defendant's credibility as a witness. Mr. Finney's argument was specially directed to that end. The court charged the jury as follows upon the subject: "If any evidence has been offered in this case tending to show that the defendant has been charged with any other crime, such evidence has been offered for the purpose of impeaching his credibility as a witness, and the jury should confine it to that purpose. No man should be convicted of one crime because he is charged with another. You are therefore instructed that, if evidence of this character has been introduced, it must be considered only in connection with the veracity of the witness, and must not affect his guilt or innocence." Mr. Finney did not, at that time, refer to the guilt or innocence of the prisoner. His remarks, when taken with all that was said, did not mean that indictments by grand juries were evidence of guilt, but that persons so indicted continually could

not be honest in their statements. A general and argumentative proposition may be put in the form stated, precisely as a man may argue interrogatively without intending that he should be answered. Upon this view the court did not think it improper to argue dishonesty in speech from a given state of facts in the record. The ruling of the court was made in the presence of the jury, and fairly indicated to them the interpretation to be placed upon the statements; that the argument was directed against defendant's veracity, and not to his guilt. But to show that they were further safeguarded from any prejudicial or unfavorable interpretation from the objectionable remark as to indictments, if improper,—which is not conceded,—the court charged the jury: "The jury are instructed by the court that the indictment in this case is a mere accusation or charge against the defendant, is not of itself any evidence of defendant's guilt, and no juror should permit himself to be to any extent influenced against the defendant because of its having been returned to the jury as a true bill." Mr. Finney ceased after objection, and proceeded to argue on a different subject. I do not think defendant was prejudiced in the least.

Fourth Bill.

In defendant's fourth bill he complains of that portion of the charge of the court in which it instructed the jury that, "if any part of the funds charged to have been embezzled have been proved to have been embezzled beyond a reasonable doubt, the jury should convict." The court cites, as authority for the charge, section 1061 of the Revised Statutes.

Fifth Bill.

Defendant complains in his fifth bill of exceptions to the refusal of the district court to give the following special charge, which he requested should be given to the jury: "The presumption of innocence is a presumption of law established in favor of all accused. It is evidence introduced by the law in his behalf. It is one of the instruments of proof going to bring about the proof from which reasonable doubt arises." The court states as its reasons for not giving the special charge that it was covered by the general charge it had given to the jury.

Sixth Bill.

In his sixth bill defendant complains of the action of the court in overruling his motion for a new trial. In defendant's motion for a new trial he urged that the verdict returned was contrary to law and the evidence, and assigned as errors committed to his prejudice the matters and things set forth in his various bills of exception. In his fourth ground for a new trial, referring to the overruling of his challenge for cause of the juror Barrere, he averred that the court's ruling compelled him to exhaust his peremptory challenges; that it worked great injury to him, and deprived him of a right he was vested with, to his great injury.

Henriques & Dunn, for appellant. Robert H. Marr, for the State.

NICHOLLS, C. J. (after stating the facts). The instruction given by the court to the jury that, "if any part of the funds charged to have been embezzled has been proven to have been embezzled beyond a reasonable doubt, the jury should convict," was not erroneous. Neither the commission of, nor the punishment for, the crime of "embezzlement," depends upon the value or amount of the thing embezzled. *State v. Thomas*, 28 La. Ann. 828. The charge was made with reference to a verdict of guilty as responsive to the charge "actually made" of embezzlement; not a possible verdict of guilty as for "larceny" under the indictment. Section 1061 of the Revised Statutes declares that the allegations of the indictment, as far as regards the description of the property, shall, "in cases of embezzlement, be sustained by proof that the offender embezzled any piece of coin or bank note, or any portion of the value thereof."

We see no force in the objections urged in defendant's second bill of exceptions, touching the testimony of the witness Mirabel Le Blanc, which was permitted to be introduced, over appellant's contention that it was testimony, not in rebuttal, but in chief, and which should have been brought out by examination of the witness before the state had closed its case on its original direct evidence. Nor do we see any force in the complaint made of the question asked by the judge of the district attorney as to what "was intended to be proved by the witness," and of the answer given to that question, "that the defense set up here was that it was a loan" (the transaction between defendant and Emile J. Le Blanc), and "the object of the testimony was to prove that it was not a loan." We have several times had occasion to say that where one of the parties to a suit offers testimony apparently irrelevant, or testimony which is admissible only for certain purposes, or under certain contingencies, it is his duty, when tendering the testimony, to announce the object and purpose had in view, so as to enable the court to determine primarily whether it would be admissible at all, and next to enable it, in its subsequent supervision of the case, and in its charge to the jury, to see that proper limitations should be observed as to the scope and effect of the testimony. It would have been right and proper for the district attorney, without question from the court, to have made the same announcement as that which he did when questioned. When objection was made by the defendant to the line of examination to which he surmised the witness would be subjected, it was necessary for the court, for the proper determination of the force of the objection, to know what the exact situation was and would be. In *State v. Bartley*, 34 La. Ann. 150, a question having arisen as to the introduction in evidence

of a confession proposed to be offered against the defendant, it was complained that the witnesses touching the character of the confession were examined before the jury, and that the ruling of the court as to the admissibility of the confession required his passing on a question of fact and the credibility of witnesses in presence of the jury, to the prejudice of the accused. In reference to the matter, we said: "The record does not show that the witnesses testified touching the confession in the presence of the jury, and, if they did, as the judge was bound to decide the question of the admissibility of the confession,—a question depending solely on the character of the confession, whether voluntary or not,—we cannot well see how the effect of that ruling on the jury, though it might have been incidentally on a question of fact pertaining to the main issue, or on the credibility of witnesses, was to be avoided." We ourselves do not see how the question asked by the court could possibly have prejudiced the defendant. What was said was said in the presence of the jury, but not for the jury, or to affect its action in any way. *People v. Glassman* (Utah) 42 Pac. 960. In *State v. Spencer*, 45 La. Ann. 1, 12 South. 135, *State v. Boswell*, 45 La. Ann. 1158, 14 South. 79, and *State v. Pruett*, 49 La. Ann. 299, 21 South. 842, we had occasion to refer at some length to the character of rebutting evidence and rebutting testimony in connection with charges made that testimony which properly should have been introduced by the state in making out its case by examination of the state's witnesses in opening its case had been held in reserve to be improperly used on a false claim that the testimony was rebutting evidence. There can be no doubt that it is the duty of the district attorney, in the interest of fairness to an accused, in the absence of special reasons controlling his course in that respect, to place at once upon the stand all the witnesses upon whom he relies to establish defendant's guilt; but it frequently happens (as we said in *State v. Spencer*, 45 La. Ann. 1, 12 South. 135) that such departure from the general rule has to be made from motives entirely foreign from any desire to obtain a conviction through finessing as to order of proof. It also not infrequently happens that counsel of accused erroneously conclude that evidence offered and received as rebuttal is not such in law and fact, because it may have a tendency to confirm and corroborate the witnesses of the state who had been first introduced for the purpose of establishing guilt of the accused. In *State v. Boswell*, 45 La. Ann. 1158, 14 South. 79, we said: "The fact that, after the defendant had closed his case, the state recalled some of its witnesses, and interrogated them as to matters which might have been relevantly and properly introduced originally as part of the state's evidence in chief, does not necessarily affix to that testimony the character of new and direct criminative evidence in chief." In *State v. Pruett*,

49 La. Ann. 299, 21 South. 849, we quoted from Rice on Evidence, and the authorities cited by him, a sentence in which rebutting evidence is referred to as meaning, "not merely evidence which contradicts the witnesses on the opposite side, but evidence in denial of some affirmative fact which the answering party is endeavoring to prove." The district attorney, in criminal cases, has done his duty when he has offered all the evidence in his power and under his control which is necessary, if not explained or disproved, to establish the guilt of the accused. The plea of not guilty opens wide the door to defenses of all kinds. The prosecuting officer in most instances is ignorant of the peculiar lines or special grounds of defense which will be set up. He is not bound to know or to anticipate them, but is authorized to await their development on the trial, and to disprove them if he can. It does not follow that, because in the counter attack matters may become necessary to be shown by way of breaking down the defendant's case as set up by him, which have a tendency incidentally to strengthen the state's own case, the testimony is any the less rebuttal testimony. It may be that an accused may limit his defense so closely to successful proof that a particular fact had occurred at a particular time and place mentioned as to limit the prosecution in reply to disproof of the testimony going to show that that particular fact had happened at that particular time and place. Such seems to have been the facts of one of the cases cited by counsel of defendant. The range and scope of the state's testimony in rebuttal depends so much upon the range and scope of that offered by the defendant that it would be impossible to lay down any fixed rule in advance by which to be guided in particular cases. We think the question asked of Mirabel Le Blanc, and the answer given by him, though apparently of little importance in the case, were none the less fairly in rebuttal of defendant's own account of matters as they transpired.

Defendant complains that the district attorney, in his opening address to the jury, made use of the expression that "honest men do not be indicted by the grand jury." In *State v. Johnson*, 48 La. Ann. 90, 19 South. 213, we said that the prosecuting officer had the right to press upon the jury any view of the case arising out of the evidence; adding that, to justify the court in setting aside the verdict of a jury on the ground of improper remarks of a district attorney, it would have to be very thoroughly convinced that the jury was influenced by such remarks, and that they contributed to the verdict found; that, were it to pursue any other course, the energies of counsel of accused parties would be constantly directed to finding and seizing upon flaws in the arguments of the prosecuting officer, and pressing upon an appellate court, which neither saw nor heard the district attorney, nor saw the jury he addressed, nor was in-

formed as to the testimony in the case, that the conviction of their clients was not due to their guilt, but to improper conduct on the part of counsel for the state; that matters of that kind could, as a general rule, be left to the supervision and control of the district judge, a sworn officer of the law, standing utterly impartial between the accused and the state. In the case at bar the prosecution had been permitted without objection to introduce in evidence another indictment which had been returned against the defendant for embezzlement, but expressly limited, as to its purpose and proposed effect, to an attack upon the credibility of the accused, who had taken the stand in his own behalf. Whether it would have been admissible for that purpose had objection been made, we need not now consider, as the defendant acquiesced in and consented to its use for that particular purpose, and he can scarcely complain that the district attorney and the court should have taken the same view of the matter which he did himself. If, in point of fact, the jury had drawn, from the fact of the finding against the accused of the indictment which had been so placed before them, a presumption of guilt by considering it as criminative evidence before them, and not merely as "impeaching" evidence, they would have been clearly at fault, and the district attorney would have been clearly wrong had he attempted to fix and impress upon them that they were authorized to do so. A prosecuting officer has the right to press upon the jury any view of the case fairly arising out of the testimony, but he should not seek to have the jury accord to evidence which he himself has offered for a specific, limited purpose, and which he doubtless may have succeeded in having received in evidence without objection, precisely because of that announcement as to its purpose and object, an effect entirely beyond that which he had himself declared would be its legitimate scope. While it would not be safe practice to tie the prosecuting officer down to an absolutely correct appreciation of the exact scope of the evidence in a case, he should certainly know that testimony introduced for a special purpose could not properly be made to extend beyond the same. We are informed by the court that the expression complained of was made use of by the district attorney in arguing as to the "credibility" of the accused, and not as to his "guilt," and that, had his whole argument been brought up in the record, that fact would have been apparent. The district attorney was unfortunate in the use of the word "honest" if he intended to convey the idea of "untruthfulness," for the inference naturally drawn by an ordinary jury from the fact that a second indictment for embezzlement had been found against the same party would be, not that the party was unworthy of belief as a witness, but that he was a dishonest man; and the use by the district attorney of the word "honest" in connection with that matter

was calculated to fix and confirm such an inference or presumption. The district judge, in his charge, finally placed the subject properly before the jury, but we think he should have at once interfered when objection was made, and explained clearly to the jury what the legal situation was. In *State v. Johnson*, from which we have quoted, we said: "The district judge in this case saw the jury, heard what the district attorney said, and listened to all the evidence adduced. If he thought that the verdict was not just, but based upon prejudice resulting from anything said by the district attorney, we would be slow to believe that he would have overruled a motion for a new trial, or let the verdict stand." The same remarks are applicable to the case at bar, but we reach the conclusion, in the present case, that defendant's complaint was not of sufficient gravity to justify a reversal, with very considerable hesitation.

The last complaint of defendant to which we direct our attention is that in respect to the action of the district court in overruling his challenge for cause of the juror Barrere, resulting in his having to challenge him peremptorily. Coupled with the bill of exceptions reserved by appellant on this subject, it was alleged in his motion for a new trial, which the court overruled (to which ruling he also excepted), that before the jury was sworn he exhausted his peremptory challenges, and that by the course pursued by the court he had been injured and prejudiced. The attorney general contends that the question involved in these bills should not be considered by this court, for the reason that the juror Barrere did not sit upon the trial, and that there was no affirmative showing through testimony that any other objectionable juror had done so, or that defendant had suffered injury by the court's action; that appellant should affirmatively show injury as well as error. He cites, in support of that position, *State v. Garig*, 43 La. Ann. 365, 8 South. 934, *State v. Creech*, 38 La. Ann. 480, and *State v. Tibbs*, 48 La. Ann. 1278, 20 South. 735. An examination of the case of *State v. Tibbs* will show that it was decided adversely to the accused, for the reason that he had not, with any reasonable certainty, shown in his bill of exceptions upon what legal grounds he had objected to the juror Bernard, nor disclosed the facts upon which the court based its ruling in accepting him. The juror was not objected to for reasons affecting his personal competency, but for some supposed defect in his name. We stated explicitly that we could not grant appellant relief, for the reason "that we could not deal with bills of exception" by reaching objections by inference. The reliance of the accused on appeal was in establishing that the court's ruling in accepting Bernard was legally wrong, and no question of injury, "either legal or actual," as resulting therefrom, was pressed. The court, in its opinion, after passing upon the case, alluded incidentally to that fact, but

based no action whatever upon it. It referred to a similar condition of affairs as having been alluded to by the court in *State v. Creech*, 38 La. Ann. 480. By reference to the opinion in *State v. Creech* it will be seen that the court there said "that it had not been suggested that at the stage of the proceedings when the challenge for cause was overruled, nor even during the whole trial, the accused had exhausted his peremptory challenges." The case was decided upon the absence, not only of any showing, but even of any suggestion, that the accused had exhausted his peremptory challenges. It is obvious, therefore, that the question we are considering now was not before the court. The court refused relief in *State v. Garig* for the reason that defendant's peremptory challenges had not been exhausted, holding that, where several defendants, jointly indicted, were on trial, the peremptory challenges of all of the defendants must have been exhausted before a ruling of the district court erroneously accepting a juror, and forcing defendant to exercise one of his peremptory challenges, could be assigned as reversible error. In 1 *Thomp. Trials*, § 15, the author says: "If the court erroneously overrules a challenge for cause, and thereafter the challenging party excludes the obnoxious juror by a peremptory challenge, he cannot assign the ruling of the court for error, unless it appear that, before the jury was sworn, his quiver of peremptory challenges was exhausted; in which case there is room for the inference that the erroneous ruling of the court may have resulted in leaving upon the panel other obnoxious jurors whom the party might, but for the ruling, have excluded by peremptory challenge. Some courts therefore hold that it is enough in such a juncture to show that his peremptory challenges were exhausted before the jury was sworn." As courts holding this position, the author cites: *McGowan v. State*, 9 Yerg. 184; *Burrell v. State*, 18 Tex. 718; *Johnson v. State*, 27 Tex. 764; *Bowman v. State*, 41 Tex. 417; *Lester v. State*, 2 Tex. App. 482, 443; *Carroll v. State*, 8 Humph. 315; *Robinson v. Randall*, 82 Ill. 521; *People v. Gaunt*, 23 Cal. 156; *People v. Gatewood*, 20 Cal. 146; *Wiley v. Keokuk*, 6 Kan. 94; *People v. McGungill*, 41 Cal. 429; *Morton v. State*, 1 Kan. 468; *Stout v. Hyatt*, 13 Kan. 232; *State v. McQuaige*, 5 S. O. 429; *Tuttie v. State*, 6 Tex. App. 556; *Ogle v. State*, 33 Miss. 383; *Brown v. State*, 57 Miss. 424; *Mimms v. State*, 16 Ohio St. 221; *Erwin v. State*, 29 Ohio St. 186; *State v. Bunger*, 14 La. Ann. 461; *State v. Caulfield*, 23 La. Ann. 148; *State v. Lartique*, 29 La. Ann. 642, 646; *State v. Hoyt*, 47 Conn. 518. The author adds that: "Other states take what seems to be the better view,—that it must also appear, not only that his peremptory challenges were exhausted, but that some objectionable person took his place on the jury, who would have otherwise been excluded by a peremptory challenge." When the trial court, in a criminal case, by overruling a challenge for cause to a

juror, forces the prisoner at the bar to exercise one of his peremptory challenges, and when subsequently, before the jury is sworn, the accused has been obliged to exhaust all of his peremptory challenges, we think the accused on appeal has disclosed good ground for the reversal of the verdict against him by showing error in the ruling of the court, without the necessity of his affirmatively showing resulting injury from the court's action by forcing upon the jury a juror obnoxious to the accused. Defendant, under the provisions of an express statute of the state (section 997 of the Revised Statutes), had the privilege and right conferred upon him of peremptorily challenging, without showing cause, 12 jurors. The right to 12 peremptory challenges so conferred is an absolute one. The deprivation of the exercise of that right carries with it per se, as it does in every other case where the exercise of an absolute statutory right has been refused or made unavailable, the nullity of the proceeding in which the refusal has taken place. It is not a question of injury at all, further than the injury itself of denying the right. The denial of the right is itself the injury. If further and subsequent injury were deemed to be necessary to enter as a factor in the case, such injury would, *juris et de jure*, be presumed. The proposition here announced is, we think, so elementary as to need no special citation of authority to support it. We applied it in *State v. Pruett*, 49 La. Ann. 290, 21 South. 842, where we said, "The express statutory right granted to a defendant by the act cannot be denied because the exercise of it might be barren of results;" stating that neither the district nor the supreme court was permitted to speculate upon the subject. See, also, *State v. Jones*, 46 La. Ann. 1399, 16 South. 369; *State v. Baldoser* (Iowa) 55 N. W. 99; *State v. Ryan* (Iowa) 30 N. W. 397; *Ford v. Railway Co.* (Iowa) 75 N. W. 650.

The practical result of this action can be illustrated by supposing that, when the twelfth juror was tendered the accused for acceptance or rejection, he had, at that time, only utilized ten of his peremptory challenges. This would leave him with two challenges under his control. The twelfth juror being, we assume, obnoxious, he would peremptorily challenge him, leaving him one peremptory challenge to use against the party tendered in place of the twelfth juror, who had been challenged. This challenge he could exercise without any right on the part of the prosecution to know on what ground the thirteenth man was rejected. How would the case stand if, when the twelfth juror was tendered, the accused had exhausted eleven peremptory challenges? This juror being obnoxious, he could, as before, reject him, using his twelfth challenge for that purpose; but what would be the situation when the person tendered to replace the person so rejected was offered? No matter how obnoxious he might be, the accused would be forced to ac-

cept him, unless he could successfully show legal cause for exclusion. It will be seen at once that the accused would have been placed at a disadvantage by having no peremptory challenge under his control. Now, if these eleven peremptory challenges had been all used by the accused of his own free will and accord, the situation, though distressing, would be none the less perfectly legal, for he would have availed himself to the full extent of his legal right of twelve challenges; but this would not be the case if one of the eleven had been forced from him by an erroneous ruling on the part of the court. That erroneous ruling would not have the effect of impairing his right to have had the twelfth juror, who was actually and ultimately placed upon the jury, rejected, without question from the court. The ruling would have left that right intact, but illegally controlled through an error. "The act of the court" cannot be made to injure the accused, and force him into a position different from that he was entitled to hold. The accused was entitled to have had the thirteenth man tendered rejected without question, and that right he has never lost. He had it all through the trial, and he has it on appeal. He was not called upon, when he had, in point of fact, though not of law, exhausted his twelve challenges, to disclose that the last juror tendered was "obnoxious to him," and thus incur his ill will. In view of the action of the trial court, which was presumably correct, his mouth was closed, and he was forced to accept the situation until relieved on appeal by a declaration of the error of the court below. That error it is our duty to announce, and, by announcing it, to replace matters in the position they would have been had the error not been committed.

It is said that, the law having granted to the accused twelve peremptory challenges, the moment a single one of those twelve was improperly taken from him by forcing him to exercise it in respect to a particular juror whom he was entitled to have had rejected for cause, his statutory right of having twelve challenges would be at that very moment invaded, as much invaded as if the whole twelve had been withdrawn from him erroneously; that it would have been then and there demonstrated that thereafter he could only have eleven such challenges left; that if the mere invasion of a statutory right of the accused would per se entitle him to claim reversible error, then an error in overruling the challenge of one single juror for cause would entitle him to relief independently of the fact that he should in fact have exhausted the other eleven challenges; and that this result would be in the face of an unbroken line of decisions to the contrary. The error of the court in overruling a challenge for cause is not per se cause for reversal. Whether or not it so operates depends upon the facts of the case as they develop upon the trial of the cause, and upon the course adopted by

the accused. Should the accused fail to exercise his peremptory challenges entirely, or only exercise them partially, it is obvious that he could not urge that he had been deprived of a privilege which he had not exercised at all, or had only partially exercised. The invasion of his statutory right only takes place at the point when the right of peremptory challenge is denied or becomes inoperative, and when it is shown by the facts of the case that he had been unable to utilize and exercise freely and without hindrance (when he had attempted to do so) his right of twelve peremptory challenges. When he had failed entirely to exercise his peremptory challenges, or had only done so partially, the question of injury would not be left as a matter in doubt or of presumption, but absence of injury would have been affirmatively shown on the face of the record. Courts of justice have no right to refuse or to make unavailable rights or privileges conferred upon parties by the legislature. They can no more do this by erroneous action than by direct arbitrary action. The right of peremptory challenge was conferred for the express purpose of enabling parties accused of crime to reject from the jury persons whom they had reason to distrust for secret, undisclosed grounds, not sufficient to be made available as causes for legal challenge. Prisoners are not called on to state why or wherefore they reject, nor are they called on to incur the ill will of jurors, when powerless to challenge them peremptorily, by disclosing to the court that any particular juror or jurors actually serving on the jury were "obnoxious" to them. The jury sitting upon the trial may be "legal" jurors by the application of legal tests, and yet very obnoxious jurors for secret and undisclosed reasons. Accused are entitled to twelve peremptory challenges, to be freely exercised, without compulsion in any case from the court. The court cannot, by an erroneous ruling, force the exercise of a peremptory challenge, when the accused is entitled, on legal grounds, to a rejection of the particular juror objected to. If, in the formation of the jury, the prisoner has exhausted the twelve challenges, but one has been used substantially under legal duress, he is, in law, to be held as having really been given the privileges of only eleven peremptory challenges, and his statutory right has been invaded.

We think appellant entitled to have us examine the district court's action in respect to the juror Barrere, in order to determine whether, by reason of that action, defendant was forced to exercise improperly and unnecessarily one of his peremptory challenges. The consideration of that subject in this case has given us very great concern. Was the ruling of the district judge that Barrere was a legal juror—a person proper and fit to sit upon the trial of defendant's case—a correct ruling? The first matter attracting attention is the fact

that the questions and answers given by Barrere during the first part of his examination are not before us. The only questions and answers taken in writing and transmitted in the record are those taken down during the examination by the defendant and the later examination by the court. The entire examination should have been taken down and forwarded. As matters stand, we do not know with any precision or certainty what the juror had answered before he was questioned by the defense and the court. The judge signed the bill with the declaration that "he had previously answered all questions of the district attorney and counsel for defendant, disclosing his fitness and competency from all bias or prejudice." The particular questions and answers upon which this conclusion of the judge rested are not recited. The judge states that at one time the answers of the juror upon the question of law touching the burden of proof aroused his suspicions that he was deliberately attempting to evade jury duty, but that a further examination had convinced him that the error was more from ignorance than a desire to evade jury duty, and that his answers were quite natural, since the question propounded was one of pure law, requiring instruction and explanation; that it was only when a question of law was asked him as to the rule of the burden of proof that he answered wrong, and for a time after the instruction of the court persisted in the error. In the present condition of things, we are bound to assume that the juror, during the first part of his examination, had stated, in answer to questions propounded to him, that he was free from bias and prejudice, and had formed and expressed no opinion in reference to the matter before the court; and we must examine his answers to the later questions from the standpoint of his having originally made answers which would have shown him a competent juror. The first question (as shown in the transcript) which was propounded to him by defendant's counsel was as to the course he would individually pursue if taken as a juror. The question was whether, "if he was taken as a juror, he would require the state to prove defendant's guilt, or he would require the accused to prove his innocence." His reply was "that he would require him to prove his innocence." He was then asked, "Do you mean that you would require him to prove that he was not guilty?" and his reply was, "Yes, sir." If these questions and answers had followed a prior declaration by the juror that he had formed or expressed an opinion in the case, we scarcely think the court, in view of his persistence in adhering to the answers (the nature and force of which he said he understood fully), after his attention had been specially called to what the law was upon the subject, and of his only changing front (even then not fully and satisfactorily) after he had been threatened with contempt proceedings by the court, would have felt itself justified in holding Barrere to have been a competent juror. The ultimate an-

swers, given, as they were, in the face of threatened contempt proceedings, would have been entitled to little or no weight. We have, however, to consider the conclusions of the district court from the precise circumstances under which that court was called upon to reach them. We have to consider, therefore, matters from a standpoint considerably different from that which we have just referred to. The question is, was Barrere, from the view of his fitness and competency as exhibited by his answers, taken in their entirety, a juror such as could, with proper regard to a fair and impartial trial, have been forced upon the defendant as a jurymen, in spite of the latter's objection that he was not? Counsel of accused argues this bill as if the juror had declared that he would require the accused to prove his innocence because of the fact that this particular defendant was on trial, or by reason of some fact or facts connected with this special case. Argument from this standpoint we do not think warranted. What we understand the juror to have said was that he would require any party who stood charged by indictment with crime to prove his innocence. He evidently was in accord with the district attorney in the statement made by him in his argument that "honest men are not indicted for crime." Had he been actually placed on the jury, there is no doubt but that this statement of the district attorney would have powerfully influenced him, for it would have been in the direct line of his announced ideas on that subject. His views in respect to that particular matter were expressed in no uncertain form. His answers were reiterated after defendant's counsel had explicitly explained to him the law, and his answers were accompanied by the declaration that he had fully understood the import of what he said. He adhered to them even after the court itself had undertaken to examine him, and until he was forced from his position by a threat of being dealt with as for contempt; and he then receded reluctantly, and not fully. The judge, after going so far as to threaten the juror with being dealt with as for contempt, finally accepted him as competent, with the statement that he believed he acted from ignorance, and under misapprehension, rather than intentionally, and from design. The situation after this was such as, in our opinion, forced the defendant, in self-defense, to challenge the juror. He could not, with any safety to himself, permit a person to participate in his trial as a juror who had been accepted under such conditions. We do not think that the court should ever place upon the jury a person whose answers to questions propounded to him on his voir dire, either as to questions of law or fact, had been such as to call for a threat from it that he would be dealt with as for contempt by reason of them. A change of view or opinion, announced after such a threat, is bound to carry with it a doubt as to its sincerity, and a question as to whether it was not the result of coercion. A verdict rendered by a jury of whom such a jurymen

was one could not but be received with more or less distrust as to its impartiality and correctness. There is no necessity and no propriety in accepting such a juror. It is not only necessary that an accused person should be found guilty, but that he should be so adjudged by a tribunal with no suspicion attached to it as to its absolute fairness. It is much better that the defendant, even if guilty, should be afforded a new trial, than that the verdict and sentence against him should stand with a doubt attached to the conviction that the state, in procuring it, had not afforded to the accused all the legal and constitutional privileges to which he was entitled. We are of the opinion that the court erred in overruling the challenge to the juror Barrere, thereby forcing the accused to exhaust his peremptory challenges before completion of the jury. For the reasons assigned, it is hereby ordered, adjudged, and decreed that the verdict of the jury be set aside, and the judgment thereon rendered be annulled, avoided, and reversed, and the case remanded for further proceedings according to law.

MILLER, J. I concur on the ground the juror should have been excluded.

BLANCHARD, J., dissents.

(61 La. Ann. 222)

LEVERT et al. v. HEBERT (HEBERT, Intervener. No. 12,975).¹

(Supreme Court of Louisiana. Jan. 9, 1899.)

REPLEVIN—SALES—MARRIED WOMEN—PURCHASES.

1. A petition alleging that plaintiffs were owners of certain described movables, and praying that they be put in possession of such movables as "their property," states a cause of action for a recovery as owners, so as not to be a mere possessory action for movables, which is prohibited by the Code of Practice.

2. A pre-existing debt is a sufficient consideration for a transfer of movables.

3. In an action to recover movables from the possession of defendant, his wife intervened, setting up a marriage contract stipulating against any community of property, and claiming the property as her own by purchase through her husband as agent. Neither husband nor wife testified. There was no evidence that the wife, at or since her marriage, was or had been possessed of any paraphernal property or moneys, or that she had any productive property. It was shown that the husband had money in a bank, and that he closed his own account, and transferred it to the credit of his wife, with himself as agent. Subsequently he drew against the account, signing the checks as agent. There was no showing that the bank had the wife's signature or power of attorney to pay out the moneys to her husband. *Held* to show that the property belonged to the husband.

Appeal from judicial district court, parish of Iberville; E. B. Talbot, Judge.

Action by Levert, Burguires & Co. against Amedée N. Hébert. Mrs. Agnes Lee Hébert intervened. From a judgment for plaintiffs, defendant and intervener appeal. Affirmed.

¹ Rehearing denied February 6, 1899.

Hébert & Hébert, for appellants. Lozano & Hébert, for appellees.

NICHOLLS, C. J. On or about the 31st of January, 1898, the plaintiffs filed in the district court a petition in which they alleged that they were the owners of certain movable property; that it was then in the possession of defendant, who was unlawfully and illegally holding the same, and absolutely refused to deliver the same to petitioners, notwithstanding amicable demand; that they feared the defendant, having and holding illegal possession of same, would send the same out of the jurisdiction of the court during the pendency of the suit then being brought. They prayed for a writ of sequestration, for citation upon defendant, and that after due hearing there be judgment in their favor, ordering and directing the sheriff to place them in full and complete possession of their property, and for all general, special, and equitable relief. Defendant excepted that plaintiffs' petition declared no cause or right of action. He also moved to have the sequestration set aside on the ground that the allegations of plaintiffs' petition were insufficient in law to maintain the action, and that the affidavit annexed to the petition was necessarily insufficient to maintain a sequestration. The exception and the motion having both been overruled, on the 7th May, 1898, defendant answered, pleading the general issue. On July 12, 1898, Mrs. Agnes Lee Hébert, wife of the defendant, filed an intervention in the suit, in which she alleged that she was married to defendant in 1892, under a marriage contract which stipulated that there should be no community of property between them; that at various times since her marriage she had had funds and moneys in bank aggregating the sum of \$4,200, and that in the course of time she purchased in her own right and name, through her said husband, whom she had authorized to draw checks, drafts, etc., as her agent, all of the property sequestered by the plaintiffs in their suit against her husband; that the plaintiffs, averring themselves to be owners of said property, prayed the court to be put in possession thereof, and, averring further that they believed that the defendant Hébert would remove the property out of the jurisdiction of the court, had obtained a writ of sequestration, and had had all of said property seized by the sheriff; that, having money in bank, as alleged, she bought the machinery, implements, mules, and horses sequestered by the plaintiffs; that a certain boiler mentioned and the thresher were originally the property of her husband, having been bought by him in the year 1892, and paid for by the plaintiffs, who were then her commission merchants; that, he finding himself in need of the money in the year 1894, in order to assist him in his planting operations, and thus bear a part of the family expenses, she undertook to furnish

the machinery, mules, horses, and implements necessary to make a crop; that at that time she purchased from her husband the boiler and engine and thresher, he using the money to make his crop; that from time to time since 1894, and previously, petitioner had furnished all the machinery, implements, and stock necessary to run her husband's business, and had permitted him to make use of the same, thus bearing a part of the expenses; that she had paid with the moneys all the repairs, etc., to all the machinery, etc., sequestered by the plaintiffs, and during the last year she had used them to make a crop for her own account; that at the time of the sequestration all of the property seized was in her possession, and they had in fact always been in the actual physical possession of herself and her husband acting as her agent; that she had never made, nor authorized any one to make for her, a sale of said property; that the plaintiffs had never had possession of said property alleged to be theirs, actual or constructive, and therefore their pretended ownership of it is illegal, fraudulent, and untrue, and intended to deprive her of her property; that she was the bona fide owner of said property. She prayed to intervene in the suit; that plaintiffs and defendant be cited; that there be judgment in her favor, decreeing her to be the owner of all said property, and quieting her possession of same; and that plaintiffs' suit be dismissed; and for all and general relief. The intervenor bonded the property sequestered under order of the court. The defendant Amedée Hébert answered this intervention, admitting that all the facts and allegations were true and correct; that his wife, being separate in property from him, and having moneys in her own right, purchased the property described in her petition as therein set forth; that said property had never been out of her possession; that said property was at that time being employed by her in the making of a crop for her account. The plaintiffs answered the intervention, pleading first the general issue. They averred that they acquired all of the said property by an act sous seing privé on the 12th of February, 1897, through their agent, A. K. Grace, from Amedée N. Hébert, in good faith and for a free consideration, to wit, \$3,392 cash; that said act of sale was recorded in Iberville on the 19th of February, 1897; that actual delivery of said property was made to their agent on the 12th of February, 1897, in the presence of two witnesses, and on the same day said property was leased to said Hébert for the year 1897, at a rental of \$271.38; that said purchase was made without notice from any one of a claim of ownership thereof; that the record of the sale to themselves was notice to intervenor of said transaction, and she never objected thereto until the filing of their suit for the recovery of their property; that the marriage contract between intervenor and her husband was

never recorded in Iberville parish, nor was any property assessed in intervener's name in said parish. They denied that intervener had ever possessed any money or funds in her own right, as by her alleged; that such funds, if any she had, were funds of her husband, deposited by him in the name of the intervener in pursuance of and in continuance of a concocted scheme of fraud and simulation; that each and every transaction between intervener and her husband was a simulation and scheme fraudulently entered into between them for the purpose of shielding the property of the husband from the pursuit of his creditors, and to enable him, at his will and pleasure, to fraudulently deceive persons dealing with him, so that he might falsely and fraudulently acquire property and enrich himself and intervener at the expense of others, and particularly petitioners. They prayed that the demand of the intervener be rejected, and that they themselves be decreed to be the owners of all the property, and that they be placed in possession thereof. The district court rendered judgment in favor of plaintiffs, recognizing their title to the property described in their petition, and ordered that they be placed in possession thereof. It rejected intervener's demand. Defendant and intervener appealed.

Appellants contend here that plaintiffs' action was a possessory action for movables, which character of action is expressly disallowed by the Code of Practice. Plaintiffs alleged themselves to be owners of certain described movables. They averred that they were in the possession of the defendant, Hébert, illegally. They prayed for citation upon him, and that the court order that they be placed in possession of their property. The prayer, substantially, was that the court order that the plaintiffs be placed in possession of the articles enumerated, as their property. The language used might have been more specific and better chosen, but the action was properly permitted to stand as against an exception of no cause of action. If, on the trial of the cause, it had developed that plaintiffs were advancing their claims merely as holders, and not as owners, of the articles, the action would have properly failed; but the ultimate trial established very clearly (what we think the pleadings themselves sufficiently showed) what the character of plaintiffs' pretensions were. They rested upon an allegation made, and, in our opinion, established ownership of this property. Plaintiffs showed that by act under private signature, of February 12, 1897, they purchased from the defendant (intervener's husband) the personal property involved in this litigation for the price of \$3,392.08; that the act of sale recited the delivery of possession to the purchasers; that on the same day the vendor, Hébert, leased the same property from the plaintiffs for the year 1897 at a rental of \$271. The in-

tervener does not pretend to be a creditor of her husband, nor does she contend that she acquired any portion of this property from him, with the exception of the boiler and thrasher, and her claim as to this was not attempted to be followed up by proof. Her claim rests upon a direct purchase alleged to have been made by herself of these movables from the dealers selling the same. Under such conditions, she is not concerned in knowing whether, at the time Grace acted as the agent of the plaintiffs in making the purchase which he did in their behalf, he then held their power of attorney or not. By claiming the benefit of his acts they have ratified the same. Questions of delivery and price play no part in this controversy. The act sous seing privé signed by the defendant, and not attacked by him, concludes him as to the transfer and delivery of the property. It does not follow that, because no money actually passed between the parties at the time of the sale, therefore the transfer of property was unreal. Rev. Civ. Code, art. 1900; *Weld v. Peters*, 1 La. Ann. 432. A pre-existing debt due by transferor of property to his transferee supports the transfer.

It is contended by intervener's counsel that she has shown that, by marriage contract between herself and her husband, it was stipulated there should be no community between them; that she has shown that at the time of the sequestration in this suit she was in possession of the personal property which was sequestered, claiming the same as her property; that under these circumstances, plaintiffs having failed to show adverse title, there was no necessity that she should offer proof of her ownership of the property in dispute. She maintains, however, that she has shown affirmatively that this property was purchased for her by her husband, acting as her agent. Neither intervener nor defendant took the stand as a witness. No evidence was introduced to show that at the date of her marriage, or at any time since, was she possessed of any paraphernal property or moneys, or that she had any industry from which she could acquire property, other than a lease to her for one year of the Avery plantation, executed just a few days before the sequestration was issued in this case. In this lease her husband appeared as acting for her under a power of attorney, but the power was not annexed to the act, nor was any such power shown to have ever been executed. It was shown that Amedée N. Hébert opened an account in his own name in the Louisiana National Bank on October 17, 1894, depositing that day \$2,591; that at different times between that date and January 14th (January, 1895) he drew out the whole of this amount except \$1,336; that on that day he closed his own account, and opened an account on the books of the same bank by transferring this balance to the

credit of "Mrs. A. N. Hébert, A. N. Hébert, Agent"; that this account had had various deposits placed to its credit between the 14th of January, 1895, and February 1, 1898, the whole making an aggregate of \$7,516; that during this time Amedée N. Hébert drew constantly against the account, signing the checks, "Agent." From what source Mrs. Hébert acquired these various deposits is not attempted to be explained. It was shown that Hébert, the husband, had himself been in active business as a planter in 1894, and presumably he continued in business thereafter. We find him suddenly closing his bank account, and transferring the balance standing to his credit to an account opened in his own name as agent of his wife, to which he could add deposits from time to time as he pleased, and from which he could draw without let or hindrance. It is not shown that Mrs. Hébert personally had anything to do with the opening of this account, nor through what cause she had become entitled to the amount of \$1,336, with which it opened. She alleges in her intervention that she had authorized her husband to draw checks as agent in her behalf, but that statement was not verified in any way. There was nothing to show that Mrs. Hébert's signature was ever procured by the bank, or that it acted in paying out moneys on this new account under any power of attorney shown to it from the wife. The moneys having been deposited by the husband himself as agent of Mrs. A. N. Hébert, the bank obviously recognized the right of the same party to control the fund, and to check against it as agent. The wife does not pretend to know when or for what the various checks drawn by her husband were given. She does not attempt to identify any one check as having been given in payment of any particular piece of property. She claims that the whole of this property was in her possession at the time of the sequestration, but the only evidence on this subject is that of the deputy sheriff, who stated that at the time of the sequestration they were on the Avery plantation, and being used in the cultivation thereof. It does not follow from that fact that they belonged to her, or that they were in her possession as owner. The husband, particularly if he was embarrassed in his planting operations, might well allow his wife, separated in property from him, to be substituted for himself as lessee for the opening year, and utilize his mules, plows, wagons, and farming utensils in making the crop. We are satisfied that no portion of the moneys, standing on the books of the Louisiana National Bank to the account of Mrs. A. N. Hébert belonged in fact to the wife, but, on the contrary, that they belonged to her husband. That conviction carries with it the affirmance of the judgment appealed from. The judgment is affirmed.

(51 La. Ann. 447)

HAYES et al. v. DUGAS et al. (No. 12,994.)¹
(Supreme Court of Louisiana. Feb. 6, 1899.)

**MARRIED WOMEN — ACTIONS — ADMINISTRATORS —
LIABILITY OF SURETIES.**

1. In a suit by married women, the mere statement they are joined and assisted by their husbands will not suffice. Rev. Civ. Code, art. 121; Code Prac. art. 106; *Lacour v. Delamarre*, 2 La. Ann. 140; *Grover v. Clarke*, 7 La. Ann. 177; *Dunn v. Woodward*, 11 La. Ann. 265.

2. The suit against sureties on an administrator's bond will not be defeated because the creditors have not notified their judgment against him to the administrator, or called on him for a statement of the succession funds in his hands, there having been a final account filed by the administrator, and homologated, showing the succession funds in his hands, and fixing the amounts due the heirs.

3. Our law requires, before suit can be brought against sureties on the bonds of administrators, all necessary steps shall be exhausted to procure payment from the administrator. The final judgment against the administrator, the execution returned nulla bona after the diligent effort to make the money, and calls on the parties constitute a substantial compliance with the requirement as to suits of this character. Rev. St. art. 3715; Rev. Civ. Code, art. 3066; *Nicholson v. Ogden*, 6 La. Ann. 486; *Gaillard v. Bordelon*, 35 La. Ann. 300.

4. The sureties will not be discharged because of the mortgage on the records in favor of the individual who was the administrator, securing a note payable to him, it not being shown the plaintiffs could have seized the note extant in the hands of the holder, whoever he might be. *Succession of Lauve*, 6 La. Ann. 530; *Simpson v. Allain*, 7 Rob. 504; 1 Hen. Dig. vide "Execution of Judgment," p. 345, No. 5.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Iberia; Felix Voorhies, Judge.

Action by Desire Hayes and others against J. C. Dugas and others. From a judgment for defendants, plaintiffs appeal. Reversed.

Foster & Broussard, for appellants. Martin & Voorhies, for appellees.

MILLER, J. The defendants are sued as sureties on the bond of an administrator, and plaintiffs appeal from the judgment against them. The plaintiffs are the heirs of the deceased. The record shows the homologation of the final account of the administrator, exhibiting the amounts in his hands allotted to the plaintiffs, the issue of an execution against the administrator for the amounts he was directed to pay the plaintiffs, and the return nulla bona on the execution. The demand of the plaintiffs is resisted on the grounds that two of the plaintiffs are married women, not authorized to sue; that plaintiffs have shown no notification of the plaintiffs' judgment to the administrator, or call on him for a statement of his condition as administrator with regard to the succession funds, as directed by articles 1053 and 1056 of the Code of Practice; and that plaintiffs have discharged defendants by not sub-

¹ Rehearing denied February 20, 1899.

jecting, to the demand they make on the sureties, the property plaintiffs, it is claimed, could have seized.

The defense, in part, is based on the statutory requirement that there is no recourse against the sureties on judicial bonds until the necessary steps have been unavailing against their principals. Rev. Civ. Code, art. 3006; Rev. St. § 3715. These necessary steps have had frequent exposition in our jurisprudence, and include in the main the recovery of final judgment against the administrator or executor, the issue of an execution, and the return nulla bona after due diligence to make the money, and the calls on the parties. *Nicholson v. Ogden*, 6 La. Ann. 486; *Gallard v. Bordelon*, 35 La. Ann. 390. The argument insists that in this case it is equally indispensable, to maintain the plaintiffs' suit, to show the notification to the administrator of the judgments, and the call on him for the condition, or rather the amount of the succession funds in his hands, directed by Code Prac. arts. 1053, 1055, 1056. It is not easy to appreciate the necessity in this case of such notification or call. We are referred to the decision in *Wilson v. Murrell*, 6 Rob. 68, as supporting this contention; but in that case, it seems, the account of the administrator was ordered to be amended, and there was, as we read the decision, only a judgment of partial distribution. In this condition the supreme court held that, before the succession creditor could sue on the bond of the executor, it was essential to notify the administrator of the judgment of the creditor, and call on the administrator for a statement of the condition of the succession funds in his hands, as directed by the articles of the Code of Practice on the subject. In this case the amount of the succession funds in the administrator's hands, and the amounts to be paid to the plaintiffs, are determined by the final judgment. We perceive in the brief a reference that might be deemed to convey the idea that there are still succession creditors unpaid; but, as we read the record, the judgment fixes the amounts due by the administrator to the plaintiffs as heirs. Hence we cannot apply the articles of the Code so as to require a call for a statement of the succession funds the homologated account furnishes, or to exact a notification to the administrator of a judgment homologating the account rendered by him.

On the other branch of the defense, based on the mortgage recorded in favor of Norice, securing the promissory note for \$6,000, which it is claimed the plaintiffs should have subjected to their judgment, it suggests itself that neither the debt represented by the note, nor the mortgaged property, could have been subjected to the plaintiffs' execution, unless they obtained possession of the note. It is true, there was recorded a donation of the note by Norice; but, if the note was transferred to the donee, he, in turn, must

have parted with it. The plaintiffs made two efforts to seize the note by garnishments against parties they supposed held it as the property of Norice. These efforts resulted in the denial by the garnishees of the possession or control of the note. Finally, the note turned up in the hands of the People's Bank, pledgee, who, on the judgment on the note, seized and sold the mortgaged property in satisfaction of the debt of the bank. We have no basis to hold that the defendants have been discharged from their obligation as sureties, because of a promissory note, once the property of the principal debtor, with no proof that the plaintiffs could have seized the note essential to have seized the debt the note represented. *Stockton v. Stanbrough*, 3 La. Ann. 390; *Succession of Lanue*, 6 La. Ann. 530; *Simpson v. Allain*, 7 Rob. 504; 1 Hen. Dig. p. 345, No. 5.

The exception of the defendants directs attention to the institution of this suit by the married women, joined with the other plaintiffs; and the exception is that the wives thus made plaintiffs are neither authorized by their husbands nor by the court. We think the exception well taken. We find neither authorization. The recital in the petition that the wives are joined and assisted by their husbands is not the equivalent of the authorization of the husbands appearing of record; nor can we hold the suit is by the husbands, as they are not introduced as plaintiffs. Code Prac. art. 106; Rev. Civ. Code, art. 121; *Grover v. Clarke*, 7 La. Ann. 177; *Dunn v. Woodward*, 11 La. Ann. 265; *Lacour v. Delamarre*, 2 La. Ann. 140; *Robinson v. Butler*, 6 Rob. 78.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be avoided and reversed; and it is now ordered and decreed that this suit, in so far as respects the demands of Delanson Hayes, wife, Sallie Gordy, wife, Louisa Cook, wife, Mary Stansbury, wife, joined as plaintiffs herein, be, and it hereby is, remanded to enable the said married women to obtain the authorization requisite to prosecute their suits. It is further ordered, adjudged, and decreed that each of the plaintiffs, save said married women, do have and recover from defendants in solido the amounts severally claimed by the said plaintiffs, as stated in the petition, with legal interest thereon, and that, save the costs incident to the suits by said married women to be paid by plaintiffs, the defendants pay costs.

(51 La. Ann. 326)

HEWITT v. BUVENS et al. (No. 13,073.)
(Supreme Court of Louisiana. Feb. 6, 1899.)
APPEAL—REVIEW—QUESTIONS OF FACT—CONCURRENT ATTACHMENTS.

1. The questions were exclusively questions of fact, and not reviewable, under article 101 of the constitution. The circuit court of appeals was competent, and had jurisdiction, to

finally determine whether the attachments were concurrent.

2. The court decided that they were concurrent, and that the creditors were entitled to a pro rata division of the proceeds. The supreme court declined to disturb the decree and to issue an order nisi, as it is manifest on the face of the papers that the conclusion would be the same on the merits.

(Syllabus by the Court.)

Application of the Simmons Hardware Company for a writ of certiorari in the matter of the attachment of Mrs. J. A. Hewitt and Ardis & Co., against M. F. Buvena. Application for rule denied.

W. Porter Good, for petitioner.

BREAUX, J. Relator, the Simmons Hardware Company, is a creditor of M. F. Buvena. It sued out a writ of attachment, upon which the property of the defendant was seized. It avers that, immediately after, other creditors of the defendant sued out writs of attachment on suits contemporaneously filed against the same defendant. There was testimony introduced in the district court regarding the ranking of the attachments. There was some contradiction among the witnesses. The clerk of the court testified that the writs in relator's case and that of Ardis & Co., another creditor, at whose instance an attachment was issued, were issued together, and handed to their attorney, just a brief time before those of Ogilvie and Buckley, Ourrie & Co., other creditors who proceeded by attachment. This testimony is, in the main, corroborated. The testimony as to the time the seizure was made after the papers came into the hands of the sheriff was contradictory in some respects. The returns on the attachment writs show that identically the same property was seized under all the writs. The returns on the writs of relator and of Ardis & Co. show that the writs of attachment were executed on the 6th day of December, 1897, and in the other cases on the day following, but notices of attachment were all given the same day. The relator avers that the papers were served after the attachments had all been made, just as they were numbered on the back of the writs. These attaching creditors joined in an intervenor to annul or subordinate the attachment of one of the creditors, Mrs. J. A. Hewitt, made, as we take it, prior in time. The district court rendered judgment in favor of the interveners subordinating her attachment to those of the interveners, and decreeing that the amount realized on her attachment should be divided pro rata among the contesting interveners. From this judgment the relator and Ardis & Co. appealed to the court of appeals. The judgment of the lower court was affirmed.

The following is a quotation from the opinion: The evidence shows that all "the attachments were sued out" substantially at the same time, and executed concurrently. In any event, "all the creditors joined in the suits (revocatory action) to annul or subordinate the

attachments of the plaintiffs, and should share in the privilege accorded the revoking creditors pro rata." From the foregoing it is evident that there was no contest regarding the law, and that the attachments, as to priority of right, are controlled by the time of day they were levied, and not by reference exclusively to the day on which it was that the writs were executed by seizing the property. The questions involved are exclusively of fact. Passing upon these facts, both the district court and the court of appeals held that they were executed concurrently,—questions of which a court of appeals has jurisdiction, and is competent to finally determine. Moreover, the attaching creditors having joined in proceedings to avoid a privilege claimed under a prior attachment, it was just and proper to decide that the contesting creditors were entitled to a pro rata division of the proceeds arising from the privilege revoked. It was a privilege securing a substantial right, and the creditors came, as relates to concurrence, within the purview of the provision of the law relating to the revocation of conveyances and privileges. Rev. Civ. Code, art. 1977. The attachments were concurrently executed, and the intervention, to which we have referred, joint. We think the conclusion of the court of appeals and of the district court, that the attachments were concurrent, was correct. The relator's application for a rule nisi is not granted.

(51 La. Ann. 316)

In re MORA'S ESTATE. (No. 13,001.)

(Supreme Court of Louisiana. Feb. 6, 1899.)

ADMINISTRATOR—RIGHT TO APPOINTMENT.

The opponent raised the objection that the applicant for the administration had parted with all his interest as an heir, and that, in consequence, he (opponent) should be appointed. *Held*, the act of donation had not been accepted by the donee intended, in the manner required; that donations produce effect from acceptance in precise terms (Rev. Civ. Code, art. 1540); that the donor, not having been divested of his interest in the succession by an acceptance in due form, was entitled to the appointment.

(Syllabus by the Court.)

Appeal from judicial district court, parish of St. Mary; A. C. Allen, Judge.

In the matter of the estate of Thomas Mora, deceased. To the appointment of Francis Mora, administrator, Francis Navarro filed an opposition. From an order rejecting the opposition, opponent appeals. Affirmed.

Don Caffery and Son and J. Sully Martel, for appellant. Phillip H. Mentz, for appellee.

BREAUX, J. This was a contest for the administration of the succession of Thomas Mora. The administrator appointed in due time after the death of Thomas Mora died some time after his appointment, but before his administration of the succession had been closed. Francis Mora, a brother of Thomas Mora, applied for the appointment in June,

1898. Francis Navarro, nephew of the deceased, interposed an opposition to the appointment of Francis Mora as administrator, on the ground that Francis Mora had renounced the succession of Thomas Mora, and had ceded all his rights as heir of Thomas Mora, in favor of and to his widow, Mrs. Thomas Mora. The testimony shows that Francis Mora, petitioner for the administration of the succession of his late brother, in the year 1896, signed a notarial act with a number of the other heirs of the late Thomas Mora; that Thomas Mora died intestate, without forced heirs. The heirs named in the act as donors did not all sign, nor has the donee, Mrs. Francis Mora, widow of the deceased, to date. The act sets forth that the heirs (about 18 in number) are the sole heirs of Thomas Mora, and that, by reason of their affection for his widow, they give to her all their rights in the estate; that all the property is community property. Francis Mora and only three other heirs signed. The others did not sign, although named in the act as donors. Thomas Mora testified that he had ceded all his rights to the widow, but subsequently modified his testimony by stating that the act before alluded to was the only abandonment of the estate he had signed, and that he understood that, when he signed it, all the heirs of his brother would also sign; that the heirs refused to sign. This witness testified that Mrs. Thomas Mora verbally accepted the donation. While it is true that he testified that she had accepted, he also testified on an examination that, when he signed it, he was in the expectation that all the other heirs would also sign. The attorney of Mrs. Francis Mora testified that he had advised her not to accept, unless every heir of Thomas Mora (15 or 20 in number) consented; "that any one heir, however remote his interest, might apply for the administration, and the act of donation could only be useful to prevent an administration." The estate was indebted in a large amount to the widow, and to the children referred to as the "Egloff children," who were in some way under the protection of Thomas Mora. The judge of the district court rejected the opposition of Navarro, and appointed Francis Mora administrator. The opponent, Navarro, prosecutes this appeal.

A donation is binding only from the date of its acceptance in precise terms. Rev. Civ. Code, art. 1540. Acceptance is an essential in order that the donation may have effect. There are exceptions to the rule which do not arise in the case before us. The question before us for decision is within the terms of the article of the Civil Code quoted. We have not found that it has been directly passed upon in any of the decisions of this court. In *Trahan v. McMannus*, 2 La. 209, the question was incidentally considered, and cannot be considered, for that reason, an authority in support of the donation here. The question of acceptance of a donation again

arose in *Lawrence v. Jury*, 35 La. Ann. 601. There was an acceptance (in the case just cited), and the defendant went into possession of the property after it had, as we take it, in a manner formal enough, accepted the donation. In the case before us for decision, the widow of Thomas Mora never accepted, and the evidence discloses that she was advised not to formally accept the donation,—an advice she chose to follow.

In the absence of direct authority here on the particular point, we consulted the views of French commentators. The article of the Code before cited is taken from 932 of the Code Napoleon, and corresponds with it. The court requires, says Laurent (volume 12, § 224), an express acceptance. In this the "legislator exceeded the limits even of solemnity in further exacting that the consent of the donee should be made manifest by express terms." *Id.* But article 932 is formal,—"Donation shall have effect only from date of its acceptance in precise terms." *Id.* These were the words used to point out that without formal acceptance there was no donation. It was announced in energetic terms that no effect should be given to the instrument, unless it is made manifest by the acceptance of the donee. The following is quoted from Merlin (*Donation*, vol. 4, p. 94): "*Comme l'acceptation ne forme qu'un seul et même contrat avec la donation dont elle est une partie nécessaire, il faut par conséquent quel soit aussi constante et aussi solennelle que la donation même.*" The foregoing is quoted only to the extent that it sustains our views here. We do not find it needful to approve in this case, involving, as it does, the appointment of an administrator, all the bearing and scope the quotation may have. If Mrs. Mora were to claim a right under the act, it would not be of any avail before her acceptance in the manner required by the Code. As she could claim no right without acceptance, it follows that the title remains in Francis Mora. It being, in our view, an inchoate donation not accepted, and which could not have any effect before its acceptance, we would not be justified in giving it some other effect, such as that, while it is not an act of donation, it is virtually a renunciation or an acceptance of the succession. Not a word in the act shows that it was the intention to accept or renounce the succession, but that it was the intention to make a donation. Being null to date for nonacceptance by the one intended to be donee, it must be considered, in the language of the Code, as having no effect at all.

With reference to estoppel, one of opponent's grounds, we can only say in answer—and we think it is decisive of the question—that Mrs. Thomas Mora would not be heard to urge that plea prior to any acceptance on her part. If she could not claim the estoppel, third persons would not have any right to that plea. For reasons assigned, it is ordered, adjudged, and decreed that the judgment appealed from be affirmed.

(51 La. Ann. 320)

PRUYN v. YOUNG, Sheriff, et al. (No. 13, 008.)

(Supreme Court of Louisiana. Feb. 6, 1899.)
FRAUDULENT CONVEYANCES—RELATIONSHIP—POSSESSION—SIMULATION—EVIDENCE—PRESUMPTIONS.

1. One who claims under a sale made to him by his father, who was in insolvent circumstances, if the sale be attacked for simulation, must show that the sale was a real, bona fide transaction.

2. A similar presumption arises, shifting the burden of proof from the one attacking to the vendee, if the father remain in possession of the property after the sale.

3. The testimony of vendee alone in his own behalf (who fails to show why the other parties to the act have not testified) is not sufficient to overcome three separate, strong presumptions, established by law (to wit, one arising from relationship between the parties to the sales, continued possession of the vendor after the sale, and failure to introduce corroborative testimony, or failure to account for its absence). The testimony would have had a bearing upon the principal issue. The means of proof were accessible to plaintiff. It was for him to produce the proof, as on him was the onus probandi. "Where effective proofs are in the power of a party, who refuses or neglects to produce them, that naturally raises a presumption that they would, if produced, make against him." Best, Ev. p. 277.

(Syllabus by the Court.)

Appeal from judicial district court, parish of East Baton Rouge; H. F. Brunot, Judge.

Action by Robert H. Pruyne against J. T. Young, sheriff, and others, for an injunction. From a verdict and judgment for plaintiff, defendants appeal. Reversed.

James F. Pierson and R. W. Knickerbocker, for appellant Eugene Barrow. Thomas J. Kernan and L. D. Beale, for appellee.

BREAUX, J. Plaintiff sued out a writ of injunction to restrain defendant from executing a judgment obtained by him against Robert L. Pruyne, plaintiff's father, on the 12th day of February, 1897. He averred in his petition for an injunction that he is owner of the property seized, by purchase from R. L. Pruyne on the 20th of January, 1897. Defendant in injunction answered, and alleged that plaintiff's title is simulated, and prayed that it be declared and decreed a fraudulent simulation, and his claims to ownership rejected. As alleged, the property was bought by notarial act for the price of \$3,000, of which plaintiff, the act declares, paid \$1,636 in cash, and for the balance gave his two promissory notes, each for \$682, and 6 per cent. interest from date, payable at one and two years. Plaintiff bears witness to a cash payment, consisting of two notes secured by mortgage, which he (plaintiff) had accepted as his share of the succession of his mother, and \$1,000 by a check for the amount, and swears that the first of the two \$682 notes was paid by him at its maturity, and that he is making arrangements to pay the other, for a similar amount, at its maturity. Plaintiff admits that he did not take formal cor-

poreal possession of the property. We are informed that the succession of plaintiff's mother consisted of her community interest in three tracts of land and of some personal property, and that, for the purpose of settling the community, the three pieces of land were sold January 20, 1897, and that the most valuable was sold to I. E. Craig and G. A. Craig for \$3,780, in conformity with an agreement made about a year prior. Another tract of 32 acres was sold to M. G. Pruyne for \$636, by the same vendor, and the third tract was sold to Stevens for \$1,000. Plaintiff avers that these deeds were introduced by plaintiff for the purpose only of showing plaintiff's interest in his mother's estate, and that the three sales amounted to \$5,416. One-eighth was plaintiff's share as an heir, \$677,—of which \$636 was represented by the Craig notes for \$318 each, taken as cash in payment of the purchase price of property claimed by plaintiff in this suit. As to the remaining \$1,000 of the price, plaintiff claims he has shown by witnesses of high character that he was in a position to make the investment and pay the price. A number of witnesses were heard upon this question. The testimony of the plaintiff alone was heard in support of his contention that he paid the price as alleged, and that the sale was, as it purports to be, a real sale. Defendant sought to meet and rebut this testimony by introducing evidence to show that plaintiff's capital was limited, and his business not considerable. Recurring to the judgment obtained by defendant Barrow against Robert L. Pruyne, it appears of record that the petition for the judgment was filed on the 9th day of June, 1894. It was assigned to be tried on the 22d of January, 1897. Judgment was rendered and signed in the month following. The defendant reconvened, claiming damages. The foregoing, relating to the facts, is ample enough to enable us to apply the law, and decide the case. The jury found for plaintiff, and rejected defendant's demand. Defendant prosecutes this appeal.

An act, authentic in form, beyond the fact that it was passed, does not operate as proof against third persons. It may be attacked, and, if the averments of simulation are sustained, it may be decreed void for simulation. Under the general rules of evidence, the burden of proof lies on the person who attacks the act to support his cause by sufficient evidence; but in this case the general rule does not apply. The onus of proof lies on the vendee, and not on the creditor, who avers that the sale attacked was passed to his prejudice. The burden of proof was shifted, for the reason that the sale under which plaintiff claims was made to him by his father. The prospective heir's purchase from the one from whom he expects to inherit, if the latter is insolvent, gives rise to a presumption which creditors can invoke. The burden of proof was also shifted, for the reason that the vendor remained in possession after the sale had

been made, and was in possession when the seizure of the property was effected, as well as when the case was tried in the district court. It is well settled, where the vendor continues in the corporeal possession of the thing sold, the presumptions are that the sale is simulated, and the burden of establishing the reality of the sale rests on the vendee. This ground is not seriously controverted, as we take it, but the position is, on behalf of plaintiff, that the question is one purely of simulation vel non, and that the evidence sustains the reality of the sale.

As relates to possession of the vendor after the sale, extreme views have been taken. Chancellor Kent supposed (erroneously, it was said) that the English law was unsettled upon the subject, but not, he wrote, in the federal courts of this country, in which a sale without possession is treated as a fraud. "It was even decided that the bona fides of the transaction, and the fact that possession remained with the vendor for justifiable purposes, would not suffice to render the sale valid." This view of the want of possession in the vendee is more extreme than needful to sustain the conclusion at which we have arrived. We only cite this book in support of the proposition that possession in the vendee gives rise to a strong presumption against the reality of the act. 2 Kent, Comm. p. 697.

We have already said that the burden of proof was on the plaintiff. After a careful reading of the testimony, we reiterate that, not only the burden of proof was shifted to plaintiff, but that independent and distinct circumstances raise a strong presumption, rebuttable, it is true, still only rebuttable by direct, clear, and sufficient testimony. In this case we find, after plaintiff had proven his credit and ability to pay the cash which he alleged was paid for the property, that he rested; content to rest his cause upon his own testimony regarding the reality of the sale. The vendor did not testify, and no reason was given for not calling him as a witness. The supreme court had, at the date of the trial in this case, found that such proof as that wanting here was of weight in an issue such as is here presented. It had been found that the vendee had utterly failed to sustain the burden of proof that rested upon her. Said the court, despite the grave charges brought against her and her vendor, neither has favored the court with any proof of their bona fides, or of the payment of the price of sale, or of the reality of the transaction. "Why should both defendants fail to appear and testify to the verity of the sale and the payment of the price if they could truthfully swear to those simple facts, and thereby put an end to litigation, involving, not only their means, but, to some extent, their reputations? These questions admit of no answer acceptable to reason except that, if they had testified at all, their statements would not have sustained their defense." *King v. Atkins*, 33 La. Ann. 1057. The rule was applied in other cases presenting

a similar issue regarding the burden of proof (*Day v. Railway Co.*, 35 La. Ann. 694), and is referred to by 7 Thomp. Neg. p. 514, § 6. In the case before us for decision it is true that the vendee swore to the verity of the sale, and that in this respect there is a slight difference from the first-quoted case. The rule none the less specially applies here for the reason that the burden of proof was on plaintiff. The testimony of plaintiff alone in his own behalf did not have the effect for which he contends. The testimony of the vendor was needful to sustain the asserted verity of the sale, or to give some explanation for its absence. The issue presented of simulation vel non is an independent one, and to refute the charge when the burden has shifted it becomes important to support the denial with direct and sufficient testimony. If it becomes manifest that there is other evidence upon that direct issue, the question naturally arises, as in the case of *Cochrane v. Gilbert*, 41 La. Ann. 739, 6 South. 733, why should both defendants fail to appear and testify? The question here is, why should the vendor fail to testify? He had sold all the other property in which he had an interest on the day that he sold his home place to his son, the plaintiff, and this, we think, made it the more necessary to testify regarding the seriousness and reality of the transaction which enabled him to retain his house in his declining years. We would not have it inferred that, in our view, a sale made at the time and under the circumstances the sale here was made must be deemed simulated. But we do think its reality must be made evident by the testimony of those who must have had an immediate knowledge of the facts. Standing alone, the testimony of plaintiff in his own behalf is scarcely enough to rebut the presumptions arising from the possession and relationship of plaintiff, and it is clearly insufficient, when uncorroborated by the testimony of witnesses who were parties, who must have known the important particulars leading to and including the different sales to which plaintiff's vendee was a party on the day before stated. As relates to damages, we think, under the circumstances, that the amount should be less than usually assessed in similar cases. It is, for reasons assigned, ordered, adjudged, and decreed that the injunction sued out in this case be dissolved, and plaintiff's demand rejected, and it is ordered and decreed that defendant Eugene Barrow, tutor, recover damages in reconvention in the sum of \$75; costs of both courts to be paid by plaintiff.

(51 La. Ann. 200)

STATE ex rel. SMART et al. v. KANSAS CITY, S. & G. RY. CO. (No. 13,020.)

(Supreme Court of Louisiana. Feb. 6, 1899.)
MANDAMUS TO RAILROAD—ESTABLISHMENT OF DEPOT.

A railroad company cannot be forced by mandamus to establish a depot at a particular place, in the absence of a duty having been im-

posed upon it so to do, either by general laws, or by special requirement in its charter.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Caddo; A. D. Land, Judge.

Application by the state, on the relation of E. E. Smart and others, for a writ of mandamus to the Kansas City, Shreveport & Gulf Railway Company. Decree for defendant, and relators appeal. Affirmed.

The plaintiffs in this case represented in their petition to the court that they were residents of the town of Leesville, parish of Vernon, where many of them owned residences and stores, and where many of them had been conducting various occupations, as merchants, hotel keepers, and mechanics; that they owned their several business and residence houses long before the construction by the defendant of its railway line through the parish of Vernon and through the town of Leesville, the parish seat of Vernon parish; that, in consideration of the public benefit to be derived by the town of Leesville, E. E. Smart, one of the plaintiffs, donated to said railroad the right of way through said town, and petitioners were led to believe by the proper officials of said railway that the said town should have a depot, with proper conveniences, and so located as to furnish proper facilities for the people of Leesville; that it was the duty of said corporation to furnish their town with a convenient and suitable depot, sufficient in capacity for the transaction of railroad business, and so located as to be accessible and convenient to the business and residents of said town; that this obligation was incumbent on said railroad company by the constitution and the laws of the state of Louisiana; that for a period of six months the said corporation stopped its trains, received freight and discharged same, as well as carried passengers, from a switch located within 230 yards of the court house of Vernon parish, about the center of said town; that access to said stopping point was easy, safe, and convenient to the public and the people generally having business in said town of Leesville and at the court house of Vernon parish; that on the 29th of January, 1897, the said corporation, through its right of way agent, purchased 40 acres of land adjacent to the town, had the same surveyed and platted into town lots, and built a depot thereon, one-half mile from the court house; that the said depot is located in a swamp, inaccessible to the public, and imposes extra expense on passengers going to and from said town of Leesville to said depot; that it is with extreme difficulty goods are hauled to and from said depot, owing to the almost impassable condition of the road leading from the town to the same, the ground being of marshy character, and quicksands underlying part of the road; that access to said depot to secure freight was difficult and expensive, and the public were greatly inconvenienced thereby; that an additional expense was imposed on the people of Leesville in or-

der to transact business with said railroad company, which was an unnecessary and grievous burden, because said company could furnish safe, convenient, and easy access to the public and people of Leesville by locating a depot in said town, and continuing to serve the public as they began; that the said corporation, in total disregard of the constitution of the state and its charter of incorporation, had engaged in the business of buying and selling real estate in said parish of Vernon, and that the purchase of said 40 acres of land was not incidental or necessary to its business as a common carrier; that said depot was located, not in the interest of the public, or for the convenience of its business as a railroad, but for the sole purpose of making large profits on the land purchased; that said company, through its land commissioner, was seeking to secure the removal of the court house, which stands where it has been convenient to the people of Vernon, on high ground, and surrounded by the buildings of the merchants, mechanics, and residents of said town, and said commissioner had offered \$1,000 and 1 acre of ground for its removal to the center of the company's tract of land, but a half a mile distant from the present court house, all for the sole purpose of aiding said corporation to carry on its land speculations, and make profitable its real-estate investment in land, not necessary nor incidental to its business as a common carrier, which it was illegally conducting; that its agents and employes were actively engaged in circulating petitions to the police jury of Vernon parish to order an election for the removal of the court house one-half mile distant, to a low, marshy thicket, where the corporation was then selling lots by reason of its locating its depot on said tracts; that prior to said location it was an uninhabited tract of forest swamp; that the said acts of the corporation would render valueless a large amount of property in residences and business houses belonging to the relators, and practically compel them to remove to close proximity to said depot as then located, and solely to advance the illegal and selfish real-estate speculation of the officer of said corporation, and that said corporation was so conducting its business near the town of Leesville, by locating its depot at a remote distance from said town, and refusing to furnish adequate and sufficient depot facilities for the general public in said town and vicinity, as to infringe on the equal rights of individuals, and the general well-being of the state; that said acts of said corporation in locating its depot one-half mile from said town, and refusing to furnish a depot for the general public's convenience in said town, although passing immediately through it, was illegal, and to the great injury of petitioners, and that for said injury the law had assigned no relief by the ordinary means, and that, in order to maintain their rights and those of the public, it was necessary that a writ of mandamus issue on relators' behalf, ordering and commanding said corporation to furnish them and the public generally

of the town of Leesville suitable, adequate, and accessible depot facilities, at which the public business of said town can be conducted with comfort, and with regard to the rights and general convenience of the public, without the oppressive, expensive, and extremely difficult method occasioned by the remote and inconvenient location which was solely in the interest of the sale of town lots, and not in the interest of the public. Their prayer was that the corporation establish a depot in the town of Leesville which would give the people of said town accessible, adequate, and suitable facilities for the transaction of freight and passenger business with the said corporation. The defendant filed an exception of no cause of action, which the district court sustained, and dismissed plaintiffs' suit. They appealed. In its reasons for judgment the district court said: "The petition sets forth no contract or agreement binding the defendant to maintain a station in Leesville, but alleges that such is the obligation of the company under the constitution and laws of the state. The court has been referred to no law or decision of this state which makes it the duty of a railroad company to establish stations at or near the county seat of the parish, or in every town or village which its line may traverse. It is not alleged that Leesville is an incorporated town, and it may be assumed that it is a village without fixed limits, in which the court house of the parish is located. It is admitted that the station of the defendant corporation is not more than one-half mile from the court house, and the object of this suit is to compel the erection of a depot, side tracks, etc., at a point nearer to the court house, say 230 yards distant therefrom. In *State v. New Orleans & C. R. Co.*, 37 La. Ann. 589, our supreme court held that the writ of mandamus does not lie to compel corporations to perform obligations arising from a contract, and that it can be invoked only to compel the performance of some clear, unequivocal duty imposed by law. By Act No. 133 of 1888 it was provided that when a corporation is bound by contract or otherwise to any parish or corporation, with reference to the paving, grading, repairing, reconstructing, or care of any street, highway, bridge, culvert, levee, canal, ditch, or crossing, and shall fail or neglect to perform said contract or obligation, the parish or municipal corporation shall have the right to proceed by mandamus. In *State v. New Orleans & N. E. R. Co.*, 42 La. Ann. 138, 7 South. 226, our supreme court held that Act No. 133 of 1888 extended the remedy of mandamus to matters and things not hitherto included in its scope, and must be strictly construed. If there is no law of this state imposing a clear and unequivocal duty on defendant to establish a station in Leesville, the mandamus will not lie, however reprehensible may have been the motive and actions of the corporate authorities."

J. Henry Shepherd, for appellants. Tallferro Alexander, for appellee.

NICHOLLS, C. J. (after stating the facts). Though the fact is not directly stated in plaintiffs' petition, we understand them to charge that the defendant company, after having during a period of six months stopped its trains, and received and discharged freight, and received and delivered passengers from a switch located within 230 yards of the court house of Vernon parish, about the center of said town, had illegally and improperly discontinued said service; that it had done so from the selfish and improper motive of furthering its own interests in the sale of lots upon a tract of land which it had bought for speculation, in violation of the constitution of the state. Plaintiffs do not allege that defendant had ever established a depot at Leesville; nor do they allege, if the service at that place, such as it was, was discontinued, that a demand for its resumption was made and refused. The relief which they seek at our hands is not the resumption of the discontinued service at the place referred to, and the replacing of the switch, if it has been removed, but the "establishment by the defendant company of a depot in the town of Leesville which would give the people of said town accessible and suitable facilities for the transaction of freight and passenger business with said corporation." Plaintiffs do not question the right of the company to establish depots at points other than Leesville, whether far or near; nor do they ask that the depot which the company has established on its ground be removed to Leesville. Plaintiffs ask at our hands no action looking to the prohibiting of the further sale by the defendant of lots of ground on real estate which it had purchased and was dealing with in violation of the constitution. The allegations on that subject, we presume, were inserted simply in aid of the limited relief sought, by showing bad faith in the company in discontinuing business in the town. If true it be that the defendant is violating the provision of article 236 of the constitution by "engaging in business other than that expressly authorized in the charter or incidental thereto," and relators are injured and prejudiced thereby, they are not without remedy, as the attorney general, on his attention being called to that fact, with official action requested at his hands, would, beyond doubt, bring the authority of the state to bear in the premises.

On the argument of the case our attention was directed to the allegation that "E. E. Smart [one of the plaintiffs] donated to the defendant company the right of way through the town in consideration of the public benefit to be derived by the town of Leesville, and petitioners were led to believe by the proper officials of said railway company that the said town should have a depot, with proper precautions, and so located as to furnish proper facilities for the people of Leesville." This averment falls short of show-

ing any promise or engagement to that effect by the corporation, or of showing any misrepresentation on its part by which petitioners were led to take action of any kind. The allegation is of too vague and uncertain a character to base upon it any claim of estoppel, contract, or engagement.

As matters stand the only question before us is whether, as a matter of law, the plaintiffs have the right, through mandamus, to force the defendant to establish a depot at Leesville. The supreme court of the United States was called upon to consider this question in *Railroad Co. v. Washington Ter.*, 142 U. S. 492, 12 Sup. Ct. 283, under a state of facts very similar to those alleged by the plaintiffs in their petition. The facts of that case, as shown by the report of the court's opinion, were that "the Northern Pacific Railroad at one time stopped its trains at Yakima City, but never built a station there, and after completing its road four miles further, to North Yakima, established there a freight and passenger station; that North Yakima was a town laid out by the defendant on its own unimproved land; that, after having established this depot, defendant ceased to stop its trains at Yakima City. In consequence, apparently, of this, Yakima City, which at the time of the filing of the petition for mandamus was the most important town, in population and business, in the county, rapidly dwindled, and most of its inhabitants removed to North Yakima, which at the time of the verdict had become the largest and most important town in the county. The defendant could build a station at Yakima City, but the cost of building one would be eight thousand dollars, and the expense of maintaining it one hundred and fifty dollars a month, and the earnings of the whole of this division of the defendant's road are insufficient to pay the running expenses. There were other stations for receiving freight and passengers between Yakima and Pasco Junction, which furnished sufficient facilities for the country south of North Yakima, which included Yakima City; and the passenger and freight traffic of the people living in the surrounding country, considering them as a community, would be better accommodated by a station at North Yakima than by one at Yakima City. After the verdict, and before the district court awarded the mandamus, the county seat was removed by the territorial legislature from Yakima City to North Yakima." In discussing the question the supreme court of the United States declared that "a writ of mandamus to compel a railroad corporation to do a particular act in constructing its road or buildings, or in running its trains, can be issued only when there is a specific legal duty on its part to do that act, and clear proof of that duty. If, as in *Railroad Co. v. Hall*, 91 U. S. 343, the charter of a railroad company expressly requires it to maintain its railroad on a continuous line, it may be compelled

to do so by mandamus. So, if the charter requires the corporation to construct its road and run its cars to a certain point on tide water, as was held to be the case in *State v. Railroad Co.*, 29 Conn. 538, and it has so constructed its road and used it for years, it may be compelled to continue to do so. And mandamus will lie to compel a corporation to build a bridge in accordance with an express requirement of statute. *New Orleans, M. & T. Ry. Co. v. Mississippi*, 112 U. S. 12, 5 Sup. Ct. 19; *People v. Boston & A. R. Co.*, 70 N. Y. 569. But if the charter of a railroad corporation simply authorizes the corporation, without requiring it, to construct and maintain a railroad to a certain point, it has been held that it cannot be compelled by mandamus to complete or maintain its road to that point, when it would not be remunerative. *York & N. M. Ry. Co. v. Reg.*, 1 El. & El. 858; *Great Western Ry. Co. v. Reg.*, Id. 874; *Com. v. Fitchburg R. Co.*, 12 Gray, 180; *State v. Southern Minnesota R. Co.*, 18 Minn. 40 (Gil. 21). The difficulties in the way of issuing a mandamus to compel the maintenance of a railroad and the running of trains to a terminus fixed by the charter itself are much increased when it is sought to compel the corporation to establish or to maintain a station and to stop its trains at a particular place on the line of its road. The location of stations and warehouses for receiving and delivering passengers and freight involves a comprehensive view of the interests of the public, as well as of the corporation and its stockholders, and a consideration of many circumstances concerning the amount of population and business at or near, or within convenient access to, one point or another, which are more appropriate to be determined by the directors, or, in case of their abuse, by the legislature, or by administrative boards intrusted by the legislature with that duty, than by the ordinary judicial tribunals." Referring to the case directly before it, the court said: "To hold that the directors of this company, in determining the number, place, and size of its stations and other structures, having regard to the public convenience as well as its own pecuniary interests, can be controlled by the courts by writ of mandamus, would be inconsistent with many decisions of high authority in analogous cases." The court cited a number of decisions bearing upon the question at issue,—among others, that of *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667, 681, 682, 4 Sup. Ct. 185, 192, in which Chief Justice Waite, in delivering the opinion, said: "No statute requires that connecting roads shall adopt joint stations, or that one railroad shall stop or make use of the station of another. Each company in the state has the legal right to locate its own stations, and, so far as statutory regulations are concerned, is not required to use any other. A railroad company is prohibited,

both by common law and by the constitution of Colorado, from discriminating unreasonably in favor of or against another company seeking to do business on its road; but that does not necessarily imply that it must stop at the junction of one, and interchange business there, because it has established joint depot accommodations and provided facilities for doing a connecting business with another company at another place. A station may be established for the special accommodation of a particular customer, but we have never heard it claimed that every other customer could, by a suit in equity, in the absence of a statutory or contract right, compel the company to establish a like station for his special accommodation at some other place. Such matters are, and always have been, proper subjects for legislative consideration, unless prevented by some charter contract; but, as a general rule, remedies for injustice of that kind can only be obtained from the legislature. A court of chancery is not, any more than a court of law, clothed with legislative power." The court quoted approvingly from *People v. New York, L. E. & W. R. Co.*, 104 N. Y. 58, 66, 67, 9 N. E. 856, in which the court of appeals refused to grant a mandamus to compel a railroad corporation to construct and maintain a station and warehouse of sufficient capacity to accommodate passengers and freight at a village containing 1,200 inhabitants, and furnishing to the defendant at its station therein a large freight and passenger business, although it was admitted that its present building at that place was entirely inadequate; that the absence of a suitable one was a matter of serious damage to large numbers of persons doing business at that station; that the railroad commissioners of the state, after notice to the defendant, had adjudged and recommended that it should construct a suitable building there within a certain time; and that the defendant had failed to take any steps in that direction, not for want of means or ability, but because its directors had decided that its interests required it to postpone doing so. The court, speaking by Judge Danforth, while recognizing that "a plainer case could hardly be presented of a deliberate and intentional disregard of the public interest and the accommodation of the public," yet held that it was powerless to interpose, because the defendant, as a carrier, was under no obligation at common law to provide warehouses for freight offered, or station houses for passengers waiting transportation, and no such duty was imposed by the statutes authorizing companies to construct and maintain railroads "for public use in the conveyance of persons and property," and "to erect and maintain all necessary and convenient buildings and stations" for the accommodation and use of their passengers, freight, and business, and because, under the statutes of New York, the proceedings and determina-

tions of the railroad commissioners amounted to nothing more than a request for information, and had no effect beyond advice to the railroad company and suggestion to the legislature, and could not be judicially enforced. The court said: "As the duty sought to be imposed upon the defendant is not a specific duty prescribed by statute, either in terms or by reasonable construction, the court cannot, no matter how apparent the necessity, enforce its performance by mandamus. It cannot compel the erection of a station house, nor the enlargement of one. As to that the statute imports an authority only, not a command, to be availed of at the option of the company, in the discretion of its directors, who are empowered by statute to manage 'its affairs,' among which must be classed the expenditure of money for station buildings or other structures for the promotion of the convenience of the public, having regard to its own interest. With the exercise of that discretion the legislature only can interfere. No doubt, as the respondent urges, the court may by mandamus also act in certain cases affecting corporate matters, but only where the duty concerned is specific, and plainly imposed upon the corporation. Such is not the case before us. The grievance complained of is an obvious one, but the burden of removing it can be imposed upon the defendant only by legislation. The legislature created the corporation, upon the theory that its functions should be exercised for the public benefit. It may add other regulations to those now binding it, but the court can interfere only to enforce a duty declared by law. The one presented in this case is not of that character. Nor can it by fair or reasonable construction be implied."

The mandamus in *Railroad Co. v. Washington Ter.* was refused, though presented in the name of the territory on the relation of its prosecuting attorney. The mandamus in the case at bar was presented in the name of private individuals, whose special interest in the subject-matter, as differing from that of the public at large, and giving them a right to stand in judgment, might be questioned. No issue was made, however, upon that point in the briefs or argument.

In *Southeastern Ry. v. Railway Com'rs*, 6 Q. B. Div. 586, 592, a railway company was held, by Lord Chancellor Selborne, Lord Chief Justice Coleridge, and Lord Justice Brett, in the English court of appeal, to be under no obligation to establish stations at any particular place or places, unless it thought fit to do so, and was held bound to afford improved facilities for receiving, forwarding, and delivering passengers and freight at a station once established, and used for the purpose of traffic, only so far as it had been ordered to afford them by the railway commissioners, within powers expressly conferred by act of parliament.

The decisions in *Railroad Co. v. Washing-*

ton Ter. and in *People v. New York, L. E. & W. R. Co.*, 104 N. Y. 58, 66, 67, 9 N. E. 856, were, in our opinion, based upon correct principles, which should and must control the present case. For the reasons herein assigned, it is ordered, adjudged, and decreed that the judgment of the district court be affirmed, without prejudice.

(51 La. Ann. 193)

**KELLY-GOODFELLOW SHOE CO. v.
FLUKER et al. (No. 13,068.)**

(Supreme Court of Louisiana. Feb. 6, 1899.)

INSOLVENCY—EXPIRATION OF RESPITE—RIGHT OF ACTION.

The expiration of the period for which a respite has been granted authorizes parties whose right of action has been stayed by the order of respite, and whose claims have not been paid, to proceed separately in their individual behalf against their debtor. There is no obligation or duty on their part to force him to a *cessio bonorum*.

(Syllabus by the Court.)

Action by the Kelly-Goodfellow Shoe Company against Ben K. Fluker and others. Case certified.

Stubbs & Russell, for petitioners. E. T. Lamkin and W. F. Millsaps, for respondents.

NICHOLLS, C. J. The judges of the court of appeals for the Second circuit have submitted to this court for its opinion, under article 101 of the constitution, the following question of law, the determination of which they declare is necessary and proper for a decision by the court of appeals of the case of the Kelly-Goodfellow Shoe Company against Ben K. Fluker et al., pending before it on appeal: "After the full term of a respite has elapsed, and no payments have been made by the debtor, can a creditor who participated in the meeting of creditors, and voted for the respite, proceed against the debtor by direct action for the recovery of his debt alone, without first resorting to judicial process to annul or vacate the judgment homologating the proceedings of the creditors or proceeding to force a *cessio bonorum*?" They state that the question arose under the following facts: The defendant Ben K. Fluker, in March, 1895, was granted a respite for three years for the payment of his debts. The judgment homologating the proceedings of the creditors was signed March 2, 1896, and the terms of the respite were that the debts should be paid in three equal, annual installments from that date. The plaintiffs were creditors, participated in the proceedings, and voted for the respite. The respite debtor failed to pay any part of plaintiffs' claim during the term of the respite, and on October 25, 1898, the plaintiffs brought an ordinary action against him to recover the same, coupling an attachment thereto. The defendant Fluker pleaded the respite in bar of the suit, alleging that the judgment of March 2, 1895, had never been

revoked or annulled, but was still in full force and effect, and therefore the suit ought not to be entertained. The district judge, in a written opinion filed in the cause, while maintaining that the plea should be overruled, yet maintained it, contrary to his own views, because the court of appeals for the First circuit, in the case of *Mrs. M. L. Bennett against Meredith*, sheriff (decided by that court in October, 1896, in the parish of Caldwell), maintained an injunction presenting the same issue. The judges of the court of appeals for the Second circuit, in their application, state that they differed from the views expressed in that case, and thought that the respite presented no bar to plaintiffs' suit, because the period for which it was granted has expired, and submitted the question to the supreme court, in the interest of uniformity in the jurisprudence of the state, for a proper decision of the cause.

We know of no legal reason why individual creditors whose action has been stayed by an order of respite may not proceed at once after the expiration of the delay fixed by the order to enforce their rights (if not then satisfied) by ordinary proceedings, as if the respite had not been granted. We have on several occasions declared that, while the respite was still in force, individual creditors would not be permitted to institute suits in their separate interest under and through which the property of the debtor, the common pledge of the creditors, should be appropriated to their own particular benefit; that the order for the respite and the respite proceedings themselves could not be ignored by direct action of individual creditors acting exclusively in their own behalf, even though the debtor may have failed to have carried out the duties imposed upon him by the respite; that their remedy was either to proceed, contradictorily with the debtor and all the creditors, to have the respite set aside, or to take action such as would inure to the benefit of all the creditors. Without intimating under what circumstances and by what method it should or could be done, we intimated that a forced *cessio bonorum* would be action of that character. The expiration of the time granted for the respite carries with it ipso a complete change in the attitude of the creditors towards the debtor and relatively to each other. Separate action for individual benefit prosecuted during the respite would enable particular creditors to utilize the respite proceedings for their own good, to the prejudice of the others resting upon them in security, and to take advantage of facts known only to themselves, and possibly coming to that knowledge by collusion with the debtor. All parties, however, are equally advised as to the extent of the delay granted, and, when it does expire, all stand upon an equality as to freedom of action. In *Anderson v. Duson*, 85 La. Ann. 917, and *Tobacco Co. v. Jefferies*, 45 La. Ann. 630, 12 South. 747, and other later cases, speaking of the order of respite, we said: "The effect of

the order was to create a judicial contract between the debtor and all his creditors, by which the debtor was allowed a delay for the payment of the sum which he owed them, and that this contract gave rise to reciprocal obligations, not only as between each creditor and the debtor, but between each creditor and all the others, which obligations they were bound to respect." But the courts are not authorized to broaden the effect of these obligations beyond the exact terms of the contract between the parties. Rev. Civ. Code, art. 3084, defines a "respite" to be an act by which a debtor who is unable to satisfy his debts at the moment transacts with his creditors, and obtains from them time or delay for the payment of the sums which he owes them; and article 3085, the "voluntary respite" as being that when all the creditors consent to the proposal which the debtor makes to pay in a limited time the whole or a part of his debt. The forced respite is declared to be that where a part of the creditors refuse to accept the debtor's proposal, and when the latter is obliged to compel them, by judicial authority, to consent to what the others have determined in the cases directed by law. Though differing from each other in the respects stated, voluntary and forced respite are identical, as being contracts limited in their scope and effect to a limited period fixed and defined,—terminating *ipso facto* by expiration of this time. Article 3096 declares that the time allowed to a debtor in a forced respite cannot exceed three years; and, if the majority of the creditors in number and amount have granted him more time, the creditors who are opposed to the respite may cause this delay to be reduced to the legal time, saving to the debtor the right, when it shall be expired, to call these creditors again, in order to obtain a new delay, which in this last case shall be granted only if all these creditors unanimously consent to it.

It is obvious that the restriction upon the action of creditors is limited to the period fixed in the order of respite, and that, the contract of respite terminating *ipso facto* by expiration of time, all parties are released from the restrictions imposed by it, and fall back upon their original rights, which have remained all the time, intact and unimpaired, though temporarily held in abeyance. Bank v. Bloch, 44 La. Ann. 893, 11 South. 466. From that time forward the various creditors owe no duty to each other, and none to the debtor, under the respite. Individual creditors, by placing themselves in the situation which would authorize them to exact a *cessio honorum*, may have recourse to that remedy, but they are under no legal obligation or duty to do so. Act No. 133 of 1888, if it applies at all to proceedings to be taken after the expiration of the respite delay, is permissive, not mandatory.

The objections urged in this case are not advanced by a creditor, but by the debtor himself in his own interest. His pretensions

are utterly without foundation. Dyson v. Brandt, 9 Mart. (La.) 498. If he desires to make a voluntary surrender, he is at liberty to make an application to the court to that end; but he can neither gain additional time under the respite, nor force his creditors to throw him into a surrender, under a supposed right which he holds against them to do so. The right to force a surrender upon the debtor is a right held by creditors adversely to their debtor, and not one which the debtor can coerce them into exercising. We answer in the affirmative the question submitted to us herein. The decision of the court of appeals for the First circuit in the case of Mrs. M. L. Bennett against Meredith, sheriff, referred to by the judges of the Second circuit, is erroneous, and should not be followed.

(61 La. Ann. 473)

APPLEBY et al. v. LEHMAN et al. (No. 12,992.)¹

(Supreme Court of Louisiana. Jan. 23, 1899.)

FRAUDULENT CONVEYANCES—RIGHTS OF CREDITORS
—ATTACHMENT—DATION EN PAIEMENT
—VALIDITY.

1. On the face of the papers, there was an attempt made to give an undue preference to some of the creditors of the vendor.

2. A sale in which the vendor leaves it to the vendee to make a pro rata division of the price, among the former's creditors (especially as the vendor sold all his property, and in other sales did not stipulate for a pro rata division among the creditors) is not binding upon creditors, so as to preclude them from suing out a writ of attachment.

3. The sales of record evidence an intention to prevent and hinder the creditor from collecting, and to place the property beyond the reach of his creditors, in violation of article 240 of the Code of Practice.

4. "The law forbids to give in payment to one creditor, to the prejudice of the other, any other thing than the sum of money due."

5. A dation en paiement of all the debtor's property is null, even though in one of the sales between him and his vendee there is a stipulation for a pro rata division of the price among the creditors; the amount being much less than the sum of his debts.

(Syllabus by the Court.)

Appeal from judicial district court, parish of East Feliciana; Joseph L. Golsan, Judge.

Action by Mrs. Callee Appleby and husband against A. Lehman & Co. and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

W. F. Kernan, for appellants. Isaac D. Wall, for appellees.

BREAUX, J. This was a suit for damages in the sum of \$3,000, which plaintiff alleges were caused by an illegal seizure under a writ of attachment, and, in addition to the claim for damages, for an injunction restraining the sheriff and the creditor who had proceeded by attachment to recover his claim from proceeding further under the writ of attachment. In January, 1898, Peter W. Apple-

¹ Rehearing denied February 20, 1899.

by sold to plaintiff all his stock of goods and fixtures in the store,—inventoried (the act sets forth) by disinterested parties at \$2,324.78. The consideration for the act is made to appear by the following: That Mrs. Callie Appleby is to credit certain judgment notes held by her against P. W. Appleby with the said amount of \$2,324.78, and Mrs. Callie Appleby further agrees to prorate with the creditors of P. W. Appleby out of the amount above written. We are informed by the testimony that the different conveyances made by the vendor to plaintiff included all the personal property of the vendor, and all his real estate. His notes and accounts he also transferred to plaintiff, to be collected, and the amount collected also to be divided pro rata among all his creditors. The real estate was conveyed to plaintiff by P. W. Appleby, for cash, in three deeds; two bearing the same date, viz. 19th of January, 1898, and one the 31st of January, 1898. In one it is declared that the "consideration for which this sale and transfer is made and accepted is the price of fifteen hundred dollars paid or to be paid, fifteen hundred dollars cash in hand, the receipt of which is hereby acknowledged by vendor." In the other deed the consideration was \$402 cash. With reference to the first price, the vendor stated that he has now not received it, but that in reality the property was conveyed to the vendee because it was her property. The other deeds set forth cash consideration, but no such cash was paid. The testimony refers to other transactions and indebtedness for which the conveyance was made. In February, 1898, defendants sued out a writ of attachment against the vendor, charging him with having infringed upon and violated paragraphs 4 and 5 of article 240 of the Code of Practice. The sheriff, under the writ, seized the entire stock of merchandise sold as above stated, which plaintiff had bought, as just stated, for the sum of \$2,324.78, consisting of clothing, hardware, and other property, to collect his claim for \$200.08. The sheriff was notified that plaintiff claimed as her own the property which he was about to seize. After seizure, plaintiff sued for wrongful seizure of property, claimed the property, and obtained an injunction against the seizure. Other creditors for small amounts about the same time also sued out attachments. These attachments were enjoined. The suit was directed against all the defendants (plaintiffs in the attachment writs). The latter excepted on the grounds of misjoinder of parties. The district court sustained the exception and dismissed the injunction. After the dismissal she sued out an injunction against each of the seizing creditors, including the present defendant, who is sued separately from the other attaching creditors. P. W. Appleby is the half-brother of F. Appleby, husband of Mrs. Callie Appleby, the plaintiff. The latter is separate in property from her husband. In the transaction between the two brothers it appears that the husband of plaintiff, as well

as plaintiff, became the debtor of their vendors. This indebtedness, they claim, was the consideration of the transfer made to the plaintiff. As relates to delivery, the goods were left in the store previously occupied by the vendor, and the same clerk remained. P. W. Appleby's name and sign were on the store the day of the seizure. On the trial of the suit before a jury, the verdict and judgment of the court went against plaintiff. From this judgment she appeals.

The contract whereby the vendor sought to sell the contents of the store to plaintiff was not a sale. We are concerned in deciding whether there was a sale solely with the price needful to constitute a contract of sale. No one denies that under our law it is settled that there could be no sale without a price certain. "*Nam nulla emptio sine pretio.*" We have not succeeded in finding a price certain. We have seen that the vendor conveyed all his property. In one of the deeds he sought, by its terms, to stipulate for a pro rata division of the price among all the creditors; but, in the other three deeds, that he executed about the same time as vendor, no such attempt was made. The sales were for cash on the face of the papers, and creditors were not bound to consider them as having been made for other than cash. Plaintiff cannot sustain the position that she was bound, under the terms and conditions of the sale, to make a pro rata division of the price, and that in consequence she was indebted for the whole amount to the extent needful to pay the pro rata to the other creditors. She was not bound at all in this respect, for three of the sales stipulated in cash, and these three deeds are silent about division of the price. With reference to the sale in which there was a stipulation sought to be imposed on vendee, it is sufficient to say that the debtor made insolvent by the different conveyances had no right in law to restrict to a pro rata division only part of the property. He (the creditor) was at least entitled to a percentage of the whole property in part payment of his claim. The price was not certain, for it was not for cash, though so declared in the deed. It was not certain, for the defendant, who was the creditor of the vendor, was excluded from participating in any part of the proceeds by the declaration that the sale was for cash. Moreover, if we were to consider the sale of the merchandise alone, in our judgment the condition stipulated, that the vendee should make a pro rata distribution of the price, was in the nature of a condition precedent to the sale; the amount to be considered and then paid prior to a complete sale. The property, as we take it, did not become plaintiff's, under the condition imposed upon her, prior to payment. In this view, it was not an executed contract, but it was, at most, solely executory. 24 Laurent, § 74. A question similar was considered in *Prude v. Morris*, 38 La. Ann. 767. Should the transaction be

viewed as a *dation en paiement*, instead of a sale, the conclusion, in our judgment, should be the same. The law is clear enough. No conveyance shall be made by the debtor to "give an unfair preference to some of the creditors." Code Prac. art. 240. The insolvent debtor is not at liberty to select one or more of his creditors, and convey to them, out of the ordinary course of business, property which is the common pledge of the creditors. Rev. Civ. Code, art. 2658.

But the learned counsel representing plaintiff with great force insists that there is no evidence of record that the sale of the stock of merchandise which was enjoined in this writ was made to defraud any of the creditors of the vendor, or to give plaintiff an undue and unjust preference. We, in deciding the point presented, are not dealing with the sale of the stock of merchandise exclusively. We must consider all the deeds which resulted in a complete conveyance by the debtor of all his property to the plaintiff. The debtor may not have intended to give an unfair preference to the plaintiff creditor, and both vendor and vendee may have had in contemplation the payment of the defendant. But no promise to pay, or the least evidence of the intention to pay, was reduced to writing in the deeds conveying the real estate, and placed of record. The state of facts appearing of record is controlling, and not the unknown intention of the parties. Lord Coke advises as follows: "Reader, when any gift shall be made to you in satisfaction of a debt, by one who is indebted to others also, let it be made in a public manner, and before the neighbors, and not in private." From Benj. Sales, p. 365. This court has said that the insolvent is not free to give in payment to one creditor to the prejudice of another. *Queyrouze v. Thibodeaux*, 30 La. Ann. 1116. The effect, whether considered as an intended sale, or a *dation en paiement*, or a payment, was to hinder or delay the creditors of the plaintiff in a manner forbidden by article of the Code of Practice already cited. In the application of the article, the question for the jury of the vicinity was whether the transaction was *bona fide*, or to hinder and delay creditors. The jury found the latter, and we are not inclined to differ with them, in so far as the question was one of fact.

As relates to delivery, the question is not free from difficulty. We have before noted the facts regarding the asserted delivery. They do not show that delivery which is required in a *dation en paiement*. The decision of this court has emphasized the necessity of actual delivery in order that the transferee may hold the property. *Queyrouze v. Thibodeaux*, 30 La. Ann. 1114. Under the facts as proven, delivery was not shown as it should have been. The plaintiff has not established when she went into possession and control of the property and business of the store. Beyond the notice that she claimed the goods at the date of the

seizure, her possession and control of the property and business of the store are not, in our view, proven.

In any point of view, no damages can, in our judgment, be allowed; nor should the writ of attachment be dissolved. The debtor conveyed away all his property, and would have left the creditors without recourse, save, at most, to the extent of a percentage or pro rata division of the proceeds of one of the sales; i. e. price of the merchandise of his store, \$2,324.78. The indebtedness of the vendor was about three times that amount. The sales were not made in due course of business, and, in our view, violated the provision of the Code of Practice regarding preferences which debtors should not give.

We have not discovered error in the verdict found, or in the judgment of the court. They are approved, and the judgment of the district court is affirmed.

(51 La. Ann. 210)

PATOUT et al. v. LEWIS. (No. 12,999.)

(Supreme Court of Louisiana. Feb. 6, 1899.)

SERVITUDES—ACCESSORY RIGHTS—OBSTRUCTIONS—REMOVAL—ESTOPPEL—INJUNCTION.

1. It is not necessary, in an act creating a servitude, that the accessory rights required to carry it into effect, and without which it would be of no value or service, nor the obligations resulting from those rights, should be mentioned. They accompany and pass with the contract, as incidents thereof.

2. A person consenting to a servitude upon his land thereby consents to a right of access to and from, and a right of passage to and from, the land subjected to the servitude, in order to give effect to the servitude to the extent and in the manner known to and contemplated by the parties. He to whom a conventional servitude is due has the right to make all the works necessary to use and preserve the same. He has the right to place a gate in the boundary fence, if one be necessary to reach the grounds, and insist that it be not removed and access to the lands barred.

3. It is the duty of the owner of the estate which owes the servitude to fix the place where he wishes it to be exercised, when the manner in which the servitude is to be used is uncertain, and the place which is proper for the exercise of the right is not precisely fixed in the title.

4. When the right of building and operating a tramway and switch has been granted, and the owner of the land has consented to the use of the land at the end of the switch for the purpose of dumping cane, to be thence loaded on cars, and the tramway and switch have been constructed, and a dumping ground has been used at a certain place and in a certain manner for several years, to the knowledge of all parties, the owner of the land cannot ignore the fixed condition of affairs in which he has acquiesced, and to which he has by his conduct consented, and take down and remove the gate giving access to the grounds, and bar entrance to the latter, under a claim that the switch and dumping ground were improperly located, and the right to the servitude had been forfeited for nonperformance of conditions attached thereto.

5. The owner of the land has the right, when the servitude is not being exercised, to strengthen for his own protection the gate giving access to the land subjected to the servitude, and the fence upon his boundary line; but he

must do so in a manner not tending to diminish the use of the servitude, or to make it more onerous. He cannot change the condition of the premises.

6. The owner of the estate to whom the servitude is due has the right, when the owner of the estate owing the servitude has barred entrance to the lands subjected to it, to remove the obstructions placed in the way of the exercise of his rights, without having recourse therefor to judicial proceedings, when he can do so without a breach of the peace; and, when it has been established on the trial of a particular case that he could validly have exercised such right, he cannot be subjected to damages for having applied for and obtained, and had executed, an *ex parte* order of court directing the sheriff to remove the obstructions, even though the order should not have been given.

7. When the owner of the land to whom a servitude is due finds the exercise of his right prevented by the removal, by the owner of the land owing the servitude, of the gate giving entrance to the ground, and the latter refuses, on demand, to replace matters as they stood, he is warranted in fearing, should he open the way to the grounds, that entrance thereto would be again barred by the owner unless he should be enjoined from so doing.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Iberia; Félix Voorhies, Judge.

Petition by Mrs. M. A. Patout & Son against John B. Lewis. From a judgment for defendant, plaintiffs appeal. Reversed.

Petitioners prayed the district court for an injunction, directed to the defendant, prohibiting him from further interference with the free use and undisturbed possession of certain described lands, and more particularly that he be restrained from further obstructing, by fencing and otherwise, any of certain lands which had been donated to them by defendant by notarial act of the 11th of January, 1893, by act before Weeks, notary, for the purpose of facilitating plaintiffs' operations in the purchase and transportation of cane to their sugar mill, situated in the parish of Iberia, on which plaintiffs had constructed a tramway and switch. They averred that since the date of the donation of the lands they had taken possession of the same, and had continued to hold them up to date, but that defendant, without right or reason, had fenced off and barricaded the lot of ground described in the act of donation as being of 250 feet in length by a width of 250 feet, used as a dumping ground for cane; that he had placed his fence on said tract, and, refusing to remove it, was impeding and obstructing the free passage on said land, and preventing the use thereof for the purpose for which it was donated and used by plaintiffs; that they were about to begin milling operations; that the parties from whom they purchased cane in the neighborhood of said tract required access to the switch on said tract, as in preceding years had been the rule; that the obstruction to their rights, depriving them of the means and facilities required for their operations, was a nuisance, and inflicted upon them irreparable injury. Plaintiffs supplemented their prayer for an injunction by a prayer that the sheriff

of Iberia parish be ordered to proceed to the locality indicated, and to remove therefrom the fencing and obstructions set forth, and to clear said lots therefrom. The district court, upon this petition, ordered an injunction to issue as prayed for, and instructed the sheriff to proceed at once to the place designated, and to remove therefrom the fencing and obstructions placed thereon by the defendant. The sheriff under this order proceeded to the point specified, and made an opening in the fence bordering the public road, thus enabling parties to enter from the public road into the dumping ground. The defendant answered, pleading first the general issue. He admitted the existence of the act of donation, but denied all rights claimed by plaintiffs under the same. He averred that plaintiffs' action in suing out the writ of injunction, and causing the sheriff to cut down and remove a part of his fence which inclosed his cultivated lands, was illegal, malicious, and without cause or shadow of right, and that, if plaintiffs had any right to an entrance upon the land (which he denied), said right could only exist by virtue of the act of January 1st, and that said act contained no stipulation requiring defendant to remove any part or portion of his fence and inclosure, but imposed on plaintiffs the obligation of putting up and keeping all necessary gates; that the fence inclosing the land referred to as a "dumping ground" is the fence that inclosed the lands of defendant, wherein he cultivated his crops, and by cutting an opening in said fence, and leaving the same open, the entire crop of defendant was exposed to the ravages of cattle and other animals; that the wrongful injunction, and acts perpetrated thereby, had caused him to suffer much annoyance, loss of time, and expenditure of money, and forced him to employ counsel to dissolve the injunction; that he had been damaged by said wrongful acts in the sum of \$2,000. Further answering, he alleged that plaintiffs had violated the conditions assumed by them in the act of donation, and had forfeited all rights under said act to any portion of the land over which the right of way was granted, and had also trespassed upon the land of defendant not donated, by laying the tramway or switches in a place different from that designated in the act, and this plaintiffs did knowingly, and against the will of defendant, who protested at the time, and had repeatedly protested and demanded that the switch be removed, and which wrongful action resulted in cutting up the land of defendant in a very damaging manner. He averred that a portion of the land occupied by the switch built by plaintiffs was never donated, and that plaintiffs were trespassing thereon; that plaintiffs had forfeited the right of way granted, for the reason that the consideration promised, and for which the right of way was granted, had been refused and denied defendant, and in lieu thereof abuse and injury to his property had been perpetrated by the willful and malicious acts of the

plaintiffs; that plaintiffs' refusal to allow him and his laborers the use of the cars and switch had caused him to lose hundreds of tons of cane, worth \$750, which he also pleaded in reconvention; that the right, if granted, should be declared forfeited, and plaintiffs decreed the trespassers; that the injunction sued out should be dissolved, with damages, actual and exemplary, in the sum of \$1,000 each, and attorney's fees in the sum of \$250, which he pleaded in reconvention. He prayed that the injunction be dissolved, with damages, actual and exemplary, in the sum of \$1,000 for each cause, and with \$250 attorney's fees, and \$750 for cane crops lost. He prayed that the act of donation of the right of way over his land be declared forfeited and set aside and annulled, or, in the alternative, if said donation be maintained, that plaintiffs be decreed trespassers on such portion of defendant's lands as was shown to be occupied by the switch, and not designated in the act, reserving defendant's right to enforce a specific compliance with all the stipulations of the act, and to sue for damages resulting from any violation. The district court ruled that the setting aside of the act of donation could be demanded only in a direct action; that it could not be asked in reconvention. It dissolved the injunction, with costs. It rejected the demand for damages, declaring that none had been proved. Plaintiffs appealed. Defendant answered the appeal, praying that the judgment be amended by awarding him \$100 for attorney's fees, and \$500 as damages, and that as so amended the judgment be affirmed.

Walter J. Burke & Bro. (Foster & Broussard, of counsel), for appellants. L. T. Dulaney, for appellee.

NICHOLLS, C. J. (after stating the facts). Defendant and appellee having answered the appeal taken herein by plaintiffs, asking that the judgment below be affirmed, except to the extent which he prayed to have the same amended by awarding him \$100 for attorney's fees, and \$500 as damages, our inquiries are limited to ascertaining whether or not the judgment below was correct in setting aside plaintiffs' injunction, and, if it was, whether or not defendant should not have been allowed his attorney's fees and damages to the extent now claimed.

The evidence established that the plaintiffs were planters, engaged not only in the cultivation of cane, and the manufacturing of the same into sugar, but in manufacturing sugar from cane purchased by them from their neighbors; that this latter branch of their business necessitated their having under their ownership and control a tramway over the lands of the parties from whom they purchased, and so situated as to enable other parties from whom they purchased to avail themselves of the same; that they applied to their neighbors (among whom defendant was one) for assistance in carrying out this object, and

succeeded in obtaining from them grants under which they constructed the tramway. The dealings between plaintiffs and defendant touching this matter are shown by a notarial act of the 11th of January, 1893, before Weeks, notary, in which, after reciting that plaintiffs were a partnership formed for the purpose of buying cane and refining sugars, etc., and were then locating and about commencing the construction of a switch from their sugar mill, in the First ward of the parish of Iberia, near the town of Patoutville, to and including the lands of John B. Lewis, which switch was to pass through the property therein described, Lewis is made to declare that in consideration of the increased value which would be given to said land, and of the additional benefits and conveniences resulting from the building of said switch, he gave, granted, donated, and conveyed, free from all damage and cost, unto Mrs. M. A. Patout & Son, their heirs and assigns, a strip of land in said parish, to wit: "Said strip of land to be twenty-five feet wide on its whole extent, except as hereinafter given more width for the purposes of curves, yards," etc. "Beginning and to commence at the western boundary of Frère Bonin's, about where the railroad of the Caffery Refinery crosses, and running due north along said east boundary to the public road where said switch, after crossing Frère Bonin's land, meets said Lewis' land, said Lewis grants as much land as shall be necessary to make the proper curve; thence due west, along south side of the public road, and contiguous thereto, to the extreme northwest corner, as shall be necessary to make an extra switch, said switch running along the west line from the northwest corner about two hundred and forty feet; and at the terminus of said extra switch said Lewis grants a tract of land 250 feet in length and two hundred and fifty feet in width; said land to be high land, and to be used for the purpose of a yard for dumping cane, etc., switch purposes. Said right of way or strip of land shall be 25 feet in width, and ——— feet, more or less, in length. To have and to hold the said tract of land, for the purposes above mentioned, unto the said Mrs. M. A. Patout & Son, their heirs and assigns, forever." The said firm of Mrs. M. A. Patout & Son, on their side, bound and obligated themselves to put in all necessary and proper drains, crossings, and gates on the line of said switch, if a switch should be needed; said Lewis, grantor, reserving the right to demand that said switch should be placed on the northeast corner of his land. Should the said road cease to be used for the purposes stipulated, then and in that event said land granted should revert, and become the property of grantor. The evidence showed that the tramway was constructed as it still exists in the year 1894, and that it was utilized in taking off the crops of 1894 and 1895. As laid, it crosses Lewis' land on its eastern boundary, running by a northwesterly curve near to the northern boundary of the

land, contiguous to which is a public road running east and west. The tramway runs along the northern boundary, nearly due west, parallel to the public road, until it nearly reaches the western boundary of the land, where it curves towards and crosses the public road mentioned, and leaves Lewis' property. From the point where this last curve commences, the plaintiffs constructed the switch referred to in the act. It runs on a curved line from the main tramway in a southwesterly direction, and terminates about 60 feet from the western boundary of Lewis' land, along which there is a second public road at right angles to, and connecting with, that first mentioned. At the time of the passage of the notarial act the particular tract of land on which the tramway and switch were built was used by Lewis as a pasture, but it was subsequently turned into a cultivated field. A gate opened from the public road on the northern boundary into this pasture, through which outside parties from whom plaintiffs purchased cane passed with their loaded carts, dumping the cane around the end of the switch, to be there loaded into cars. It was soon found that the cattle on Lewis' pasture went upon the dumping ground, and to some extent injured the cane lying upon the same. To remedy this, permission was granted by Lewis to throw a wire fence around the interior lines of the dumping ground. In the meantime, the passing of the loaded cane carts through the pasture having considerably cut it up, Lewis gave permission to the farmers selling cane to the plaintiffs to open a gate opposite to the dumping ground through the fence lying along the public road on the northern boundary; they to be responsible for it. It was through this gate that the farmers mentioned had access to the dumping ground in 1894 and 1895. The interior wire fence to which reference has been made served the double purpose of protecting the farmers' cane from injury from cattle and also of preventing animals who might accidentally get into the dumping ground through the gate from passing into the pasture or field beyond. At some time, not fixed with certainty, this interior fence was removed by the defendant. In 1895, just after the grinding season of 1894 had closed, defendant caused the gate opposite the dumping ground to be taken out and placed on the other side of the public road, and the gap in the fence made by such removal to be closed by wires stretched across the same. Defendant, on the stand, gave as his reason for so doing that the gate had become dilapidated, and no longer served as a protection against the ingress and egress of cattle. Just before the commencement of the grinding season of 1896, plaintiffs sent two persons to ask defendant to replace the gate. On his failing to do so, plaintiffs instituted the present proceedings. The testimony in the case and defendant's pleadings show that a disagreement of some kind had taken place between the plaintiffs and the defendant, either in respect

to the purchase of the cane cultivated by defendant's tenants, or to their right to avail themselves of the cars upon the tramway to transport their cane to other places. The facts of the case are not shown, but defendant, in his answer, sets up a claim in reconvention of \$750 for damages for loss of cane, and in his testimony, referring to the demand on him to reopen or replace the gate, stated that he answered the parties sent to him for that purpose that he "would not put in the gate"; that he thought Mr. Patout had treated him very badly. Defendant denied that he was asked to "reopen the fence," and insisted that the demand upon him was "to put in the gate." One of the two parties who made the demand upon him testified to the same effect, but the other testified that he had called upon defendant "to open the gate."

We understand the district court to have reached the conclusion, in view of all the circumstances and probabilities of the case, the relations of the parties, and the business in which they were respectively engaged, the situation of the properties, and the benefits to be derived by each, that the notarial act before Weeks, notary, evidenced, not a transfer of the ownership of the property described therein, but the creation of a servitude; that, therefore, the fence surrounding Lewis' land remained his property, and he had the legal right to take out the gate which the farmers had placed in the fence, and close the gap, particularly at a time when the servitude was not being exercised; that there was nothing in the act of January, 1893, entitling the plaintiffs to deprive defendant absolutely of the exercise of that right; that the evidence left the exact legal location of the dumping ground in doubt, and it was a question whether, under the act, it was not entirely inside of the pasture, away from the fence and the northern boundary line of Lewis' land. The court, in its reasons for judgment, said: "The fence formed no part of the property donated. It was and still is his property, of which he may dispose as he judges proper, provided he does so in a legal manner, although others might be inconvenienced by his action. He could certainly close his gate, which is a part of the inclosure of his lands, and prevent ingress and egress through it, unless it be shown that by some act of his he has divested himself of the power to do so. The act of donation is mute on the subject. There is no proof, other than that he allowed the use of that gate by sufferance, and to accommodate his neighbors. He therefore cannot be hampered in the use he may desire to make of his property. The court is of the opinion that the plaintiffs have no real right that they can exercise on the gap or gate in question. They have no right of way through that gate, without the consent or permission of the defendant." The court was of the opinion that under no circumstances were the plaintiffs authorized to deal with the fence in manner such as to leave defendant's field unprotected. Defendant's counsel says: "It will be

noted that one of the conditions of the act on which plaintiff bases his right was that the plaintiff should keep up all necessary gates; hence it was his duty to keep up this gate opening into the dumping ground. But, while he looks upon it as such a necessity as to warrant him in calling upon the court, he did not take care to see that it was kept in standing order. Plaintiff's laches in this matter made it necessary that defendant should act to protect himself, and, finding the gate broken and down, he closed the gate with wire. The dumping ground was not in use at that time of the year, and the closing did not and could not injure any one, or in any manner interfere with the rights of plaintiff. Neither was it a trespass on the land of plaintiff, since he had no ownership in the land, but the use of it only at a certain season of the year. The failure of the defendant to obey plaintiffs' order to him ill suited their imperious temper, and without hesitation they invoked the machinery of the court to enforce their mandate. The deputy sheriff, who executed the writ, and Mr. Davis, both witnesses for the plaintiffs, say that it only required ten minutes' work with a hatchet to remove the wires obstructing the gate. Mr. Davis says there was no physical or other opposition made to the opening of the gate, and Mr. Lewis swears that he never made, or threatened to make, any objection. Then, if no objection was made by defendant or any other person, why did not the plaintiff open the gate himself, instead of suing out an injunction and having the sheriff to open it, and that some time before it was necessary for use, and while he was obligated to keep up all necessary gates? The evidence showed that no threat was made by Mr. Lewis, and no reason at all can be given by the plaintiff for apprehending opposition to opening the gate, or that it would be again obstructed by defendant."

The first point to which we direct our attention is the contention made by the defendant that the dumping ground was improperly located, and that plaintiffs had no rights whatever at the particular spot where defendant barricaded the fence. For the purposes of this suit, we must assume the location was the proper one. A fixed status or condition of things, reaching over a number of years, the consent to which is evidenced not only by the silence and acquiescence of defendant, but by affirmative acts on his part, cannot be ignored and collaterally drawn in question as has been attempted to be done by defendant. The switch was constructed years ago, and the dumping ground has been occupied where it now exists ever since, not only, under the eyes of Mr. Lewis, without complaint, but by his express permission the farmers of the neighborhood were permitted to have access, at first through the pasture gate, and subsequently through the gate opposite the end of the switch. It was the duty of the defendant, under article 779 of the Revised Civil Code, if the manner in which the servitude was to be

used was uncertain, and if the place necessary for the exercise of the right of passage was not designated in the title, to fix the place where he wished it to be exercised. We think he has done so in this case. Defendant insists that there was no mention in the act before Weeks of any grant to plaintiffs or others to enter upon the dumping ground through his northern boundary fence; that, even if it had been located along that line, the act cannot be extended beyond its exact terms as to the character and extent of the rights granted; that in point of fact the dumping ground was intended to have been located entirely within and away from the fence, and he was not called upon to grant a right of way from it to the public road; that the act contained not a word of restriction upon his right of ownership in respect to the fence. There was no necessity for the defendant to have expressly granted to the plaintiffs and the parties from whom they purchase cane a right of ingress to and egress from the dumping ground to the public road through the fence, nor a right of way to and from the same over intermediate land of the defendant if such there was. Defendant was fully advised as to the object intended to be accomplished by the switch and dumping ground, and, in consenting thereto, necessarily consented to everything necessary to be done to make the grant effective in the manner contemplated by the parties. The principle announced in article 2490 of the Revised Civil Code, which casts upon a vendor "the obligation of delivering the thing sold," including "the accessories and dependencies, without which it would be of no value or service, and likewise everything that has been designed to its perpetual use," has application in this matter. The same principle finds expression in articles 701, 702, 1903, 1930, 1954, and 1964 of the Revised Civil Code. There was no necessity for the act to have contained any express declaration by defendant that he did, through the agreement to which he was then consenting, impose any restrictions upon his rights of ownership in respect to the fence. The acquisition of rights by the plaintiffs carried with it, ipso facto, as a consequence, all restrictions upon defendant's rights which would be necessary to give effect to the rights conveyed. Article 772 of the Revised Civil Code declares that he to whom a servitude is due has a right to make all the works necessary to use and preserve the same, and article 774 gives to the owner of the estate to which a conventional servitude is due the right to go on the estate which owes the servitude, with his workmen, in the place where it is necessary to construct or repair the works for the exercise of the same. Plaintiffs were entitled to place a gate in the boundary fence, in order to give to those from whom they purchased cane ingress and egress from the dumping ground. They were also authorized to inclose the dumping ground on the interior of the pasture by a wire fence, to protect the cane thereon from being injured by cattle. This

fence was not only necessary for the use of the servitude granted, but it was beneficial to defendant, in barring the entrance of cattle from without upon defendant's pasture. Rev. Civ. Code, art. 662. It may be conceded that the granting of the servitude to plaintiffs did not withdraw from the defendant the right of repairing the gate, and taking steps to protect his field or pasture from outside depredations by temporarily extending wires across the place occupied by the gate during the period when the servitude was not being exercised; but this is something other than a right to take down and remove the gate, and to bar future entrance to the dumping ground, for article 777 of the Revised Civil Code declares that the owner of the estate which owes the servitude can do nothing tending to diminish its use, or to make it more inconvenient; thus, he cannot change the condition of the premises.

Defendant intimates that it was not his intention to do more than to temporarily protect himself; that he nowhere declared that plaintiffs and their vendors of cane should not thereafter have access to the dumping ground; that it only required a hatchet and a few minutes' work to have replaced matters in their original situation; that plaintiffs or their workmen could have done this themselves, and plaintiffs acted maliciously in having recourse to judicial assistance. We are of the opinion that the plaintiffs had the right to replace matters themselves, if they could have done so without the danger of a breach of the peace; but we do not see that they incurred any increased responsibility, or lost any of their rights, by asking and obtaining the aid of the court in enforcing this right. We are not called upon to say whether the court could not have legally declined such assistance, or whether, such aid having been ordered to be given, defendant could not, before it was executed, have stayed the order. The order has been given and executed, and the replacing of matters in their original status has become an accomplished fact. We do not see how, as matters stand, defendant was prejudiced by the fact complained of. We are not prepared, under the circumstances of this case, to regard defendant's action in taking down and removing the gate, and stretching wires across the gap, as having been intended to be merely temporary, and done with the object of temporary protection to his field. We are of the opinion, on the contrary, that defendant intended to permanently close the fence, and bar future entrance to the dumping ground, and that plaintiffs had reason to believe that the obstruction to such entrance, placed there by defendant, and then existing, was intended to be permanent; that the removal of same, if attempted, might be resisted, and, if removed, that it would be replaced. We are of the opinion that plaintiffs were justified in seeking a restraining injunction. We do not understand its effect will be to prohibit defendant from exercising hereafter any rights which he may legally have touching the fence in question, but

simply to prevent him from doing anything tending illegally to diminish the use of the servitude, or to make it more inconvenient,—from changing the condition of the premises to the prejudice of plaintiffs' rights. With that construction given as to the scope, extent, and effect of the injunction which issued herein, we are of the opinion that the judgment of the district court was erroneous, and it should be set aside. For the reasons assigned, it is ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, annulled, avoided, and reversed, and the injunction is reinstated, and the cause remanded to the district court. Costs of appeal and of the district court to be borne by the defendant and appellee.

(51 La. Ann. 347)

ROWSON et al. v. BARBE. (No. 12,979.)

(Supreme Court of Louisiana. Feb. 6, 1890.)

PETITORY ACTION—EVIDENCE—DONATION OF REALTY—VALIDITY—JUDGMENT.

1. In a petitory action, plaintiff must recover upon the strength of his own title, not upon the weakness of that of his adversary.

2. Such an action may be defeated by showing that the title is in a third person, or that a third person has a better title than that asserted by plaintiff.

3. By the Civil Code of 1808, as by the present Code, a donation of real estate is null and void, unless executed before a notary and two witnesses, and accepted in express terms by the donee during the lifetime of the donor.

4. Without these formalities and essentials, a donation *inter vivos* presented as a muniment of title fails absolutely.

5. Where plaintiff's case fails on the weakness and insufficiency of the showing of title made by him, and it is so adjudged by the trial judge, it was error to go further, and pass judgment rejecting defendant's pleas of prescription, set up in the answer; this, on the ground that the case fell before consideration of the defense began.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Calcasieu; S. D. Read, Judge.

Action by E. F. Rowson and others against Clara Barbe. From the judgment, both parties appeal. Affirmed as to plaintiffs, and reversed as to defendant.

Fournet & Fournet and Williams & Sugar, for plaintiffs. Pujo & Moss and Schwing & Mooré, for defendant.

BLANCHARD, J. This is a petitory action, instituted by plaintiffs, who seek to be decreed the owners of section 21 in township 11 S., of range 3 W., and section 37 in township 11 S., of range 4 W., containing 676.79 acres of land. The land is situated in the parish of Calcasieu, on Lake Arthur. It was formerly thought to be only fit for pasturage purposes, being then wild prairie lands, of little demand, and scarcely any market value. But the remarkable development of the rice culture industry in that section of the state has brought about a great change, and lands once selling as low as 12½ cents an acre now command \$10 to \$20 per

acre. The land in controversy is of that character, and, naturally, the more valuable such lands become, the more are the tenures of ownership by which they are held apt to be called into question, and adverse muniments of title set up. Defendant pleaded the general issue, averred possession of the land since 1878 under a chain of title which she sets out, invoked the prescriptions of 2, 3, 5, and, 10 years, and reconvened, in the event of eviction, for the value of improvements placed by her on the property. The judgment below, while denying the prescriptions pleaded by defendant, rejected plaintiffs' demand on the weakness and insufficiency of the showing of title made by them. Both parties appeal,—plaintiffs seeking to reverse the decree by which their demand is rejected; defendant, to reverse that part of it overruling the prescriptions aforesaid.

Plaintiffs assert the following chain of title, viz.: (1) Grant from the Spanish government to Louis J. L. Brognier De Clouet, under the designation by the United States commissioners of Grant B, No. 89; (2) confirmation of this grant by the United States, and issuance of patent to Louis J. L. Brognier De Clouet, or to his legal representatives, and to his or their heirs, on November 1, 1833, and recorded January 13, 1874; (3) donation *inter vivos* by private instrument of writing on March 2, 1813, from Louis J. L. Brognier De Clouet to Marie Louise Catiche De Clouet (Dame Lastrapes), his niece and goddaughter, recorded January 13, 1874; (4) act of sale, conveyance, and transfer, without warranty, on October 2, 1896, by the heirs of Marie Louise Catiche De Clouet, deceased, and of her then deceased two sons and daughter, Alfred Lastrapes, Charles Lastrapes, and Henriette Lastrapes, widow of Alexander Landry, to plaintiffs, recorded October 6, 1896. Defendant asserts chain of title as follows, viz.: (1) Last will and testament of Balthazar Neville De Clouet to Dolores De Clouet et al., dated September 30, 1844; (2) act of sale and conveyance by Dolores De Clouet et al. to Perigrino Avendano, on July 22, 1859, and recorded August 16, 1859; (3) tax sale of the property as that of Perigrino Avendano to Clairville Granger, on July 8, 1872, and recorded May 6, 1874; (4) confirmation of this tax sale by the state auditor to Clairville Granger, on August 6, 1874, and recorded October 2, 1875; (5) act of sale and conveyance by Clairville Granger to defendant, on August 31, 1878, and recorded December 14, 1881. The heirs of Marie Louise Catiche De Clouet (Dame Lastrapes), appear to have paid taxes on the property in the years 1887, 1888, 1890, 1893, and perhaps other years. Defendant has paid taxes on the same property since her purchase from Clairville Granger, in 1878. In the latter part of 1891, or the early part of 1892, she took actual, corporeal possession of the land, leasing it to various parties, and the same was put under fence and in cultivation. It has been since, and is now, in her actual possession. Plain-

tiffs and those from whom they claim title have never been in actual possession.

It is a principle of law so familiar as to have become trite that a plaintiff in a petitory action must recover upon the strength of his own title, not upon the weakness of that of his adversary. *Phillips v. Flint*, 3 La. 146. And a petitory action may be defeated by showing that the title is in a third person, or that a third person has a better title than that asserted by plaintiff. *Thomas v. Turnley*, 3 Rob. (La.) 207; *Williams v. Riddle*, 10 Rob. (La.) 505; *Surgi v. Colmar*, 22 La. Ann. 20; *Cronan v. Cochran*, 27 La. Ann. 120. As has been seen, one of the props of plaintiffs' asserted title is the act of donation made in 1813 to Marie Louise Catiche De Clouet. This was a private act, and the signature thereto was simply "B. De Clouet." Plaintiffs affirm this was Louis J. L. Brognier De Clouet. Defendant contests this, denies that it is shown by legal evidence to have been Brognier De Clouet, and asserts it might just as well have been Balthazar De Clouet, who is shown to have been a brother of Brognier. However this may be, it is not important in the view we take of the case as presented. The act of donation, by whosoever executed, was not in the form prescribed by the law, and was never accepted by the donee during the lifetime of the donor. The Civil Code of Louisiana of 1808 was in force at its date. A donation *inter vivos* of real estate made while that Code was in force was null and void, as it is under the present Code, unless executed before a notary public and two witnesses, and accepted in express terms by the donee during the lifetime of the donor. *Packwood v. Dorsey*, 6 Rob. (La.) 329. This pretended donation, then, as a muniment of title, falls absolutely. Its nullity is not merely relative; it is absolute. Such an act can be held to have no effect whatever. So far as it is concerned, matters are left in the same situation as if the donation had never been made or attempted, and thus it is open to the attack of any person whatever having the slightest interest. *Scott v. Briscoe*, 37 La. Ann. 179.

This is not a case where it can be claimed that, after the death of the donor, his heirs, either expressly or by voluntary execution of it, ratified or confirmed the donation. No express act of ratification is shown. No conduct of theirs is cited from which voluntary execution appears. Mere silence and inaction on their part is, in such a case as this, neither voluntary execution, confirmation, nor ratification. The case presents a different state of facts in this regard from that appearing in *Ventress v. Brown*, 34 La. Ann. 448, and other authorities cited by plaintiffs' counsel. Plaintiffs never had possession of this land at any time, and if the heirs of Brognier De Clouet had, by intervention, appeared in this suit, and disputed plaintiffs' pretensions by setting up the nullity of the act of donation under which they claimed, and asserted title in themselves as heirs, direct or collateral, of their ancestor,

there can be no doubt that, if judgment went against defendant at all, it would have been in favor of the interveners, and not in favor of plaintiffs. If this be so, then it is clear that third persons are shown to have a better title than that on which plaintiffs base their claim, and this better title in others not suing defendant may invoke to repel plaintiffs' assault. So, plaintiffs advancing to the attack on defendant's possession as owner find themselves repulsed and beaten back at the threshold by the weakness of their own line. They retire discomfited, without having developed the weakness, if any, of defendant's position. They must show, before the possessor can be put on his defense, a legal title to the premises in dispute. *Compton v. Mathews*, 3 La. 134.

In this view of the case, it is unnecessary to consider the various objections urged against defendant's showing of title, and equally unnecessary to review the several grounds, including prescription, urged in support of her title. While it may be true, as plaintiffs' counsel urge on us, upon the authority of *Gravenberg v. Savole*, 8 La. Ann. 499, that a plaintiff in a petitory action is not bound to show title in himself good against the world, and that he is only required to produce title as owner "*causa idonea ad transferendum dominium*," to repel the presumption of ownership resulting from mere possession, the principle does not apply in the instant case. Defendant has not a "mere possession" of the land. Her occupancy of the same is not that of a naked possessor only. It is predicated upon acts of transfer and conveyance purporting title, followed by payment of taxes upon the property for many years, and actual, open, notorious, corporeal possession and cultivation since the beginning of 1892. Its origin was not that of a mere trespass. *Jamison v. Smith*, 35 La. Ann. 609.

For the reasons assigned, it is ordered, adjudged, and decreed that the judgment appealed from be so amended as to pass upon and decide only the question of the sufficiency or insufficiency of the showing of title made by plaintiffs to the real estate sued for, and not upon the question of prescription raised by defendant. It is further ordered, etc., that the judgment of the lower court rejecting plaintiffs' demand, because of the weakness and insufficiency of the title they present, be affirmed, with costs of both courts.

(51 La. Ann. 290)

MOLL v. SBISA. (No. 13,070.)

In re MOLL.

(Supreme Court of Louisiana. Feb. 6, 1899.)

CLERK OF RECORDER'S COURT—EXEMPTION OF SALARY.

The salary of the clerk of the Sixth recorder's court is exempt from seizure.

(Syllabus by the Court.)

Bill for injunction by Anthony Sbisa against Joseph Moll. Application by Joseph Moll for

certiorari to the circuit court of appeals. Denied.

Conrad G. Collins, for relator. Respondent judges, pro se.

WATKINS, J. The question presented for our consideration is an interesting one, and, in our opinion, is best stated in the opinion of our learned Brothers of the respondents' court, and which is herewith reproduced in its entirety, and as follows, viz: "The question presented is whether the plaintiff in injunction, Anthony Sbisa, holds an office, within the meaning of article 1992, Rev. Civ. Code, and article 647, Code Prac., providing that money due for the salary of an office shall be exempt from seizure. He is a clerk of the Sixth recorder's court, at a salary of \$1,500 a year. He was appointed by the recorder, has taken an oath of office, and has been discharging his duties since May 1, 1896. The Sixth recorder's court was created by Act No. 154 of 1894, amendatory of the city charter of 1892 (Act No. 20); and among its provisions is one that the recorder shall be allowed to appoint a clerk, at a salary of \$1,500 a year. Section 49 of the charter provides that the recorders and their clerks shall have power to administer oaths. Although absolute uniformity of view is not found in the adjudged cases on the point at issue, yet they practically unite on the following fundamental principles: (1) That a public office is a public charge or employment imposed or conferred by appointment or authority of government for public purposes. (2) That an office is an employment, but every employment is not necessarily an office. (3) That there are two classes of public servants,—officers, or those whose functions appertain to the administration of government, and employes, or those whose employment is merely contracted. The supreme court of the United States, in a case directly in point, in which it was urged, as it now is, that a person was not an officer, but a clerk, because no specific duties were imposed upon him, he gave no bond to the government, and was merely a subordinate and assistant, who performed such services as his superior directed, said: 'He was a public officer. The general appropriation act of July 23, 1896, authorized the assistant treasurer at Boston, with the approbation of the secretary of the treasury, to appoint a specified number of clerks, who were to receive, respectively, the salaries thereby prescribed. An office is a public station or employment conferred by the appointment of government. The terms embrace the ideas of tenure, duration, emolument, and duties. The employment of the defendant was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not

occasional or temporary. They were to be such as his superior in office should prescribe. A government office is different from a government contract. The latter, from its nature, is necessarily limited in its duration, and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other.' *U. S. v. Hartwell*, 6 Wall. 393. See, also, *U. S. v. Perkins*, 116 U. S. 484, 6 Sup. Ct. 449. In another case, where it was shown that a civil surgeon appointed by the commissioner of pensions acted only when called on in special cases, gave no bond, took no oath, and did not derive his compensation from a regular appropriation, the supreme court of the United States thus emphasized the distinction indicated in *U. S. v. Hartwell*: 'If we look to the nature of defendant's employment, we think it equally clear that he is not an officer. In that case the court said the term embraces the ideas of tenure, duration, emolument, and duties, and that the latter were continuing and permanent, not occasional or temporary. In the case before us the duties are not continuing and permanent, and they are occasional and intermittent.' *U. S. v. Germaine*, 99 U. S. 512. The supreme court of this state, in declaring the salary of a city assessor exempt from execution, said: 'The text speaks of salaries of office. The term "office," under our article, has reference to functions conferred by public authority, and for a public purpose.' *Chaudet v. De Jong*, 16 La. Ann. 400. In *Hero v. Castell*, 22 La. Ann. 15, it was held that the office of city notary of New Orleans, not being created or recognized by the charter, is not a municipal office. This negative is pregnant with the affirmative that an office created or recognized by the charter is a municipal office. It has also been held that a stenographer appointed under legislative authority by a judge of the civil district court is an officer of the court (*State v. Clerk, Civ. Dist. Ct.*, 47 La. Ann. 361, 17 South. 48), and that the veterinary surgeon elected by the fire commissioners of New Orleans is unquestionably an officer of the department (*Wheeler v. Board*, 46 La. Ann. 734, 15 South. 179). By way of cumulative illustration, we may add that in other jurisdictions clerks of court, criers, and deputies have been adjudged officers when their appointment was authorized and their compensation was fixed by law. We have examined the two cases mainly relied on by the attorney for the judgment creditor, but we fail to find in them any support for his position. In *Vance v. Lafferanderie*, 4 Rob. 342, the party claiming the exemption was an auditor of accounts appointed by the judge to settle the accounts of a succession, and whose services as an officer of the court did not extend beyond that particular case. In *People v. Central R. Co.*, 42 N. Y. 289, the party exercised no functions depending directly upon authority of law, but served merely

upon the request of a public board. We therefore conclude that the clerk of the Sixth recorder's court is an officer, within the meaning of the statute, because the city charter creates his office, furnishes salary, confers upon him the power to administer oaths, and because he exercises functions appertaining to the administration of justice in a municipal police court. Judgment reversed, and it is now ordered that the injunction be made perpetual, with costs of both courts."

The article of the Code of Practice provides "that the sheriff may seize the rights and credits which belong to [the debtor] and all sums of money which may be due to him, unless it be for alimony or salaries of office." Article 647. The language of the Revised Civil Code is, "There are also rights which are merely personal, that can not be made liable to the payment of debts;" and amongst them are included "money due for the salary of an office, or wages or recompense for personal services." Article 1992. These two articles were construed in *Conroy v. Copland*, 4 La. Ann. 307, to apply to public offices, and not to the liquidator of a bank; and the only point decided in *Vance v. Lafferanderie*, 4 Rob. 340, was that the language of the Code of Practice controlled that of the Civil Code. Being thus restricted to "salaries of office," an allowance due an auditor of accounts for a succession was held subject to seizure. But in *Case v. Taylor*, 23 La. Ann. 497, the court gave effect to the above-quoted provisions of the Civil Code, and held that "the right of the defendant, arising from his contract with the state, was a recompense for the provisional services he has bound himself to perform for the state during the period of the contract; and this, being a provisional right, is not liable to seizure by virtue of article 1992 of the Revised Civil Code." This is a different view from that expressed in the *Vance Case*, and proceeds upon the principle, doubtless, that the two Codes having been revised contemporaneously in 1870, effect must be given to the provisions of both. And in our opinion that decision is correct. In *State v. Newton*, 28 La. Ann. 65, a juror claimed to be exempt from the performance of duty as such on the ground that he was assistant clerk of the Second municipal police court in the city of New Orleans. "Thereupon the attorney general stated that he was an incompetent juror, and in this he was sustained by the court, for the reason that the juror was exempt by law." On this contention this court expressed the following view, viz.: "Act No. 94 of the legislature of 1873 exempts, among others, 'the judges and officers of the several courts of this state.' The juror was an officer of court, within the understanding of the act, and was correctly discharged by the court on his claiming the exemption." In *City of New Orleans v. Lea*, 14 La. Ann. 197, the question was as to the right of the city to tax the salary of a justice of this court; and the court expressed this view, viz.: "If the right to tax the salary of a judge be

conceded, there would be no limitation but the discretion of the legislature, to do it to such an extent as virtually to abolish the means of conducting the judicial department." And the court further says: "The object, however, of this article, was to secure the independence of the judiciary. If the legislature can tax the salaries, it would be deprived of its plenary effect." Much the same may be appropriately said of the right of a creditor to seize the salary of a clerk of a recorder's court; for, if it may be done, that particular arm of the city government would become completely paralyzed. We do not feel disposed to give to the language of the articles of the Codes a restrictive signification; but, on the contrary, we think their framers intended that they should receive a liberal interpretation. Consequently, we are of opinion that whether the salary of the defendant, as clerk of the Sixth recorder's court, be considered as "money due for the salary of an office," or as the "wages or recompense for personal services," same are equally exempt from seizure. It is therefore ordered and decreed that the demand of the relator be refused, and that the opinion and decree of the respondents be maintained and enforced; and it is further ordered that the relator be taxed with costs.

(40 Fla. 480)

WILLIAMS v. STATE.

(Supreme Court of Florida. Nov. 1, 1898.)

LARCENY — EVIDENCE — POSSESSION OF STOLEN GOODS.

The following instruction in a trial for larceny of cattle: "That when a man is found in possession of stolen cattle, with the mark or brand changed into his, or with his mark or brand on the cattle, in the absence of a reasonable and credible explanation of those facts you may infer that he stole them."—*held* to be erroneous: First, because of its omission of the legal requirement that the possession must be of goods recently stolen, in order that an inference of guilt from such possession may be drawn; second, because it requires a reasonable and credible explanation from the suspected possessor, not only of his possession thereof, but of an alteration of the distinguishing marks and brands on the property, before such explanation is permitted to clear him of the charge of larceny thereof. The settled rule is that the possession of stolen goods must be recent after their loss, in order to impute guilt. The presumption of guilt, in larceny, that the law permits a jury to draw, as a matter of fact, from the unexplained possession of property recently stolen, grows out of, and rests solely upon, the unexplained possession thereof, and not upon any alterations or mutations to which the property may have been subjected while in the defendant's possession, or before it reached his possession; and, to acquit the accused of the charge of larceny when there is no other evidence of guilt than that of the possession of recently stolen goods, the law only requires from him a prompt, reasonable, and credible explanation of his possession thereof. (Syllabus by the Court.)

Error to circuit court, De Soto county; Barron Phillips, Judge.

Andrew J. Williams was convicted of larceny, and he brings error. Reversed.

Wilson & Wilson, for plaintiff in error.
William B. Lamar, Atty. Gen., for the State.

TAYLOR, C. J. The plaintiff in error was convicted at the spring term, 1898, of the circuit court of De Soto county, of the crime of larceny of cattle, and from the sentence imposed seeks relief here by writ of error.

At the trial the judge, among other things, instructed the jury as follows: "That when a man is found in possession of stolen cattle, with the mark or brand changed into his, or with his mark or brand on the cattle, in the absence of a reasonable and credible explanation of those facts, you may infer that he stole them." This charge was duly excepted to, and is assigned as error. The giving of this instruction was error. It erroneously states the law as to the presumption of guilt, in cases of larceny, that may be drawn from the unexplained possession of goods recently stolen, in that it omits that feature of the rule that requires the possession to have been "recent" after the theft, before it can be relied upon as a basis for the presumption of guilt. In the exhaustively considered case of *State v. Hodge*, 50 N. H. 510, in which it is clearly demonstrated that the presumption of guilt from the exclusive possession of property recently stolen is not a legal presumption, but one of fact that the law permits the jury to draw, it is said: "All the cases hold that the possession must be recent, after the loss, in order to impute guilt; and this presumption is founded on the manifest reason that when goods have been taken from one person, and are quickly thereafter found in the possession of another, there is a strong probability that they were taken by the latter. This probability is stronger or weaker in proportion to the period intervening between the taking and the finding, or it may be entirely removed by the lapse of such time as to render it not improbable that the goods may have been taken by another and passed to the accused, and thus wholly destroy the presumption." The same case also discusses at length the further feature of the rule, that the strength or weakness of the presumption of guilt after the lapse of time between the theft and the finding depends largely upon the character of the stolen property. *Leslie v. State*, 35 Fla. 171, 17 South. 555; *Bellamy v. State*, 35 Fla. 242, 17 South. 560. The charge is erroneous, too, in that it adds to the duty of the defendant, when found with stolen cattle in his possession, of reasonably and credibly explaining such possession, the further duty of reasonably and credibly explaining an alteration of the marks and brands thereon into the defendant's, or the presence on them of the defendant's marks and brands, before his explanation of his possession can acquit him of their larceny. The presumption of guilt, in larceny, that the law permits a jury to draw, as a matter of fact, from the unex-

plained possession of property recently stolen, grows out of, and rests solely upon, the unexplained possession thereof, and not upon any alterations or mutations to which the property may have been subjected while in the defendant's possession, or before it reached his possession. It is true that evidence of alterations therein made by the defendant that tended to prevent identification would be pertinent and material in its bearing upon the bona fides of the explanation that he might make as to how he came into the possession, but to acquit him of the charge of larceny, when there is no other evidence of guilt than that of the possession of recently stolen goods, the law only requires from him a prompt, reasonable, and credible explanation of his possession thereof. If such an explanation is given, and shows that he came into the possession honestly, it completely annihilates the presumption of guilt, regardless of any mutations to which he may have subjected the property while in his innocently acquired possession. If the defendant had been indicted and tried for another distinct crime inhibited by statute,—that of fraudulently altering the marks and brands of animals (section 2474, Rev. St.),—and had been found with cattle in his possession whose marks and brands had been recently altered or changed into his, then, in the absence of a prompt, reasonable, and credible explanation of such alteration or change of marks and brands, the presumption, as one of fact, could be drawn, that he was guilty of a fraudulent alteration thereof. *Atzroth v. State*, 10 Fla. 207. But where the charge is larceny, as here, it is error to impose upon the defendant the duty of doing more than to reasonably and credibly explain his possession of property alleged to have been stolen, in order to remove the presumption of guilt that may arise from such possession.

There are other assignments of error, but we do not deem it necessary to consider them, except to say that the court is unanimously of the opinion that the evidence in the cause, as disclosed in the record brought here, is not sufficient to sustain the charge of larceny.

The judgment of the court below is reversed.

(40 Fla. 527)

EGGART v. STATE.

(Supreme Court of Florida. Nov. 5, 1898.)

CRIMINAL LAW—ABORTION—JOINDER OF OFFENSES IN ONE INDICTMENT—ELECTION BETWEEN COUNTS—MEDICAL WORKS—ADMISSIBILITY AS EVIDENCE—SINGLE ASSIGNMENT OF ERROR—INSTRUCTIONS—ARGUMENT TO JURY—IMPRISONMENT FOR NON-PAYMENT OF FINES IMPOSED.

1. In a prosecution for the crime defined by section 2618 of the Revised Statutes it is immaterial whether the female was actually enceinte or not, and it is unnecessary to allege or prove such fact; and when an information or indictment charging such crime follows the language of the statute it is sufficient.

2. An indictment, or count in an indictment, that sufficiently charges a crime, but that charges it with a continuendo, the continuendo clause thereof may properly be rejected as sur-

plusage when the offense charged is not a continuing one, and when such rejection leaves the indictment intact, and otherwise unobjectionable.

3. Under section 2893, Rev. St., it is not error to refuse to quash an indictment or information upon the ground that it charges several distinct offenses in separate counts thereof, unless such indictment is so vague, indistinct, and indefinite as to mislead the accused, and embarrass him in the preparation of his defense, or expose him after conviction or acquittal to substantial danger of a new prosecution for the same offense.

4. It is within the sound discretion of the trial court whether it will or not require the prosecutor to elect upon which of several counts in an indictment he will try the accused; and where the various counts are properly joined therein, and a conviction can legally be sustained upon any one, or upon all of such counts combined, it is proper to refuse to require such an election.

5. Medical works, of however standard and approved authority on the subjects to which they relate, cannot be read or introduced before juries as independent, substantive, or affirmative proof; but this rule is subject to the exception that specified books may be introduced in rebuttal to contradict a witness who has testified to having derived therefrom teachings that they do not contain, or whose teachings are substantially different from that testified to.

6. Where a single assignment of error is made to embrace allegations of error in the giving or refusal to give more than one instruction asserting distinct propositions of law, an appellate court will go no further in the consideration of such an assignment, after it has ascertained that there was no error in giving or refusing to give any one of the several instructions thus aggregated under the one assignment, but will then adjudge such assignment of error to be not well taken.

7. Except in cases of murder in the first degree, where a majority of the jury may, by a recommendation to mercy in their verdict, commute the penalty from death to life imprisonment, trial juries, under the laws of Florida, have no concern whatever with the penalties to be imposed for crime; and it is therefore not improper for trial judges to refuse to inform or instruct the jury as to what penalties the laws prescribe for any given crime, or to refuse to permit counsel to discuss the same in their arguments to the jury.

8. Under the provisions of chapter 4028, Laws 1891, where the primary penalty imposed by the judge upon conviction of any crime consists only of a fine, or of a fine and costs of prosecution, the alternative penalty of imprisonment for nonpayment of such fine and costs should be in the county jail, and not in the penitentiary.

(Syllabus by the Court.)

Error to criminal court of record, Escambia county; A. C. Blount, Jr., Judge.

Gus A. Eggart was convicted of crime, and brings error. Affirmed.

Liddon & Egan, for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

TAYLOR, C. J. At the May term, 1897, of the criminal court of record for Escambia county, upon information filed by the county solicitor, Gus A. Eggart, the plaintiff in error, as defendant below, was tried and convicted of the crime of unlawfully administering drugs and other noxious things with the intent to procure a miscarriage, and from the

sentence imposed seeks reversal by writ of error.

The information upon which the defendant was tried and convicted, omitting its caption, is as follows:

"Be it remembered that E. D. Beggs, acting county solicitor for the county of Escambia, prosecuting for the state of Florida in said county, being present in our said criminal court of record in and for the said county of Escambia, on the 14th day of May, A. D. 1897, under oath information made, and gave the court to be informed and understand, that Gus A. Eggart, late of the county of Escambia aforesaid, in the state aforesaid, laborer, on the 18th day of February, in the year of our Lord 1897, and on divers others days and times between that day and the 9th day of March, A. D. 1897, with force and arms, at and in the county of Escambia aforesaid, did unlawfully advise and cause to be taken by Rosalie Rauch, a woman, certain drugs, medicines, and other noxious things, to wit, pills, known as 'pennyroyal pills,' and a liquid known as fluid 'extract of cotton root,' with the intent of him, the said Gus A. Eggart, then and there thereby to procure miscarriage of her, the said Rosalie Rauch, in consequence whereof the said Rosalie Rauch did not die; against the form of the statute in such case made and provided, to the evil example of all others in like cases offending, and against the peace and dignity of the state of Florida.

"And the said E. D. Beggs, acting county solicitor for the county of Escambia, prosecuting for the state of Florida in said county, being present in our said criminal court of record in and for the said county of Escambia, on the 14th day of May, A. D. 1897, under oath information made, and further gave the court to be informed and understand, that the said Gus A. Eggart, at and in said county and state, on the 18th day of February, A. D. 1897, did unlawfully advise and cause to be taken by the said Rosalie Rauch, a woman, certain noxious things, to wit, pills, composed of iron, sulphate, and aloes, with a coating of sugar, with the intent of him, the said Gus A. Eggart, thereby then and there to procure miscarriage of her, the said Rosalie Rauch, in consequence whereof the said Rosalie Rauch did not die; against the form of the statute in such case made and provided, to the evil example of all others in like cases offending, and against the peace and dignity of the state of Florida.

"And the said E. D. Beggs, acting county solicitor for the county of Escambia, prosecuting for the state of Florida in said county, being present in our said criminal court of record in and for the said county of Escambia on the 14th day of May, A. D. 1897, under oath information made, and further gave the court to be informed and understand, that the said Gus A. Eggart, at and in said county and state, on the 4th day of March, A. D. 1897, did unlawfully advise and cause to be taken by the

said Rosalie Rauch, a woman, a certain noxious thing, to wit, fluid extract of cotton root, with the intent of him, the said Gus A. Eggart, thereby then and there to procure miscarriage of her, the said Rosalie Rauch, in consequence whereof the said Rosalie Rauch did not die; against the form of the statute in such case made and provided. * * * Wherefore the said E. D. Beggs, acting county solicitor as aforesaid, prays the advice of the said court in the premises, and that the said Gus A. Eggart may be arrested and held for trial under the foregoing information, and that a capias may issue forthwith for his arrest."

Before arraignment the defendant moved the court to quash the information on the following grounds: "(1) The information is vague, indefinite, and uncertain, and charges no offense against the laws of the state of Florida. (2) The information fails to charge an offense against the laws of the state of Florida, in this: that it does not charge that the said Rosalie Rauch, in the information named, was pregnant, or that she was with child, or that she was quick with child. (3) The information charges more than one offense in the same count, and charges different offenses in different counts of the same. (4) The information is void for the reason that the court had no legal power or jurisdiction to appoint E. D. Beggs an acting county solicitor, and said E. D. Beggs had no jurisdiction, power, or authority to officially sign said information."

The ruling of the court denying this motion is the first assignment of error. In support of this assignment of error it is chiefly contended here that the information should have alleged, not only that the woman was pregnant, but that she was quick with child; and it is argued that at the common law it was no crime to procure the miscarriage of a woman with her consent, unless she was in that advanced state of pregnancy technically known as being "quick with child." Such undoubtedly was the common law. *Smith v. State*, 33 Me. 48; *State v. Cooper*, 22 N. J. Law, 52; *Com. v. Parker*, 9 Metc. (Mass.) 263; *Tayl. Med. Jur.* (12th Am. Ed.) p. 549, and cases cited. But our statute (Rev. St. § 2618) under which the conviction was had has changed all this, and is as follows: "Whoever with intent to procure miscarriage of any woman unlawfully administers to her, or advises or prescribes for her, or causes to be taken by her, any poison, drug, medicine or other noxious thing, or unlawfully uses any instrument or other means whatever with the like intent, or with like intent aids or assists therein, shall, if the woman does not die in consequence thereof, be punished by imprisonment in the state prison not exceeding seven years, or by fine not exceeding one thousand dollars." This statute is substantially the same as the statute of the state of Massachusetts (Pub. St. Mass. 1882, p. 1166, § 9), and Massachusetts adopted it from the

British statute of 1 Vict. c. 85, § 6. *Com. v. Taylor*, 132 Mass. 261. In the last-mentioned case it was held, under their statute, of which ours is a substantial copy, that "it is not necessary, to the maintenance of an indictment * * * for an attempt to procure the miscarriage of a woman, that she should be pregnant with child." And under the statute of 1 Vict. c. 85, § 6, from which both our own and the Massachusetts statute were originally borrowed, it was held, in the case of *Reg. v. Goodchild*, 2 Car. & K. 293, 61 E. C. L. 292, that "on the trial of an indictment * * * for using an instrument with intent to procure the miscarriage of a woman, it is immaterial whether the woman was actually pregnant or not." Our statute, like those from which it was borrowed, was designed to punish the attempt to procure the miscarriage of any woman by any of the means mentioned in the statute, whenever such attempt is made with an unlawful intent. And when an information or indictment charging such offense follows the language of the statute, it is sufficient. *Com. v. Sholes*, 13 Allen, 554; *Com. v. Grover*, 16 Gray, 602; *Com. v. Tibbetts*, 157 Mass. 519, 32 N. E. 910; *Com. v. Surles*, 165 Mass. 59, 42 N. E. 502; *Powe v. State*, 48 N. J. Law, 34, 2 Atl. 662.

We do not think the information is subject to the further objection made in the motion to quash same, to the effect that it is vague, or indefinite, or that it charges no offense under our law. On the contrary, it charges the offense in its various counts substantially and fully in the language of the statute; and, as the statute describes all the material elements of the offense fully, this is sufficient.

It is further insisted here that the first count of the information charges the offense with a continuendo, and that, because the offense is not a continuing one, this count is bad for that reason. This contention cannot be sustained. The continuendo feature of the count may properly be rejected as surplusage, and when this is done the count is unobjectionable. *Dansey v. State*, 23 Fla. 316, 2 South. 692.

Neither can the further contention be sustained that the information is bad because in it are charged several separate and distinct felonies. Section 2893, Rev. St., provides that "no indictment shall be quashed or judgment be arrested or new trial be granted on account of any defect in the form of the indictment, or of misjoinder of offences, or for any cause whatsoever, unless the court shall be of the opinion that the indictment is so vague, indistinct and indefinite as to mislead the accused and embarrass him in the preparation of his defense, or expose him after conviction or acquittal to substantial danger of a new prosecution for the same offense." It has been repeatedly held here that under this statute it is no objection to an indictment that two or more offenses are joined in separate counts therein, unless, upon an application to

quash, or motion in arrest of judgment, the court shall be of opinion that the indictment was so vague, indistinct, and indefinite as to mislead the accused, and embarrass him in the preparation of his defense, or expose him, after conviction or acquittal, to danger of a new prosecution for the same offense. *Green v. State*, 17 Fla. 669; *Kennedy v. State*, 31 Fla. 428, 12 South. 858. There is nothing in any of the counts of this information, taken separately or collectively, that tended to mislead or embarrass the defendant in the preparation of his defense, or that exposed him, after conviction or acquittal, to another prosecution for the same offense. An indictment charging in different counts two or more attempts to commit the same crime upon the same woman, but upon different dates, as in the information here, was sustained in *Com. v. Brown*, 121 Mass. 69; and in *Com. v. Follansbee*, 155 Mass. 274, 29 N. E. 471, it was held that, where the several counts of an indictment for procuring a miscarriage set forth separate offenses, the counts were properly joined in one indictment, and that it was competent for the jury to find the defendant guilty on one or more of them. *Tabler v. State*, 34 Ohio St. 127.

The fourth ground of the motion to quash the indictment—that questions the power of the judge of the criminal court of record to appoint an acting county solicitor in place of the regular official when disqualified, as was done in this case—is not argued or presented, and, consequently, will be treated as abandoned.

The refusal of the court to require the prosecution to elect upon which of the several counts of the information it would proceed to try the accused is assigned as the second error. There was no error in this. It is within the sound discretion of the trial court whether it will or not require such an election; and none was necessary in this case, since, as before shown, the various counts were properly joined, and the defendant could properly have been convicted upon one or all of them. *Murray v. State*, 25 Fla. 528, 6 South. 498; *Gantling v. State*, 40 Fla. —, 23 South. 857; *Green v. State*, 17 Fla. 669.

The third, fourth, fifth, sixth, seventh, and eighth assignments of error all involve the admission in evidence by various witnesses of confessions made by the defendant at the same time and place touching his past relations with the female upon whom the alleged crime was attempted, and to the administration to her at different times of divers drugs. There was no error in the admission of this evidence. Whether confessions proposed in evidence have been made with that freedom and voluntariness necessary to their admissibility is a preliminary question of fact for the trial judge to decide, and we cannot say, from the testimony on this point in the record before us, that the judge erred in his determination of it. There is some slight evi-

dence tending to show that the defendant went unwillingly to the house where the confessions were made; but he was not there restrained of his liberty in any way; neither were the confessions extorted from him by threats, or by the holding out of any inducements. But, besides this, the defendant as a witness on his own behalf at the trial, practically admitted and reiterated all of the material substance of the protested confessions.

The ninth assignment of error is expressly abandoned here.

The tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth assignments of error all relate to the admission by the court of medical expert testimony of two physicians as to the physical effect that certain drugs, shown by the proofs to have been administered by the defendant to the female, would have upon a pregnant woman, and to the refusal of the defendant's motion to strike out said evidence. The defendant's contention is that these medical witnesses were not shown to have the necessary qualifications to entitle them to testify as experts; that their knowledge of the drugs in proof, and of their effects upon the human system, were shown to have been derived solely from the study of medical authorities, without practical experience therewith; and that to qualify them as experts to testify they should have had practical experience, combined with knowledge derived from the study of medical authorities. There was no error in these rulings. Even should we admit the law to be as is contended for by counsel, the evidence in the record before us shows that the medical witnesses challenged were qualified as experts, both by study of authorities and from practical experience with the drugs in question.

The plaintiff in error has misnumbered his assignments by omitting the sixteenth and seventeenth in his enumeration of them, so that we, following his enumeration, pass likewise from the fifteenth to the eighteenth.

The defendant inquired of a medical witness, introduced on his behalf, "if his experience was sufficient to enable him to tell whether an analysis of the drugs administered by the defendant, made by and testified about by another medical man on behalf of the state, was a proper analysis, sufficient to determine the ingredients, and the amount thereof, contained in such drugs"; and also "if he knew what apparatus was necessary for properly analyzing pills containing vegetable and mineral ingredients like aloes and sulphate of iron." Both of these questions were excluded by the judge, on objection by the state, and these rulings constitute the eighteenth and nineteenth assignments of error. The first of these questions was properly excluded, because, instead of seeking a detailment by the witness of facts that would exhibit to the judge what his qualifications were as an expert on the subject in-

quired about, it sought simply to elicit the witness' opinion as to the extent of his own qualifications on the subject. The second question excluded might, with propriety, have been permitted to be answered, but its exclusion was harmless in view of the fact that the witness was subsequently permitted to testify to every material fact, in substance, that could have been elicited by such question.

The twentieth assignment of error is the ruling of the court permitting the state, on cross-examination of the medical expert witness of the defendant, to interrogate him as to whether he would give to a pregnant female patient, upon whom he did not desire to produce a miscarriage, the same quantity per day for three days of the same drugs testified to have been administered by the defendant. There was no impropriety in this ruling. The question tended to sift the witness' qualifications as an expert, and, to some extent, tended to test the value of portions of his testimony relative to the effects likely to be produced by the drugs mentioned.

The twenty-first assignment of error is the refusal of the judge to permit the defendant, while testifying as a witness on his own behalf, to answer the following question: "For what purposes or uses are they [the pills he said he had given the female] recommended?" And the refusal of the judge to permit the following question to be propounded to the same witness: "Did you say anything about its being used to drive it off?" is assigned as the twenty-second error. Both questions could, with propriety, have been permitted, but no harm has accrued to the defendant by their exclusion, since he was permitted subsequently to testify full and substantial responses thereto.

The twenty-third and twenty-fourth assignments of error are abandoned here by nonpresentation.

The judge permitted a state's witness, over the defendant's objection, to read to the jury various excerpts from the medical work known as the "United States Dispensatory," relative to the uses, properties, and medical effects of fluid extract of cotton root. This ruling is assigned as the twenty-fifth error. There was no error here. The weight of authority is that medical works, of however standard and approved authority on the subjects to which they relate, cannot be read or introduced before juries as independent, substantive, or affirmative proof, but that specified books may be introduced in rebuttal to contradict a witness who has testified to having derived therefrom teachings that they do not contain, or whose teachings are substantially different from that testified to. *Pinney v. Cahill*, 48 Mich. 584, 12 N. W. 862; *Gallagher v. Railway Co.*, 67 Cal. 13, 6 Pac. 869; *Ashworth v. Kittridge*, 12 Cush. 193; *People v. Wheeler*, 60 Cal. 581; *Boyle v. State*, 57 Wis. 472, 15 N. W. 827; *Washburn*

v. Cuddihy, 8 Gray, 430; *Stilling v. Town of Thorp*, 54 Wis. 528, 11 N. W. 906. The defendant, as a witness for himself, had testified to having read from the identical book offered in evidence about the fluid extract of cotton root, and of its uses and effects, and in his testimony practically asserted that this book had taught him that said drug was nothing more than an emmenagogue, and that there was nothing in the book to show that it was an abortifacient. The introduction of the identical book that he said he had read became, under these circumstances, material and proper, for the reason that the excerpts permitted to be read therefrom to the jury were shown to be the only mention made in such book of that particular drug, and the excerpt read to the jury showed that no one could have read it without seeing that it asserted one of the uses of the drug to be as an abortifacient; thus tending to rebut and contradict the defendant's testimony that he had not seen such use of the drug asserted therein.

The twenty-sixth assignment of error is the making of the following remarks by the judge at the trial to counsel in the case in the hearing of the jury: "That, in his opinion, it was not necessary to prove that the drug, medicine, or other thing advised or caused to be taken by the female should be noxious, but the advising or causing to be taken of any substance, whether noxious or not, if with intent charged in the information, would constitute the offense." This version of the law, had it been given as an instruction to the jury, would have been error; but it was nothing more than a tentative suggestion by the judge to the counsel in the case upon purely a question of law that does not seem to have been up for adjudication at the time the remark was made, and subsequently, when the time for instructions on the law of the case had arrived, the judge corrected any erroneous impressions that may have been conveyed by such remarks by instructing the jury fully, pointedly, and correctly on the subject.

The twenty-seventh assignment of error is stated here as follows: "The court erred in refusing to give the special charges requested by the defendant numbered as follows: 5, 6, 8, and 10." The charges, the refusal to give which are thus assigned as error, are as follows: "(5) In considering any and all of the counts of this information, you cannot find the defendant guilty upon any of them unless you find that he administered or caused to be taken by Rosalie Rauch some noxious substance, with the intent to procure a miscarriage of her. If the evidence shows you beyond all reasonable doubt that the defendant administered or caused to be taken by Rosalie Rauch some medicine or other thing, then you must determine whether such medicine or other thing was noxious; that is, hurtful or harmful, or used to procure miscarriage. As to whether a medicine or other thing is or is not noxious depends to a large extent upon the

amount taken. A substance which might be noxious in larger doses, might not be noxious in smaller doses. Therefore if you find from cause that the defendant did unlawfully advise or cause to be taken by Rosalie Rauch any medicine or other thing, then you must consider from the evidence whether the quantity of such medicine or other thing advised or caused to be taken was injurious, or likely to be dangerous or hurtful, to the said Rosalie; and unless the evidence convinces you beyond all reasonable doubt that the substance which the defendant advised or caused to be taken by the said Rosalie Rauch was advised or caused to be taken in such quantity as was injurious and hurtful, or likely to be injurious and hurtful, to the said Rosalie Rauch, you must find the defendant not guilty. (6) The general definition of a noxious substance is one that is hurtful and harmful to the human system, but in the sense used in the information a noxious substance is one likely to procure a miscarriage in a woman pregnant with child; and, unless the evidence shows you in this case, beyond all reasonable doubt, that the defendant advised and caused to be taken by Rosalie Rauch some of the medicines or other noxious things in the several counts of the information described, or some of them, and that they were such substances as are likely, in the quantity of the same advised or caused to be taken, to produce a miscarriage in a pregnant woman, then you must find the defendant not guilty." "(8) The statute under which the information is filed contemplates that the woman who is advised or caused to take the drug, medicine, or other noxious thing shall be quick with child at the time the offense is committed. Therefore you cannot find the defendant guilty upon the information unless you believe beyond all reasonable doubt that he advised and caused to be taken by one Rosalie Rauch some drug, medicine, or other noxious thing, with the intent to procure a miscarriage by her, the said Rosalie, and that she was at said time quick with child." "(10) If you believe from the evidence beyond a reasonable doubt that defendant did advise the said Rosalie Rauch to take certain noxious or harmful drugs, which, from their natural effect, would have the power to cause her, the said Rosalie Rauch, to have a miscarriage, yet if you should also believe that she, the said Rosalie Rauch, did not take the said medicine as advised to be taken, then you should find the defendant not guilty, as the law requires under the statutes that the state should prove beyond all reasonable doubt that the said Gus A. Eggart not only gave the advice, but that the said Rosalie Rauch acted upon it, and took said medicine as directed." It will be observed that this one assignment of error is made to embrace en masse the refusals to give four several requested instructions. The rule is quite generally settled that an assignment of error made to embrace allegations of error in the giving or refusal to give more than one instruction asserting dis-

inct propositions is entirely insufficient, and that such an assignment will not generally be considered by the appellate court; but, even if it consents to consider such an assignment at all, it will go no further after it has ascertained that there was no error in giving or refusing to give any one of the instructions thus aggregated under the one assignment. The latter part of the rule, we think, is the correct one under our practice. 2 Enc. Pl. & Prac. 950, 951; *Collins v. Spence*, 84 Ga. 503, 11 S. E. 502; *Swift v. Mulkey*, 17 Or. 532, 21 Pac. 871; *Kackley v. Railroad Co.*, 7 Ind. App. 169, 34 N. E. 532; *People v. Sweeney*, 55 Mich. 586, 22 N. W. 50; *Pratt v. Burhans*, 84 Mich. 408, 47 N. W. 1064; *Hlatt v. Kinkald*, 40 Neb. 178, 58 N. W. 700. Under this rule we will not consider this assignment of error further than to say that it is not well taken, because at least two of the refused instructions thus aggregated in the one assignment of error were erroneous propositions of law, and were correctly refused. We have seen before that under the statute violated in this case it is not necessary to a commission of the offense thereby prohibited that the woman should be alleged or proven to have been actually quick with child, or even in a state of pregnancy. The eighth requested instruction states the contrary to be the law, and the court was right in its refusal. The court also properly refused the tenth requested instruction, because it erroneously asserts the law to be that in such cases there must be a heeding or following of the advice on the part of the woman by her actually taking the drug, medicine, or other noxious thing advised to be taken, before there can be a conviction for the crime. The statute expressly provides that "whoever unlawfully administers, or advises, or prescribes for any woman any drug, medicine or other noxious thing, with the intent to procure her miscarriage, shall be guilty," etc. Under this law, if a party simply advises or prescribes the taking of any medicine, drug, or other noxious thing, unlawfully, and with the criminal intent, the inhibited crime is complete, whether the advice be followed or prescription taken or not.

During the argument of the defendant's counsel to the jury he made use of the following expressions: "The defendant has offered to you evidence of his good character. He has shown that previous to this charge being made against him, that his reputation was that of an exemplary young man in this community. This is shown by witnesses of the highest standing. And, sitting here, it may be within the awful shadow of the penitentiary, he may be proud of the reputation he has established." The counsel was here interrupted by the judge, who instructed him that in the further course of his argument he must desist from any intimation to the jury as to the nature of the punishment prescribed by the law for the offense then being tried. This interruption and ruling was excepted to, and is assigned as the twenty-eighth error. This was not error.

In states having laws like ours, that give to trial juries no voice whatever in the penalty to be imposed for crime, but that either, by their own terms, expressly fix such penalty, or leave it to be fixed by the trial judge, at his discretion, to be exercised within specified minimum and maximum limits, the rule is that trial juries have no concern whatever with such penalty, and that it is not improper for the judge to refuse to inform or instruct the jury as to such penalty, or to refuse to permit counsel for the defendant to discuss it in their arguments to the jury. *Ford v. State*, 46 Neb. 390, 64 N. W. 1082; *Russell v. State*, 57 Ga. 420; *People v. Ryan*, 55 Hun, 214, 8 N. Y. Supp. 241. Under our laws, trial juries have nothing to do with the penalty to be imposed for any crime, with but a single exception,—that of murder in the first degree, where, by the recommendation to mercy by a majority of the jury, the penalty is reduced from death to life imprisonment. In this excepted case it is, of course, proper that the judge should instruct the jury as to their right thus to reduce the extreme penalty by their recommendation to mercy.

The twenty-ninth assignment of error is stated here as follows: "The court erred in those portions of its charge to the jury which are embraced and set forth in the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and eleventh grounds of the motion for new trial, and to be found in the record, pages 154, 155, 156." Inasmuch as the questions of law involved in these instructions have already herein been passed upon, and any other consideration of them will be simply reiteration, we will say that we have examined the charges complained of carefully, and find them to be in consonance with the law as herein enunciated, and that there was no error in giving any of them of which the defendant can complain.

The thirtieth assignment of error is the refusal of the defendant's motion for new trial. We have, in what has been already said, disposed of all the grounds of this motion that have been argued here, except that feature of it claiming that the verdict was contrary to the evidence, and not supported by it, and contrary to the charge of the court. This contention cannot be sustained. The evidence amply sustains the verdict found, and the court, in its charges, stated the law fully and fairly, and the verdict is in harmony with the law as given in charge.

The thirty-first assignment of error is the refusal of the motion in arrest of judgment. The only grounds of this motion argued or contended for here have already been discussed, and found adversely to the defendant, in the consideration above of the motion to quash the indictment.

The defendant was sentenced to pay a money fine, or, in default of its payment, to confinement in the county jail for one year. This is also assigned as error. In *Bueno v. State*, 40 Fla. —, 23 South. 862, it was held by this court, under the provisions of chapter

4026, Laws 1891, that where the primary penalty imposed by the court consists only of a fine, or of a fine and costs of prosecution, the imprisonment for nonpayment of such fine and costs should be in the county jail, and not in the penitentiary. We still think this to be a proper interpretation of the statute, and the sentence imposed here was not unauthorized.

Finding no error, the judgment of the court below is affirmed.

HAZLETT v. WITHERSPOON et al.

(Supreme Court of Mississippi. March 6, 1899.)

REPLEVIN—LIABILITY ON FORTHCOMING BOND.

In replevin for property wrongfully withheld, when defendant gives a forthcoming bond, plaintiff is entitled to judgment on the bond, on recovering against the principal, though, without the fault of the sureties, the property is partially destroyed by fire after the execution of the bond; and the tender of such partially destroyed property will not release them.

Appeal from circuit court, Lauderdale county; A. J. Russell, Special Judge.

Action by John D. Hazlett against S. A. Witherspoon and others. Judgment for defendants, and plaintiff appeals. Reversed.

Geo. B. Neville and Fewell & Son, for appellant. S. A. & W. D. Witherspoon, for appellees.

WOODS, C. J. In the year 1894 the appellant sold to the Interstate Iron Works certain machinery, to be used, it appears, in the foundry of the latter; the said iron works executing its promissory notes for the purchase price, and the appellant reserving title to the property so sold until the purchase money had been paid. The iron works failing to pay the notes at maturity, the appellant brought his action of replevin against the iron works for the recovery of the property. When the replevin writ was levied, the iron works gave its bond for the forthcoming of a part of the property so levied on, with S. A. Witherspoon and W. D. Witherspoon as sureties thereon. At the January term, 1896, of the circuit court of Lauderdale county, the suit in replevin was tried, and judgment, on verdict of jury, entered for plaintiff in that suit (the appellant here) for the return of the property, or its alternative value, as ascertained by the verdict. After the bonding of the property, as before stated, and before the trial of the replevin suit, as stated, also, the building in which the machinery was used and kept was destroyed by fire, and the property greatly injured, as is manifest from the record before us. Shortly after the adjournment of the said court an execution was issued and placed in the hands of the sheriff, and thereupon the sureties tendered the machinery in its then injured condition, and demanded that the judgment against them be satisfied. This the sheriff declined to accede to, and, under direction of appellant's counsel, returned the writ unexecuted. In the month

of June following, a second execution was issued for the return of the property, or the alternative value as ascertained by the verdict and judgment; and the sureties again tendered the machinery, in its then greatly damaged condition, to the sheriff, in discharge of their liability as sureties, when the sheriff again refused to accept the property. The sheriff then levied on the property so bonded, and sold the same as the property of the iron works, and credited the judgment with the proceeds of the sale,—about \$75. The sheriff then levied the execution upon certain property of W. D. Witherspoon, one of the sureties. The sureties thereupon obtained a supersedeas of this execution from the chancellor of the district, on the ground that they were discharged by reason of their tender of the property. An issue was made up on this supersedeas and a denial of its sufficiency, a trial had before a jury in the circuit, and verdict and judgment entered for the appellees, the sureties. There was much evidence offered on both sides, but on this we do not enlarge. It is sufficient to say that the value of the property as fixed in the verdict and judgment was clearly the value at the date of the execution of the forthcoming bond, and not as of the date of the trial of the replevin suit, for the jury on that trial assessed the value of the property at nearly \$1,400. It was the value of the property when bonded, and not that when the cause was tried, and after it had been practically destroyed by fire. Its value after its practical destruction is quite clearly shown by the amount obtained for it when sold by the sheriff, to wit, \$74.

A suggestion or two will demonstrate the errors committed on the trial of the supersedeas issue in the court below. If the sureties, or their principal, had desired to show the damaged condition of the property, and its depreciated value, they should have made that defense on the trial of the replevin suit, if they could have done so. *Jones v. Coker*, 53 Miss. 198, 199. But they could not have been allowed to make that defense in that suit or in the present one. The principal wrongfully withheld the property from him who was legally and rightfully entitled to it, and the great injury which befell it while thus wrongfully detained fixes liability on the principal and sureties on the forthcoming bond for such injury. The liability of the sureties cannot be discharged by a tender of property practically worthless; for that is not the property which they bound themselves to have forthcoming, or, in default, to pay its value. Nor was the fact that the different pieces of the machinery could be identified after the fire sufficient to support a verdict for appellees. The property tendered by the sureties must have been the same property which they bound themselves to have forthcoming. To illustrate: If the property in this case had been a lot of wagons, and fire had swept over it, leaving only the iron composing parts of the wagons, would any one think that a ten-

der of the loose irons would have been such compliance with a judgment for the return of the wagons as would have discharged the sureties on a bond for their forthcoming? It is conclusively settled in this state that "in replevin for property wrongfully taken or withheld, when the defendant gives bond for its forthcoming, the plaintiff is entitled to judgment, on recovering, against the principal and sureties on the bond, though without their fault it is destroyed by fire after the execution of the bond," as the rule is clearly and admirably summarized in the headnotes to *George v. Hewlett*, 70 Miss. 1, 12 South. 865. And this rule was reannounced in *McPherson v. Lumber Co.*, 70 Miss. 649, 12 South. 857,—a case, on its principal facts, markedly similar to the case before us now. Reversed.

(77 Miss. 124)

RAMSAY v. BROWN et al.

(Supreme Court of Mississippi. March 6, 1899.)

CONTRACTS—CONSTRUCTION—DIVISIBILITY.

A cotton buyer was employed "for the cotton season of 1897-8. Said season to begin September 1st, 1897, and to last until May 1st, 1898,"—the principal agreeing to pay him "\$800.00 for the season." Early in October the buyer was paid \$100 as salary for September. *Held*, that the contract was determined to be divisible by the construction placed on it by the parties themselves.

Appeal from circuit court, Jones county; A. G. Mayers, Judge.

Action by W. A. Ramsay against W. P. Brown & Co. From a judgment for defendants, plaintiff appeals. Reversed.

Shannon & Street and Frank Johnston, for appellant. Hardy & Howell, for appellees.

TERRAL, J. W. A. Ramsay, a cotton buyer at Ellisville, Miss., claiming that W. P. Brown & Co., of New Orleans, La., were indebted to him for services as a cotton buyer, for 1½ months' wages, and for other sums of money aggregating \$196.50, sued them for that sum in attachment; and the case, by appeal from the justice court, was tried in the circuit court of Jones county. Upon the trial in the circuit court the following was shown to be the contract between the parties: "This is to show that W. P. Brown & Co., of New Orleans, have this day employed W. A. Ramsay, on the following terms, for the cotton season of 1897-8; said season to begin September 1st, 1897, and to last until May 1st, 1898: Said W. P. Brown & Co. agree to pay said W. A. Ramsay \$800.00 for the season, and they reserve the right to dispense with the services of the said W. A. Ramsay at any time they find he is not conducting the business in a proper manner, and in accordance with the instructions he received from them. W. P. Brown & Co. W. A. Ramsay." The plaintiff testified that he duly entered and continued in the service of the defendants until the 15th of

November, 1897, when, in consequence of the neglect of the defendants to honor his drafts upon them, he quitted their employ, and sued out the attachment in this case; that on the 9th of October defendants paid him \$100 for his September salary or wages, and also was then paid by them \$28.20 for expense account and for hire of a servant for one month; that he did them the best service in his power from the 1st of September, 1897, to the middle of November, 1897, when he relinquished the job in consequence of the refusal or neglect of the defendants promptly to honor his drafts on them for the cotton bought on their account, and which tended to destroy his business. A jury being waived, the case was tried by the court, and the plaintiff was denied any relief. Whether the contract was an entire contract, so that the plaintiff was not entitled to anything unless he served the defendants the entire eight months, was determined, we think, by the construction which the parties themselves put upon the contract. The payment to the plaintiff by the defendants of the \$100, September wages, on the 9th of October, was an expression of the understanding of the parties that the wages should be paid monthly. The defendants did not resist a recovery because of a set-off arising to them by reason of damages for quitting their service, but rested their defense upon the indivisibility of the contract; and, according to the dealing of the defendants with the plaintiff, we think this contention cannot be supported. The plaintiff, we think, had good ground to demand a month's wages, and something for servant hire, and should have recovered to that extent, according to the evidence before the court. Reversed and remanded.

(76 Miss. 560)

PLANT v. PLANT.

(Supreme Court of Mississippi. Feb. 27, 1899.)

CANCELLATION OF INSTRUMENT—UNDUE INFLUENCE.

A husband, not exceedingly strong mentally, whose father's influence in business matters over him was very great, assigned, a short time before his death by consumption, and when in a feeble physical and mental condition, the proceeds of a policy of insurance on his life to his father, and by another instrument conveyed to his father all his property, to the exclusion of his young, invalid wife, to whom he had been married about 18 months, and who was left penniless by this assignment, which was procured while the son was at the home of his father, where he had been taken on the father's advice, and while his wife was not present. The wife was not made acquainted with the assignment until after her husband's death, and after the insurance had been paid to the father. The son had often expressed regrets to his wife that this insurance was all that he had to leave her. *Held*, that the assignment would be set aside as procured by undue influence.

Appeal from chancery court, Lafayette county; H. C. Conn, Chancellor.

Bill by Ruth E. Plant against S. H. Plant. Decree for defendant, and plaintiff appeals. Reversed.

H. A. Barr and Stone & Sivley, for appellant. Kimbrough, Kyle & McDonald and W. V. Sullivan, for appellee.

WOODS, C. J. The complainant, the widow of William Plant, a son of the appellee, S. H. Plant, seeks by her bill in this case to set aside the assignment of a policy of insurance for \$2,000 on the life of said William Plant, deceased, made by him in October, 1895, to his father, the assignee, because procured by the exercise of undue influence on the part of the father over the son. It is shown undisputedly that William Plant was never a very strong and healthy man, and that, under the ravages of that dreaded foe of the human race, consumption, for about a year before his death he had become exceedingly weak, and was in that condition, physically, when the assignment of the insurance policy was made, and that he died in about two months thereafter. As to his mental state, the evidence of his wife and mother-in-law is to the effect that he was incapacitated to attend to business. The evidence of several witnesses introduced by defendant is to the effect that these witnesses saw no signs of mental unsoundness or decay, but these witnesses state under what circumstances they occasionally saw him, and the casual observation of him made by them. The evidence of his attending physician and that of his pastor is that, while not mentally unsound or insane, yet, nevertheless, in his extremely weak physical state, his mind must have been affected, also; for, as the physician very aptly expressed it, "if the mind did not become correspondingly weak with the body, then nature would not be in harmony with itself." We then have the case of one wasted and enfeebled by long disease physically, and with a mind also weakened and enfeebled correspondingly. The relationship between the parties was that of father and son. The son, from his youth, had been under the direct control of the father, as a clerk in the father's store, until he was admitted as a partner in his father's mercantile business, with "a working interest in the partnership," as the witness Hampton expresses it. This witness, who was the bookkeeper of S. H. Plant & Son for several years, says: "I have known Will Plant for several years before his death,—both when he was clerk in the store of his father, and after he became a member of the firm. He was always a most obedient son, when it came to carrying out his father's instructions and directions. I never knew of his objecting in any way, as he had implicit confidence in his father's business judgment, but I do not think he could have influenced Will Plant to do anything wrong." So, too, the witness Neill, who was employed by Plant & Son as a clerk, and who knew Will Plant well, says: "I know that he was always a very obedient son, and always regarded his father's judgment in business matters very highly indeed, and observed it; but I don't

think that his father could have influenced him to do anything but what was right." Of like tenor is the other evidence on the point of his father's influence over him, and his implicit deference in business matters to his father's opinion. We have, then, a son, never very strong and healthy, and, as Dr. Baird says, not "exceedingly strong mentally," whose father's influence in business matters was without bounds, except that the son could not be influenced by the father to do anything wrong, conveying, in his enfeebled physical and mental condition, the entire proceeds of the policy of insurance, and by another instrument also conveying to the father everything he owned on earth, to the utter exclusion of a young and invalid wife, to whom he had been married about 18 months before these transactions, with whom he had lived in perfect peace and happiness, and who was left penniless by this assignment. His wife had brought him at their marriage a little money and some personal property, which had been consumed by him in his last illness, and no provision was made for her reimbursement. When and where, and under what circumstances, was the assignment made? The assignment was written by an eminent lawyer, not then in practice, and not by the regular attorney of the appellee. It was written in the absence of William Plant, the assignor, and at the request of the assignee. It bears date October 7, 1895, when William Plant was living with his wife in his own home, but when he signed it is not certainly shown. The sworn bill avers that the assignment was signed on the 12th of October, and after William Plant had removed from his own home to that of his father, and while separated from the complainant, his wife, in pursuance of a suggestion made by the father. It also appears from the transcript that the conveyance of William Plant's estate to his father, in which is made mention of the assignment of the said insurance policy, bears date October 7th, the date named in the assignment, was not acknowledged by him before the proper officer until the 14th day of October, and after William Plant's removal to his father's home, and in the absence of the complainant, and after night, and that this conveyance was not filed for record until December 14th,—two months after its acknowledgment, and after William Plant's death. That the complainant was not made acquainted with the execution of the assignment at the time it was made, nor afterwards, until the appellee had collected the money due on the policy from the insurance company, is shown by her evidence; nor is she contradicted by any one. By the evidence of complainant, which is uncontradicted, we are informed that William Plant, in anticipation of his early death, repeatedly informed his wife, the complainant, that this insurance policy was all he had to leave her, and expressed his regret that she would receive no more; and this both before and after the 12th of October.

It is shown further by complainant's evidence that in a conversation had between the father and son at the residence of the son, in the presence of complainant, in the month of October, 1895, the son stated to the father that this policy was the only property which he had to leave his wife, and expressed the hope that the father would see that the insurance was properly paid to the wife at his death. To this the father replied, "God helping me, Willie, I will do my best to do as you ask me." It is also shown by complainant's evidence that after the death of her husband she inquired of appellee as to what had been done with reference to the collection of the money due under the insurance policy, and that he replied that she need give herself no uneasiness about the matter, as he and Mr. Porter had prepared all the necessary proofs of death, and were giving the matter their attention, and that he would let her know as soon as the insurance company paid the policy; and not until the appellee had collected the money did she ever hear of his setting up any claim to the proceeds of the policy. It is insisted that there is no direct evidence of the exercise of any undue influence of the father in procuring the assignment from the son. But, in view of the evidence, which we have gone into largely, *res ipsa loquitur*, and under the circumstances the law will infer the undue influence. *Bunch v. Shannon*, 46 Miss. 525; *Simonton v. Bacon*, 49 Miss. 582; *Nobles v. Moses*, 81 Ala. 530, 1 South. 217; *Haydock v. Haydock*, 34 N. J. Eq. 570. The presumption arising from all the evidence that there was undue influence must be met by the appellee, and, because he has not done this, the decree must be reversed and the cause remanded.

(76 Miss. 574)

DRAUGHN v. STATE.

(Supreme Court of Mississippi. March 6, 1899.)

CRIMINAL LAW—CONFESSIONS—PROMISE NOT TO PROSECUTE—BURGLARY—EVIDENCE.

1. Before admitting a confession to the jury, the court should examine it, and ascertain whether it is free and voluntary.

2. A promise made by the injured party not to prosecute the one who is charged with the crime vitiates, as evidence, a confession made by the latter.

3. An indictment alleging that a person named did feloniously and burglariously break and enter a dwelling house of another is not supported by evidence of the breaking of a crib or smoke house.

4. An indictment alleging that the defendant did feloniously and burglariously break and enter a dwelling house, with intent to commit the crime of larceny therein, is insufficient, in not alleging an intent feloniously and burglariously to take and carry away the goods and chattels in said house.

Appeal from circuit court, Perry county; A. G. Mayers, Judge.

William Draughn was convicted of burglary, and appeals. Reversed.

McWillie & Thompson, M. U. Mounger, and Hartfield & McLaurin, for appellant.

TERRAL, J. The indictment alleged "that William Draughn on the — day of June, 1895, did feloniously and burglariously break and enter the dwelling house of Sam West, with intent to commit the crime of larceny therein," etc. In the course of the trial it clearly appeared from the evidence of the prosecutor, Sam West, that the house broken into was not a dwelling house, but was a crib, and the only evidence of its use was that of West, who said that he lost some bacon out of it. The variance between the allegation of the breaking into a dwelling house and the evidence relating thereto constitutes the first objection of the defendant to his conviction. The evidence arising from the confession of Draughn, obtained by a promise not to prosecute him, was also objected to. In the third place the defendant complains that, before West testified as to the confessions of Draughn, he requested the court to ascertain, apart from the jury, whether the forthcoming confession was free and voluntary, or not, which the court declined to do; and this action is also complained of. These several objections, we think, are well taken.

1. That the court, before admitting the confession to the jury, should have examined, and known that it was free and voluntary, is held by *Ellis v. State*, 65 Miss. 47, 3 South. 188.

2. That the flattery of hope, held out to the defendant by the promise of West not to prosecute him, vitiated the confession as evidence, is announced in 1 Greenl. Ev. § 219.

3. That the breaking of a crib or of a smoke house will not support the allegation of the breaking of a dwelling house is affirmed by *Whart. Am. Cr. Law* (6th Ed.) § 1611.

The indictment is bad in not alleging that Draughn broke and entered the house of West with intent the goods and chattels of West, then in said house, feloniously and burglariously to take and carry away. *Whart. Ind.* (2d Ed.) § 367, p. 248.

The judgment is reversed, the verdict is set aside, the indictment is quashed, and the defendant is held to answer such bill as may be found against him. Reversed and remanded.

(77 Miss. 142)

STATE ex rel. BOURGEOIS v. LAIZER.

(Supreme Court of Mississippi. March 6, 1899.)

ELECTION CONTEST—PETITION—AVERMENTS—BOND OF CONTESTANT.

1. A petition alleged that the return of the election commissioners, which stated that relator received 30 and his opponent 31 votes, was false, and that in fact three persons named, who were not qualified voters, had voted, and their votes were counted for relator's opponent. *Held* sufficient to show that relator was elected.

2. Where election commissioners make return showing that one of the contestants named was elected, the other need not offer to qualify or give the official bond as a condition precedent to making a contest.

Appeal from circuit court, Hancock county; T. A. Wood, Judge.

Petition by the state, on the relation of Olus M. Bourgeois, against Edwin Lalzer. From a judgment sustaining a demurrer to the petition, relator appeals. Reversed.

D. B. Seal and J. I. Ford, for appellant. Bowers, Chaffe & McDonald, for appellee.

TERRAL, J. This is a contest by the relator, Olus M. Bourgeois, against Edwin Lalzer, for the mayoralty of the town of Waveland, Hancock county. The relator alleges that on the first Tuesday of August, 1898, an election was held in said town, at which he and Edwin Lalzer were opposing candidates for mayor; that said election was duly held, and that the commissioners of election made a return to the mayor and aldermen of said town, stating therein that the relator had received 30 votes, and Edwin Lalzer had received 31 votes, for mayor; that said return was false and fraudulent, and that, in fact, John Barr, Henry Meggs, and Peter Meggs, who were not qualified voters of said town, had voted for Lalzer, and their votes had been so counted for him; that A. Zimmerman, Edmond Bourgeois, Joseph Leon Bourgeois, Alcide Ladner, and Lucien Bourgeois, who were legally qualified and registered voters of said municipality, and who offered to vote in said election, and who, if permitted to do so, would have voted for relator, were fraudulently refused permission to vote by the election commissioners; that, in pursuance of said false and fraudulent return of said election commissioners, the said Edwin Lalzer intruded himself into the office of mayor of said town, to which office the relator alleged himself to be entitled if said false and fraudulent votes for Lalzer had been rejected. The defendant demurred to the petition; the court sustained the demurrer; and the relator appeals. The two grounds of the demurrer relied on are: (1) The petition does not distinctly show that the relator was elected to said office of mayor; (2) the petition does not show that the relator offered to qualify for said office by taking the oath of office, and by giving the required bond.

1. We understand the petition to allege that, rejecting the illegal votes counted for Lalzer, the relator was elected mayor. That, certainly, is the fair import of the language of the petition.

2. We do not think it was necessary for relator to have taken the oath of office, and to have given the official bond, or to have offered to do so, on or before the day of the commencement of the term of office, in order to the making of a contest for his right in the premises. The return by the election commissioners of Lalzer, as being elected to the office of mayor, made it unnecessary for him to make an effort at qualifying for the office until the wrong of the commissioners was corrected. When his right to the office is determined in his favor, he will be allowed a reasonable time in which to take the official oath and give the official bond. If it be true, as is alleged by the relator, and as is admitted by the demurrer, that the relator

was duly elected to the office of mayor, and that Lalzer intruded himself into the office by means of the false and fraudulent returns of the election commissioners, the relator has made a case for relief. Certainly, the law cannot permit such misconduct without affording a remedy for the evil. The judgment is reversed; the demurrer is overruled; and the defendant is allowed 30 days to answer after the filing of the mandate in the circuit court. Reversed and remanded.

HARRIS v. PERKINS.

(Supreme Court of Mississippi. Feb. 27, 1899.)

CONTRACTS—EVIDENCE—DIRECTION OF VERDICT.

In an action for digging a well, on an issue as to whether the well supplied sufficient water for ordinary purposes, four witnesses testified for plaintiff that water was obtained in sufficient quantities to meet the full capacity of the pump, while a greater number testified to the contrary. Held error to give a peremptory instruction for defendant.

Appeal from circuit court, Perry county; A. G. Mayers, Judge.

Action by S. O. Harris against B. F. Perkins to recover \$308.10 for work and labor done and materials furnished by plaintiff in the sinking or boring of a well for defendant. The contract price agreed upon between the parties is averred to have been 70 cents per foot, and the well is averred to have been sunk or bored 438 feet deep. Defendant filed a plea of non assumpsit, and gave notice that he would offer proof to show that by the terms of the contract the well was to furnish for six months after completion a sufficient supply of water for defendant's needs, 30 gallons a minute, and nothing was to be paid unless it did so, and that the well was a failure, and that plaintiff did not comply with the contract. After the evidence on both sides had been introduced, a peremptory instruction was given by the court for defendant, and plaintiff appeals. Reversed.

McWille & Thompson, for appellant. C. H. Alexander, L. Brame, and S. E. Travis, for appellee.

WOODS, C. J. It must be conceded that any reasonable construction of the contract between the parties will require a supply of water adequate for ordinary purposes, and that a finding of water, merely, will not meet the requirements of the contract; yet the judgment, following a peremptory instruction, must be set aside. Four witnesses testified for the appellant that water was obtained in sufficient quantity to meet the full capacity of the pump or nozzle. Many witnesses testified to the contrary, and numerically the preponderance of the evidence was with appellee. But that is not what is meant in law by the term "preponderance of the evidence." There is violent and irreconcilable conflict in the evidence, and the jury should have been permitted to pass on it. Reversed.

(76 Miss. 496)

McCAUGHN v. BROWN.

(Supreme Court of Mississippi. Feb. 27, 1899.)

SURVIVING PARTNER—RIGHT TO LIQUIDATE AFFAIRS.

Ann. Code 1892, §§ 1909-1915, provides that, where the surviving partner, on being cited by the executor or administrator of a deceased partner to give a bond for the proper winding up of the partnership affairs, refuses to do so, such representative of the deceased partner shall, on giving a like bond, have the right of winding up the partnership, but such right shall belong to the surviving partner if he gives the proper bond. *Held*, that until the appointment of an administrator for a deceased partner, and the citing of the survivor to give such bond, the latter has the right to collect debts due the partnership, and to wind up its affairs without bond.

Appeal from circuit court, Harrison county; T. A. Wood, Judge.

Action by N. L. Brown against Harper McCaughn in justice's court. A justice's judgment for defendant was reversed by the circuit court, and defendant appeals. Affirmed.

W. G. Evans, Jr., for appellant. T. V. Noland, for appellee.

TERRAL, J. N. L. Brown sued Harper McCaughn upon a note executed by him for \$165.33, due 1st of September, 1896, and payable "to the order of N. L. Brown & Son." McCaughn, by way of defense, pleaded on oath that said plaintiff had no right to maintain this suit in his own name, because said N. L. Brown & Son was a partnership composed of N. L. Brown and Albert Brown, and that Albert Brown died long before this suit was brought. Brown demurred to the plea, lost in the justice court, appealed to the circuit, where he had judgment, and the defendant appeals here.

The defendant relies upon sections 1909-1915, Ann. Code 1892, to maintain that a surviving partner, to support a suit to collect the debts due the partnership, must give the bond required by section 1911. This contention cannot be maintained. These sections of the Code are in derogation of the common law, and must be strictly construed. At common law, upon the death of one of the partners, the firm is dissolved, the legal title to the property of the partnership vested in the surviving partner, all rights of action belong to him, and he had the exclusive right to reduce them to possession. Our Code provisions interfere with the common law only when there is an administrator or executor, and he has inventoried and appraised the partnership estate, and offers to give bond for its administration, unless the surviving partner shall choose to give bond for winding up the affairs of the partnership. In such case, if the surviving partner refuses to give the bond required, the administrator or ex-

ecutor may qualify and administer the partnership property; but until an executor or administrator is appointed, and appraises the partnership estate, and cites the surviving partner to appear and qualify, or renounce his right, the surviving partner should proceed to the collection of the debts, and to the winding up of the affairs of the partnership, as authorized and required by the common law. 17 Am. & Eng. Enc. Law (1st Ed.) 1180; Holman v. Nance, 84 Mo. 677; Blaker v. Sands, 29 Kan. 393.

Judgment affirmed.

MYRICK v. NATIONAL CASH-REGISTER CO.

(Supreme Court of Mississippi. Feb. 27, 1899.)

REPLEVIN—PROPERTY NOT IN POSSESSION OF DEFENDANT.

Replevin does not lie to recover property not in defendant's possession at the time of bringing the suit.

Appeal from circuit court, Jones county; A. G. Mayers, Judge.

Replevin by the National Cash-Register Company against William Myrick. Judgment for plaintiff, and defendant appeals. Reversed.

T. J. Hardy and E. A. White, for appellant.

TERRAL, J. The National Cash-Register Company sued William Myrick in replevin for one No. 3 cash register. Myrick was summoned, and the register was seized under the writ. The plaintiff had judgment, and the defendant appeals.

William Myrick bought the register of the plaintiff by a contract which reserved title in the seller until the purchase price was paid. The purchase price not being paid, plaintiff brought replevin. Myrick lived in Jasper county, but owned a store in Jones county, in which business the No. 3 register was used. On the 8th of July, 1897, Myrick sold his store in Jones county, fixtures, register, etc., to his wife, Mrs. C. J. Myrick, which sale was evidenced by writing subscribed by William Myrick, duly acknowledged, and filed with the chancery clerk of Jones county to be recorded on the 9th of July, 1897. On the 17th of July, 1897, a levy under the writ of replevin herein was made. It was agreed to be a fact that "Myrick had never been in the actual possession of the property, and that the property was in the possession of B. F. Williford, who was the agent of Mrs. C. J. Myrick." In *Griffin v. Lancaster*, 59 Miss. 340, it is said: "It is essential in replevin that the defendant shall be in possession of the property sued for at the time of institution of the suit, and, if not so brought, the suit will be dismissed." The rule of *stare decisis* disposes of the issue in this case. Reversed and remanded.

ANDREWS v. KRAMER et al.

(Supreme Court of Mississippi. Feb. 27, 1899.)

EVIDENCE—RES INTER ALIOS ACTA—JUDGMENTS.

In an action to recover moneys paid by plaintiff to defendants for drafts sold by them to plaintiff, which belonged to a third person, to whom plaintiff afterwards had to pay the amount thereof, the record of a justice's court, showing the recovery of a judgment against plaintiff for the amount of the drafts by such third person, is inadmissible, being *res inter alios acta*.

Appeal from circuit court, Clarke county; T. A. Wood, Judge.

Action by S. H. Andrews against Lena Kramer and another. There was a judgment for defendants, and plaintiff appeals. Reversed.

D. W. Heidelberg and Buckley & Halsill, for appellant. W. T. Houston, for appellees.

TERRAL, J. S. H. Andrews sued Lena Kramer and Herman B. Kramer, in the sum of \$173.28, for money had and received by the defendants to and for the use of the plaintiff. It appeared from the evidence that one of the defendants, at the instance of the other, indorsed and sold to Andrews two checks, aggregating \$173.28, drawn at Boston, Mass., by H. W. Wadleigh on the North National Bank, and payable to the order of H. H. Kramer. These two checks were cashed by Andrews for the defendant H. B. Kramer, who presented them for that purpose at the instance of the other defendant, Mrs. Lena Kramer; and, when Andrews cashed said checks, said H. B. Kramer indorsed the name of H. H. Kramer thereon, and delivered them to Andrews. Afterwards H. H. Kramer claimed these checks to have been his property, and sued Andrews for appropriating them to his use, and obtained a judgment of recovery therefor. Thereupon Andrews paid H. H. Kramer the value of the checks, and brought the present suit to recover of the defendants the money he had paid them for said checks. On the trial of the case in the circuit court the evidence of H. H. Kramer and others disclosed the facts that the two checks were drawn by H. W. Wadleigh, a Boston customer of H. H. Kramer, who operated a tannery near Enterprise, Miss., in payment of two shipments of leather made to Wadleigh by H. H. Kramer; that these two checks came to the hands of the defendants, H. B. and Lena Kramer, and that Andrews, for accommodation, cashed the checks for H. B. Kramer at the instance of Mrs. Lena Kramer, and that H. B. Kramer indorsed the payee's name on said checks, and delivered them, so indorsed, to Andrews; and that the money paid by Andrews to H. B. Kramer came to the hands of Mrs. Lena Kramer, who appropriated the same to her own use. Besides the evidence, the substance of which is above recited, the plaintiff offered a book, not identified, purporting to be the docket of H. R. Ward, a justice of the peace, containing a judgment for the sum of said checks, and the

proceedings thereto, in favor of H. H. Kramer and against S. H. Andrews. The evidence was heard by the court, but all of it was excluded from the jury, and they were instructed to find for the defendants.

The indorsement of the checks by H. B. Kramer at the instance of Lena Kramer was an undertaking by them to Andrews that they were authorized to indorse said checks. They thereby guaranteed or warranted to Andrews a title to the checks; and Andrews, in seeking to recover the money paid them on said checks, is merely calling on them to make good their guaranty. The judgment proceedings before Justice Ward, between H. H. Kramer and S. H. Andrews, are, as to the present defendants, *res inter alios acta*, and, apart from any evidence that the book was the official record of Justice Ward, were inadmissible in evidence; but the plaintiff had offered abundant evidence to go to the jury, and the exclusion of his evidence by the court was error. Reversed and remanded.

(77 Miss. 151)

ALBERT MACKIE GROCER CO. v. BYRD.

(Supreme Court of Mississippi. March 6, 1899.)

PAYMENT—RECEIPTS—EVIDENCE.

The evidence whether two receipts for like sums, one of which was given on a postal-card form, were duplicates, or each represented a separate payment, being conflicting, it was error to modify an instruction that, a receipt being only *prima facie* evidence of payment, if the one given on the postal-card form was a second receipt for the same payment, for which a receipt had already been given, and that only one payment was made, to give credit for the amount of only one of the receipts, by striking therefrom the words "given on the postal-card form."

Appeal from circuit court, Adams county; W. P. Cassidy, Judge.

Action by the Albert Mackie Grocer Company against M. F. Byrd in justice's court. From a judgment for plaintiff, defendant appealed to the circuit court, where he had judgment, and plaintiff appeals. Reversed.

Defendant filed a counterclaim of \$300, claiming that appellant owed him the difference between the amount of its claim and the \$300. The defendant appealed to the circuit court from a judgment against him. The defendant introduced two receipts,—one a postal-card receipt, as follows: "We are obliged for yours of 3/1 containing draft amounting to \$300.00, which is placed to your credit," signed "Albert Mackie Grocer Co."; and another receipt, dated March 2, 1897, for \$300. He testified that he went to plaintiff's place of business in New Orleans on the 1st day of March, 1897, and bought some goods, and on the same day gave them a draft on M. Levy & Son for \$300; and on March 2, 1897, he went back, and purchased other goods, and paid them \$300 in cash; and that the postal card was a receipt for the draft, and the other receipt was for the money paid them on March 2d; and that

part of the goods bought were never shipped to him by plaintiff, leaving a balance due him. Plaintiff's evidence was to the effect that defendant, on March 2, 1897, bought goods from them amounting to \$448.95, and gave them a check or draft on M. Levy & Son for \$300, leaving a balance due, sued for; and that the salesman who waited on defendant at that time gave defendant a receipt for the draft, and handed the draft to the bookkeeper, who wrote the postal-card receipt, and mailed it to defendant, not knowing that a receipt had been given by the salesman; and that only \$300 had been paid by defendant. The second instruction, as asked by plaintiff, was as follows: "(2) The court instructs the jury for the plaintiff that a receipt is only prima facie evidence of payment, and is not conclusive; and if, from the evidence, the jury believe that the receipt for \$300, given upon its postal-card form by the plaintiff to the defendant, was a second receipt given for the same payment for which a receipt had already been given, and that only one payment of \$300 was made by said defendant to the plaintiff, then the jury shall find for plaintiff." The court modified this instruction by striking out "given upon its postal-card form." There was a verdict and judgment for the defendant for the amount he claimed. From that judgment plaintiff appealed, its motion for a new trial having been overruled.

Reed & Brandon and Brame & Brame, for appellant. J. A. Clinton, for appellee.

WHITFIELD, J. This case is a very peculiar one on the facts. The testimony is in utter, hopeless conflict. The case turns upon whether the receipt given upon the postal-card form was an independent receipt, —a second receipt for a second sum of \$300, —or whether it was a mere duplicate receipt. To this point all the testimony addresses itself. Whether the language of the postal-card receipt, "Yours of 3/1, containing draft," etc., refers, as counsel for appellee insists, to the date of the draft, or of some supposed letter "containing" draft, is for the jury, and we do not intend to comment upon that, or any other feature of the evidence. But we think, in the singular case made by the proof, the second instruction asked by the plaintiff should have been given as asked, and that its modification was error. Leaving the words "given upon its postal-card form" legible, with only a pencil mark through them, may have misled the jury. Reversed and remanded.

(76 Miss. 569)

COFFEE v. LOUISVILLE & N. R. CO.
(Supreme Court of Mississippi. March 6, 1899.)

CARRIERS—RULES AS TO BAGGAGE—VALIDITY.

1. A rule that baggage shall not be checked until a ticket has been procured is reasonable.

2. A rule that a baggage master shall not receive, into the baggage room, baggage until a ticket has been procured, is unreasonable and void.

Appeal from circuit court, Jackson county; T. A. Wood, Judge.

Action by C. C. Coffee against the Louisville & Nashville Railroad Company. From a judgment entered on a verdict peremptorily instructed for defendant, plaintiff appeals. Reversed.

Suit by appellant against appellee for damages for ejecting him from its train in July, 1897. On the trial, plaintiff's evidence showed that plaintiff was in Mobile, Ala., and went with his satchel to the baggage master of the defendant company in that city, and asked him to check the satchel to Scranton, a town on its road in Mississippi, and was informed by him that baggage could not be checked until a ticket was purchased, but told him to leave the satchel there until a ticket was purchased, and that the ticket office was not at that time open, but would be in time for plaintiff to get a ticket for the outgoing train that day; that plaintiff went back to the baggage room in time to get a ticket, and the satchel could not be found until the train was leaving, and plaintiff got on the train just as it was moving off, and did not have time to get a ticket. Plaintiff and a companion went into a sleeping car attached to the train, and the conductor came around, and asked them for tickets, when plaintiff explained to him why he did not have a ticket, when the conductor demanded four cents a mile as fare to Scranton. Plaintiff offered to pay the regular fare of three cents per mile, and this was refused by the conductor, who demanded that plaintiff either pay four cents a mile or get off the train. Plaintiff then offered to pay four cents a mile to the first station, and to get a ticket there, or pay the conductor enough money to get the ticket. The conductor declined to accept that, and in a rude and insulting manner ejected plaintiff from the train at a small station, where there were no hotel accommodations. Plaintiff then hired a hack to convey him to a town on the Gulf, and there took a sail boat to Scranton. Defendant pleaded the general issue, and gave notice that it would prove that by its rule a passenger on its trains who has not procured a ticket is required to pay four cents a mile for his transportation thereon. The evidence for defendant was to the effect that its agents were not allowed to receive baggage unless it was checked or accompanied by a ticket; that trunks are left on the platform before they are checked, but no small baggage, such as satchels, are so left; that the conductor was not rude or insulting to plaintiff, but stopped the train, and plaintiff got off himself. The court gave a peremptory instruction to the jury to find for defendant. From verdict and judgment accordingly, plaintiff appealed.

Denny & Woods, for appellant. Gregory L. Smith and Mayes & Harris, for appellee.

WHITFIELD, J. The case should have gone to the jury. A rule that baggage shall not be checked until a ticket has been procured is a reasonable regulation to prevent imposition upon the company. But a rule that a baggage master shall not receive, into the baggage room, baggage until a ticket shall have been procured, if there be such a rule, is an imposition on the public, unreasonable, and void. It would require intending passengers to care for their own baggage, in many situations that may readily be imagined, where to do so would be entirely impracticable. Every reasonable facility for travel should be afforded those who are intending passengers, and rules should be so framed as to be just in their provisions, alike to the company and the traveling public. As to the authority of the baggage master, see *Isaacson v. Railroad Co.*, 94 N. Y. 285, 286. Reversed and remanded.

(76 Miss. 228)

LIPSCOMB v. STATE.

(Supreme Court of Mississippi. Feb. 27, 1899.)

CONTINUANCE—INCAPACITY OF ACCUSED—JURY—SUMMONING—COMPETENCY—SHERIFFS—DISQUALIFICATION—TERMS OF COURT—COMMENCEMENT OF TRIAL—EVIDENCE ON FORMER TRIAL—RIGHT TO CONFRONT WITNESSES—DYING DECLARATIONS—APPEAL—HARMLESS ERROR—OBJECTIONS—DISCRETION OF COURT.

1. An application for a continuance based on the physical or mental condition of accused is addressed to the discretion of the trial court.

2. An accused is not entitled to a continuance as for physical and mental incapacity simply because his physician testifies to that effect.

3. Where accused applied for a continuance on the ground of physical and mental incapacity, it was not reversible error for the court to appoint a number of physicians to examine him and report to the court on oath.

4. Const. § 26, declaring it the right of an accused to be confronted with the witnesses against him, does not apply to an application for continuance.

5. A violation of the right of an accused to be confronted with the witnesses against him (Const. § 26) is not reversible error, where the evidence of the witnesses who did not confront him is not necessary to sustain the judgment.

6. It is in the discretion of the trial court to displace the sheriff, under Code 1892, § 825, providing that if the sheriff be interested in any suit, or for other cause be incapable or unfit to execute his office in any particular case, the coroner shall act in his stead.

7. Code 1892, § 828, provides that if, for any cause, there be a vacancy in the office of sheriff, "and no deputy to act as authorized by law in case of the death of the sheriff," or the sheriff be a party or interested in any suit, or for other cause incapable or unfit to execute his office in a particular case, the coroner shall act in his stead. Section 3079 provides that if a county officer die, having a deputy, the deputy may discharge the duties of the office until the vacancy is filled. *Held*, that when a sheriff is living, and disqualified to act in a particular case, the deputy cannot act in his stead.

8. A defendant who has had a fair trial cannot complain that the duties of a ministerial

office pertaining thereto were performed by one person rather than another.

9. An objection that the duties of a ministerial office should be performed by one person rather than another cannot be first urged on appeal.

10. To prevent improper influences being brought to bear on a special venire, the court ordered the sheriff to submit the names of the deputies by whom the jurors were to be summoned, so that they might be submitted to the state and accused for objection. The state objected to two persons on the list, and others were substituted. *Held*, that the course would be presumed to have been justified, the grounds of the court's action not appearing.

11. Code 1892, § 933, provides that "when the trial of any case, civil or criminal, has been commenced and is in progress," and the time for the expiration of the term as fixed by law arrives, the court may proceed with "such trial or hearing," and bring it to a conclusion, in the same manner and with the like effect as if the stated term had not expired. Section 1522 provides that words and phrases are used in statutes in their ordinary meaning, and technical words and phrases in their technical meaning. *Held* that, as used in section 933, the "trial" of a criminal case commences, not at the later stage when jeopardy attaches, but at the instant the court enters on the impaneling of a jury for an investigation of the matters of fact presented by the pleadings.

12. A witness for the state on a former trial having died, the state may prove his testimony, after preliminary proof of death, identity, etc.

13. Deceased, a vigorous young man in cheerful spirits, took what he supposed was a capsule of medicine prescribed by defendant, and in 20 or 30 minutes died in convulsions, apparently poisoned. Just before the last convulsions he requested a prayer, and said to his wife: "I am going to die. I have to tell you that [defendant] has killed me,—has poisoned me with a capsule he gave me to-night; that G. has insured my life, and hired [defendant] to kill me." *Held*, that the words, "[defendant] has killed me,—has poisoned me with a capsule he gave me to-night," could be separated from the rest of the statement, and were then admissible as being a statement of facts.

14. Accused cannot complain that evidence was given of a matter, where he himself afterwards testified to the very same thing.

15. A finding on a motion for new trial that a juror was not incompetent because of hostility to accused, concealed on the voir dire, will not be disturbed where the evidence is conflicting.

Appeal from circuit court, Kemper county; G. B. Huddleston, Judge.

W. H. Lipscomb was convicted of murder, and he appeals. Affirmed.

J. H. Currie, J. H. Neville, and W. R. Harper, for appellant. Wiley N. Nash, Atty. Gen., John R. Dinsmore, and Cochran & Bozeman, for the State.

THOMPSON, Special Judge. Dr. W. H. Lipscomb, a practicing physician, was indicted, jointly with one Guy Jack, by the grand jury of Kemper county, for the murder by poisoning of Charles T. Stewart, a patient of the accused. A severance was had, and appellant was tried at the March term, 1897, of the circuit court of said county, and convicted of the crime. From this conviction he appealed to this court, and on the 19th day of February, 1898, the judgment and sentence of death passed upon him by the court below were reversed and vacated, and a new

trial granted. The case on the former appeal is reported. *Lipscomb v. State*, 75 Miss. 556, 23 South. 210, 230. The judgment of this tribunal reversing the first conviction was rendered by a divided court; two members favoring a reversal, not because there was a want of sufficient evidence to support the verdict, but because of errors committed by the circuit court in its action on instructions. The other member of the court favored an affirmance of the judgment then appealed from, and of the death sentence, notwithstanding such errors, on the ground that appellant was so manifestly guilty, from the evidence, of having murdered the deceased by the administration of poison, as to render the errors nonreversible ones. On the first appeal the principal question discussed was that of the admissibility of the dying declaration of the deceased, which declaration was in these words: "He [meaning the deceased] said that he had been dead, and that he was going to die, and the good Lord had sent him back to tell me [the witness] that Dr. Lipscomb had poisoned him with a capsule he gave him that night, and Guy Jack had his life insured, and had hired Dr. Lipscomb to kill him." One of the judges who heard the cause was of the opinion that the entire declaration was incompetent; two of them, that parts thereof were competent, and, since the only objection to its admission in evidence on the trial then under review was a general one, that the trial court did not err in allowing the declaration to be given in evidence to the jury. As the case was to be reversed and a new trial awarded, the two judges who concurred in the opinion that parts of the dying declaration were admissible thought proper to indicate in their opinions which parts were so admissible over specific objections of the accused, if made, and which parts should be excluded upon like objections. After the case was remanded it again came on to be heard in the court below at its March term, 1898. The accused (appellant) made an application—the first one—for a continuance of the case; averring, as cause why the same should be granted, that his physical condition was such that he was unable to undergo a trial at the then present term of the court. In support of this application the accused and his attendant physician were introduced as witnesses before the court, and testified relative to the subject-matter of the application. At the conclusion of this evidence the court below, not being satisfied upon the question then at issue, caused seven practicing physicians to examine the person of the defendant, and directed them to make, on oath, to the court, in writing, a report of his physical condition. This was done; five of the seven physicians reporting that the accused was able to stand his trial, and two reporting that, in their judgment, he was unable to do so. The court thereupon overruled the application for a continuance. This was upon the 10th of March, 1898; and a special venire

was then drawn, and the case was set for trial on the 15th of that month. On the morning of the 15th the appellant renewed his application for a continuance,—or, rather, made a second one,—supporting the same by his affidavit, in which he averred that, because of his physical and mental condition, he was unable to endure the ordeal of a trial, or to properly conduct, or advise his attorneys concerning, his defense, and that his infirmities had grown materially worse since his first application for a continuance had been denied. The court below was not satisfied upon the matters of fact thus presented, and caused 12 practicing physicians to be subpoenaed to appear before the court, and 11 of them so appeared. The court gave directions to these physicians to examine the accused, and report to the court, in writing, (1) whether the physical condition of the accused enabled him to endure the strain that would necessarily be upon him during the progress of a trial; (2) whether the mental condition of the accused enabled him to intelligently note and pay that attention to the development of the testimony that would be needful to the administration of justice; (3) whether the physical and mental condition of the accused enabled him intelligently to testify, if he desired to do so, in his own behalf. Nine of these physicians, after making the examination of the accused, reported on oath to the court, in writing, to the effect that the defendant was physically able to endure a trial, and mentally able to advise his attorneys and conduct his defense, and to testify in his own behalf. Two of the eleven dissented, and reported that Lipscomb was physically unable to undergo a trial, and mentally unfit to intelligently give his evidence or to protect his interest, should a trial then be had. The court, upon receipt of the reports of the physicians, overruled the application—the second one—for a continuance. The district attorney, in behalf of the state, then moved the court to displace the sheriff of the county, because, as was averred in support of this motion, that officer was interested in the case, and an active partisan of the accused; and the motion further asked the court to make an order requiring the coroner of the county to execute, do, and perform all of the duties which appertain to the office of sheriff in the particular case being tried. This motion was based upon section 828, Code 1892, which section is in words following: "If for any cause there be a vacancy in the office of sheriff, and no deputy to act as authorized by law in case of the death of the sheriff, or the sheriff be a party or interested in any suit, or for other cause be incapable or unfit to execute his office in any particular case, the coroner of the county shall, during the vacancy, or in the cases wherein the sheriff is disqualified or unfit to act, execute, do and perform all the duties which appertain to the office of sheriff. And in every case where, by vacancy or exception to the sheriff any

writ shall be delivered to the coroner to execute, he shall do and perform all things by virtue of such writ which ought to be done therewith and thereunder; and in case of any neglect or breach of his duty, such coroner shall be subject to the same penalties and damages and to the same proceedings as sheriffs are subject to in like cases. But the coroner shall not execute the office of tax collector." Evidence was taken upon the matter of fact so presented, at the conclusion of which the court sustained the motion. The cause then came on to be heard on the motion of defendant to quash the special venire facias. The grounds upon which this motion was based grew out of the following facts: When the special venire was drawn, the trial court directed the sheriff to prepare a list of bailiffs or deputies whom he desired to act in serving the venire, and to present the same to the court, so that their names might be submitted to the attorneys for the state and the defense, with the view of enabling the attorneys to make objection to the competency or fitness of the persons named on the list to perform the contemplated service. The sheriff accordingly made out such list, and rendered the same to the trial court, and the court submitted the list to the attorneys for the prosecution and for the defense. The attorneys for the defense refused to receive the list, or to make any suggestions concerning the persons whose names appeared thereon. The attorneys representing the state made objection to two of the men named. The sheriff thereupon selected two other persons in place of those to whom objection had been made, and these two persons, together with those on the original list to whom objection had not been made, were by the sheriff appointed to execute the venire, and they did execute it; each going to a different part of the county to summon the jurors. The court below overruled the motion to quash the venire, and proceeded to impanel a jury for the trial of the accused. Six jurors had been examined by the court, and adjudged *prima facie* competent, and had taken their seats in the jury box, but none of them had been accepted by the state, or presented to or passed upon by the defendant, when the hour of 6:45 o'clock arrived in the afternoon of the last day of the March term, 1898, of the circuit court of the county, as fixed by the general statute providing the times of beginning and the duration of the terms of court in Kemper county. The special venire in the case and the regular jurors for the week had been exhausted; and the court thereupon (basing its right so to do upon the provisions of section 933, Code 1892) ordered the acting sheriff to summon additional jurors, and directed that such jurors should be present in court on the following Monday, March 21, 1898, to which day an adjournment was ordered. The Code section is in the following words: "When the trial of any case, civil or criminal, has been commenced and is in progress in any court, and the time for the

expiration of the term as prescribed by law shall arrive, the court may proceed with such trial or hearing, and bring it to a conclusion, in the same manner and with the like effect as if the stated term had not expired." When the court met on Monday, and when it was about to proceed with the examination of jurors, the defendant moved the court to discontinue further proceedings in the cause; contending that the statute above quoted did not authorize further proceedings, and was not applicable to the cause as it then stood. On the hearing of the motion the minutes of the court's proceedings on Saturday, March 19th, were offered in evidence, from which it appeared that during that day the defendants in 10 separate criminal cases, who had been convicted of crime, were brought before the court and duly sentenced. The last entry on the minutes of the court for that day, however, was one in the cause now under consideration, adjudging that the court stand adjourned until the following Monday (quoting from the entry), "to conclude the hearing of this cause commenced and in progress, notwithstanding the term of the court prescribed by the law has expired." The motion was overruled. The examination of jurors was then proceeded with, until a full jury was in the box and was presented to the accused. Thereupon the accused presented a special plea, setting up the matter above stated, and made the basis of the motion just referred to, and the plea concluded with a prayer that no further cognizance be taken of the cause at that time. The state demurred to the plea, and the court below sustained the demurrer. Thereupon the jury was completed, and the introduction of evidence entered upon. There were several exceptions to the rulings of the court on the admissibility of evidence (including the dying declaration) taken by the appellant. We will take notice of these rulings after disposing of the assignments of error predicated of the other rulings of the court before mentioned, to each of which the appellant duly excepted.

The Applications for a Continuance. We find no reversible error in the rulings of the court below denying the applications for a continuance. Of necessity, such applications, based upon the physical or mental condition of the party indicted for crime, must, even more largely than ordinary applications for the postponement of trials, rest in the discretion of the trial judge. He has the person of the accused before him, and the very appearance of the party may be considered by him in reaching a just conclusion. Were this otherwise, the guilty would be afforded opportunity to defeat a trial by feigning sickness. Witnesses who are not experts, called to contradict such pretenses, could swear to nothing save their conclusions from such appearances; and the judge can draw conclusions therefrom as well as such witnesses. Nor will it avail anything in the interest of justice to say that because an accused person

produces some medical practitioner who will join him in swearing that the indicted party is physically incapable of enduring the ordeal of a trial, or mentally incapacitated to properly conduct, or aid his attorneys in conducting, his defense, it follows, of course, a continuance must be granted. The trial judges are presumed to be honest, impartial, and capable officials, and they should be permitted to exercise that discretion in such matters which the law invests in them; and a conviction for crime ought not to be reversed for such reason as that we are considering, unless the case be indeed an extreme abuse of discretion, and such abuse must be apparent from the entire record of the conviction, looking at the whole trial and its results as a completed one. While we are not prepared to give judicial sanction to everything that was done by the learned judge of the court below in order to satisfy his mind of the real truth concerning the appellant's mental and physical condition before denying the application for a continuance, yet we do not hesitate to adjudge, looking at this record as a whole, viewing the proceedings in the court below from the standpoint of a concluded trial, that sound judicial discretion is not shown to have been abused, and that it is manifest that the court below honestly and impartially endeavored to adjudge in accordance with the very truth. We do not think the fact that the judge received the sworn report of the physicians appointed to examine appellant constitutes reversible error. It would be perhaps better practice, in such cases as this, for the representative of the state, if he suspect the accused of feigning illness or temporary mental weakness for the purpose of securing a continuance, to obtain the attendance of impartial physicians as expert witnesses, and demand of the accused that he submit to an examination of his person in the presence of the court, and allow such witnesses to be subjected to a cross-examination by the accused and his counsel. If such demand should be refused, and the accused object to such procedure, the refusal itself would be evidence tending to discredit the facts upon which the application for a continuance was based, and, where the court was in doubt, would, we think, ordinarily justify a discretion that the trial proceed. However this may be, we are surely of opinion that continuances of criminal causes, based on the matters of fact averred in this case as grounds for their allowance, are not to be placed solely in the power of defendants and their friends, even though those friends be physicians, with nothing to prevent the exercise of such power save the restraining influence of having to make oath to the matters of fact claimed by them. Nor do we think that the reception by the court below of the report of the physicians violated the constitutional right of the accused to be confronted by the witnesses against him. Such right, guaranteed by section 26 of our present state constitution, primarily relates to

the trial of the guilt or innocence of the accused. But even if we concede that the court, because of the right embodied in and guaranteed by the constitution, erred in receiving the report in this case, such error is not sufficient cause for reversing the conviction, since, as we have already said, we are satisfied from the record before us, excluding the reports of the physicians, that appellant's mental and physical condition was such as to deprive him of any right to a continuance because thereof. This is manifest from the skillful manner in which his defense was conducted, and the clearness, perspicuity, and mental acuteness which characterize his own evidence delivered in his defense.

Displacing the Sheriff. The next question for consideration is the action of the court below in displacing the sheriff, and directing that the coroner of the county, in all matters pertaining to this case, should perform the duties prescribed by law to be executed by the sheriff. We have already quoted in this opinion, in connection with the statement of facts of the case, the section of the Code (section 828) under which the court below acted. It was shown to the satisfaction of the trial judge, and the court below so adjudged, that the sheriff was interested in the result of this cause, and it cannot be seriously claimed here that the evidence was insufficient to justify the adjudication. We are of the opinion that the evidence did justify the court below in concluding that the ends of justice would most likely be promoted by having some other person than the sheriff to act in his official capacity in this case. We think the provisions of section 828 of the Code are wise, and that the circuit judges of the state should be allowed to exercise a liberal discretion in their enforcement. The main purpose of all proceedings in the selection of juries, the care and control of them during the trial of a cause, and the prevention of improper influences being brought to bear upon them after they are impaneled, is to insure fair and impartial trials of causes, and honest verdicts based upon the real belief of the jurors as produced by the evidence legitimately and properly presented under the direction and control of the court. This main purpose of all trials cannot more efficiently be promoted than by the court seeing to it that the duties of the sheriff are not left to be performed by an interested person, or one for other cause incapable or unfit to execute such duties in the particular case being tried. Of course, the power conferred by the statute is a delicate one, and should not be exercised capriciously, or without due consideration of the facts in the particular case, and the rights of the officer should not be needlessly violated. But the principal complaint is predicated of the fact, not that the sheriff was displaced, but that the court below directed the coroner to act, and did not order a deputy sheriff, against whom no personal disqualification was averred or shown, to perform the duties of sheriff during the trial. This contention, in

our judgment, is based upon a misconception from the statute. The words found in the section 828, Code 1892, "and no deputy to act as authorized by law in case of the death of the sheriff," has no other effect than to make the balance of the section applicable to the state of case provided for by another section of the Code (section 3079). This last section is in the following words: "If any state or county officer shall die having a deputy, the deputy may continue to discharge the duties of the office in the name of the deceased officer as if he had not died, until the vacancy in the office shall be filled according to law, and the official bond of the deceased officer and his estate shall be a security for the faithful performance of the duties of the office by the deputy, who shall be subject to all the provisions of law applicable to his principal in his life-time; and the personal representative of the deceased shall have like remedy against the deputy as the decedent would have if living." The two sections must be construed together, and, so construing them, section 828 cannot be held to require the performance of official duties by a deputy sheriff whose principal is living and disqualified. But, again, if the appellant had a fair and impartial trial, what right has he to complain that the duties of the ministerial office pertaining thereto were performed by one person, rather than another, if it appear, as it does in this case, that nothing prejudicial to him or his rights was done by the person who did in fact exercise the functions of the office? We think he has none, and we cannot find warrant, in any view of the case, for reversing the conviction appealed from because the court required the coroner, against whom no objection was averred, to act as sheriff during the trial.

Motion to Quash the Special Venire. We do not find anything of which appellant can rightfully complain in the facts upon which his motion to quash the special venire was based. It will be noted that the special venire was drawn and process issued for the jurors before the displacement of the sheriff. This process, therefore, was placed for execution in the hands of an officer who was shortly thereafter, upon an investigation of the truth of the matter, adjudged to be interested in the result of this case. It does not appear how the judge of the trial court, before the investigation just mentioned, became advised of the necessity or propriety of making special effort to prevent improper influences being brought to bear on those who had been drawn on the venire, but it must be remembered that the case had been tried once before. The judges of our circuit courts are men of intelligence, and presumably have at least ordinary perceptive faculties; and necessarily in the course of a trial many things in the conduct of an officer of the court fall under the observation of the presiding judge, from which he may naturally and properly draw conclusions in regard to the bias of an officer of the court, or his

unfitness to act, in the particular case. While we think wisdom requires judges to be circumspect in regard to the sources of information from which they draw conclusions, yet the law surely does not require that a judge who is thoroughly convinced that the fountain of justice is being, or is likely to be, corrupted, shall quietly permit the same to be done, even if his convictions arise alone from personal observation of an officer's conduct. No state of affairs more harmful to a proper administration of the law can be conceived than that in which a presiding judge is deprived of a power so essential to the impartiality of judicial proceedings as the supervision and control of the ministerial officers of his court. Certainly he would present a most pitiable and undignified figure, if compelled to remain inactive while witnessing the efforts of partisan officials to defeat or impede the progress of justice. To quietly submit to such malversation would be an abdication of one of the highest and most important of judicial functions, and bring into contempt an office, the honor and prestige of which is one of the splendid heritages of the Anglo-Saxon race. While we do not mean to impute to the sheriff of Kemper county anything not entirely worthy of his official position, yet we must in this case presume that, in ordering the sheriff to submit to the court the names of his deputies by whom the jurors were to be summoned, the judge did not act without reason. Whether his action was predicated of observation of the sheriff's conduct in the cause, or sprang from an apprehension that partisan deputies might be selected because of the great interest manifested by the public, in either case we see nothing that was done by the learned judge who presided in the court below which could wrong the appellant. What was done, however, demonstrates to our mind that the presiding judge was conscientiously endeavoring to secure a fair and impartial administration of justice. The record does not disclose, or raise the remotest suspicion, that the submission to the court of the names of persons whom the sheriff had selected for appointment as deputies to summon the jurors, or the submission of them by the court to counsel, in the slightest degree prejudiced the accused. So doing was not calculated to prejudice his rights. And the same can be said of the substitution by the sheriff of two unobjectionable persons in lieu of the two at first proposed, and to whom the attorneys for the state made objection. A speculation based upon the idea that the manner in which the sheriff appointed his deputies who did execute the writ might in some way have prejudicially affected the rights of the accused is too theoretical and attenuated to be made the basis for the conduct of the practical affairs of life; and such theories, if indulged, would be calculated to defeat the administration of the criminal law. Besides, the very terms of our statute (section 2389,

Code 1892) forbid that the judgment appealed from should be reversed because of the matter under consideration. It provides that "the provisions of law in relation to the * * * summoning * * * of juries are directory merely; and a jury * * * summoned * * * though in an informal or irregular manner shall be deemed a legal jury after it shall have been impaneled and sworn. * * *"

Prolongation of the Term of the Court. The court below, late in the afternoon of Saturday, the last day of the regular term of the circuit court of the county as fixed by the general statute, acting under the provisions of section 933, Code 1892, already quoted, adjudged that the hearing of the cause had been commenced, and could not be completed before the end of that day, and adjourned until the following Monday for the purpose of then completing the trial. It will be remembered that six jurors had been declared competent by the court, and had taken their places in the jury box, although none of them had been accepted by the state; and, of course, they had not been presented to or accepted by the accused. When the court met on Monday, the accused (appellant), by a motion to discontinue proceedings, and afterwards by a special plea, raised the question whether the trial or hearing of the cause had been commenced and was in progress, within the meaning of section 933, Code 1892, at the stage of proceedings reached when the court adjourned on Saturday. The court below decided adversely to appellant, and the question thus raised is now to be considered by us; and, of course, the consideration involves the construction of the statute. The states of Indiana and North Carolina have statutes substantially like our own now under consideration, but we have found no aid from the judicial decisions of those states construing their statutes more helpful in the solution of the question before us than our own decisions hereinafter cited.

At a very early day in the history of the English law it was resolved by the barons of the exchequer that for the sure and true interpretation of the statutes four things are to be considered, and the learned of all succeeding ages have approved the wisdom of the resolution. These four things are (1) the old law, (2) the mischief, (3) the remedy, and (4) the reason of the remedy. It is sufficient to say of the old law that, before the adoption of the statute under consideration, the expiration of the term as fixed by the general statute, no matter what stage of proceedings had been reached in any cause, absolutely and of legal necessity terminated the power of the court to proceed. The mischief sought to be remedied by the statute, the true interpretation of which we now seek, we think was this: The old law left it within the power of the litigant who feared adverse judgment, by dilatory proceedings after a trial had been begun, to escape the conse-

quences of such judgment being then rendered; and that, too, after the public had incurred, in many instances, practically all the expense that a completed trial would have imposed. The mischief sought to be remedied was not, as argued before us, that persons indicted for crime, and whose trials had been begun, so that jeopardy had attached, could escape all danger of ever being convicted by delaying the trial until the end of the court, because it was, under the old law, adjudged that the expiration of the term necessitated a discharge of the jury, and under such state of facts an accused could not claim protection from another trial under the constitutional provision that no person's life or liberty should be twice placed in jeopardy for the same offense. *State v. Moor, Walk. (Miss.) 134; Price v. State, 36 Miss. 531; Josephine v. State, 39 Miss. 613.*

It was also urged in the arguments in behalf of appellant that the hearing or trial of a cause, within the meaning of the statute, could never be considered as having been commenced in a criminal cause until the accused was placed in jeopardy, under the authorities construing the constitutional provision as it existed in this state at the first adoption of the statute in 1880; in fact, it was argued that the beginning of a trial and the attaching of jeopardy were coincident; and it was further contended that the impaneling of a jury was a proceeding, the object of which was to select the triors of the accused, and that a hearing or trial of a cause could not, in the nature of things, be begun until the triors had been selected, and something thereafter done, some step taken, before such triors, in the nature of a direct investigation of the issue presented by the pleadings. These arguments are not without force, and we have given them due and careful consideration. We find, under the better authorities, that the point of time at which jeopardy was determined to have attached was when a jury had been impaneled and sworn to try the accused upon the criminal charge. Jeopardy therefore attached before, but ordinarily immediately preceding, the taking of any step in the nature of a direct investigation into the truth of the charge. If, therefore, we accept the instant of time at which jeopardy attached as being the point in procedure when the hearing or trial is to be regarded as begun, we fix a time before, though ordinarily immediately before, any step is taken in the nature of a direct investigation of the truth of the charge; and such a conclusion is confronted with the apparently logical objection that at such point in the proceedings nothing had been done except to get ready to enter upon the hearing or trial. And yet, under the logic of previous adjudications of this court, if not the decisions themselves, construing the statute, the correctness of which we do not doubt, we are bound to hold that a hearing or trial of a criminal cause is begun at some point not later in the procedure than that at which jeopardy is held to attach; and we must hold,

therefore, that the hearing or trial commences before any step is taken in a direct inquiry into the truth of the charge. We do not doubt but that, under the decisions of this court above referred to, were our constitutional provision on the subject of jeopardy the same as in 1880, when the statute was first adopted, the discharge of a jury, impaneled and sworn to try an accused upon a criminal charge at or immediately preceding midnight of the last day of the term of the court as fixed by the general statute, instantly upon swearing the jury, and before any other step whatever was taken, would just as effectually entitle the accused to a discharge as the defendants were entitled to be discharged in the cases of *Whitten v. State*, 61 Miss. 717, and (if his plea were true) *Helm v. State*, 66 Miss. 537, 6 South. 322. The question then presents itself, if we are to fix upon a time in procedure anterior to any step in the direct investigation of the question of fact presented by the pleadings, does the language of the statute, "when the trial or hearing of any cause, civil or criminal, has been commenced, and is in progress," require us to fix, or justify us in fixing, upon the point in procedure immediately preceding such a direct investigation? Did the legislature so intend? It must be presumed, unless the terms of the statute forbid, that the legislative remedy for the mischief was intended to be efficient. Unless the very words of the statute require it, we would not be justified in concluding that the legislature intended to relieve the public treasuries from the unnecessary burdens imposed by abortive trials, when the failure to complete them was caused by the expiration of the term of the court under the general statute, and yet so confine and narrow the relief as to leave a large proportion of such burdens still to be borne by the taxpayers. No reason can be given why the statute ought not to be broad enough to authorize the continuance of a hearing or trial, where, as in this case, a large number of jurors have been summoned, and much time has been spent in an effort to impanel a jury, as well as one in which a jury has been impaneled and sworn. Extreme cases not only test principles, but their consideration is sometimes useful to guide the mind in reaching correct conclusions concerning statutes. Suppose that appellant's crime were so heinous as to have attracted the attention of the entire people of the county, and let us suppose that on the first day of the term of the court at which his case was called for trial the impaneling of a jury was entered upon, and that after continuous efforts to get a jury only 11 jurors had been accepted when midnight of the last day of the term, as provided by the general statute, arrived; would not the case be within the mischief sought to be remedied by the section of the Code under consideration, and should the enormity of the crime be permitted to aid the criminal's efforts to escape punishment, by rendering it impracticable to impanel a jury within the time prescribed for the duration of the term of court by

the general statute? We cannot think that the legislature, while endeavoring to remedy the evils arising from abortive trials, intended that such a case as we have supposed should, by reason of its enormity, be without the scope of the remedial statute. If such a case be within the statute, then the case actually before us is not without the purpose and intent of its provisions. Do the terms of the statute exclude the case supposed, or the actual case before us, from its operation? It cannot be denied, without doing violence to the plain language of the statute, that the words "trial" and "hearing," as used in the section, relate alike to civil cases and to criminal cases. We think the statute was enacted by the legislature without reference to the technical beginnings of trials as affected by the question of jeopardy. The use of the term "trial or hearing" proves that something more than—something in addition to—technical beginnings of trials, as construed by the courts in dealing with the constitutional provision on the subject of jeopardy, was in the legislative mind; otherwise, the words "or hearing" can be given no force or meaning whatever. There is no just or proper analogy or connection between the statute and the subject of jeopardy. The Code itself furnishes a statutory rule for construing its provisions, which must not be overlooked, and it is in these words: "All words and phrases contained in the statutes are used according to their ordinary and common acceptance and meaning; but technical words and phrases according to their technical meaning." Code 1892, § 1522. The words "hearing" and "trial" in the statute under consideration are not technical, we think, as there used. We must therefore construe them according to their ordinary and common acceptance and meaning. The best thought that we are enabled to give to the question has led us to conclude that a trial is commenced, within the meaning of the statute,—construing its terms according to their ordinary and common acceptance and meaning,—when all dilatory proceedings have been disposed of, and when all ordinary efforts, the object of which is to prevent a trial, have been ineffectually exhausted, and the cause is called for trial, and nothing remains to be done except to proceed therein. We conclude, therefore, that the court below did not err in overruling the motion of appellant, made on Monday morning, to discontinue proceedings; nor did it err in sustaining the demurrer of the state to appellant's special plea. The case of *State v. Pancoast*, 5 N. D. 514, 67 N. W. 1052, cited by counsel, in so far as concerns any question properly before that court, is not in conflict with our conclusion, although some expressions of the North Dakota court are seemingly adverse to our judgment; but even these expressions are tentative, and are limited to the meaning of the words "at any time before the trial is begun," as used in a statute of that state on the subject of a change of venue. Like ourselves, the court was endeavoring to ascertain the meaning of

words, not generally, but as used in a particular statute.

That we may not be misunderstood, we add that, in our opinion, the mere summoning of a special venire, even after the overruling of an application for a continuance, in a criminal case, would not be the commencement of a hearing or trial of a cause, within the meaning of the law, because such a case would not be within the ordinary acceptance and meaning of the terms used in the statute; but the hearing or trial of a cause is commenced, within the meaning of the statute, just as soon as, but not before, the court enters upon the impaneling of a jury for the trial of the matters of fact presented by the pleadings. This construction, we think, is the true interpretation of the statute. It neither enlarges its scope beyond legislative intent, nor unduly narrows the meaning of its terms.

Rulings on Evidence. We have carefully considered each of the assignments of error bringing in review the several rulings of the court in the admission or rejection of evidence during the trial to which the appellant objected and excepted, and do not find reversible error in any of them. We deem it necessary to mention only a part of these rulings; the objections to those not adverted to being, in our opinion, wholly without merit. After the first trial of the accused, and before the one now under review, a material state's witness died. Upon the last trial the state was permitted to prove what the deceased witness had testified on the former trial, after ample preliminary proof of his death, identity, etc. This was not error. While the exact question here presented was not then before the court, the correct rule on the subject was announced in *Owens v. State*, 63 Miss. 450. Two of us think the court below did not err in its rulings on the dying declaration. We all concur that it did not commit reversible error, because the appellant himself introduced the entire declaration. The circuit court conformed exactly to the views of a majority of the members of this court, as announced in their opinions delivered on the former appeal in this cause. The members of the court remain of the same opinion touching the dying declaration as held by them when the case was first before us. In the last trial, specific objection was made to each part of the declaration, and, as we have just said, the court below ruled on such objections in conformity to the views of a majority of the members of this court. After such rulings, most likely upon the idea that the excluded parts of the declaration characterized and mollified the effect of the parts which were held to be admissible, the appellant himself offered in evidence, and was permitted to prove, the entire dying declaration. This court did not decide, when the case was first before us, that this was improper. In fact, a majority held that, under a general

objection by appellant, the court did not err in admitting the entire declaration. Shortly after the death of Stewart, a witness (Dr. Mohler) informed appellant of the death, and of the fact that the wife of the deceased had accused appellant of murdering her husband. Upon the trial this witness was asked by the attorney for the state: "What was the accusation made by Mrs. Stewart as to who killed her husband, which you afterwards imparted to Dr. Lipscomb? What was the accusation?" To this, appellant objected, and the court overruled his objection, and the question was answered by the witness. We, however, find ourselves relieved from the necessity of deciding the question thus presented, because the record discloses that the appellant himself afterwards testified to the very matters of fact to which Mohler was permitted to testify.

Instructions. The court below did not err in granting the instructions given for the state, or in refusing those asked by the defense, to which our attention is called by the assignments of error.

The Juror Davis. The only remaining question for our consideration arises from the evidence offered on the motion for a new trial touching the qualifications of the juror Davis. The juror was unquestionably competent, according to the facts developed by his voir dire examination, and he was accepted by the parties. After the verdict the accused made affidavit that he had been informed, since the rendition of the verdict, of certain facts which rendered the juror not only incompetent, but actually hostile to the appellant, when he entered the jury box. It is to be noticed that, while appellant's affidavit avers that the matters of fact were unknown to his counsel, yet one of the counsel made an affidavit to maintain a different ground of the motion for a new trial, and did not make oath that he was personally unaware of the facts averred by his client concerning the juror at the time he was accepted as such. This circumstance is not without weight in a case like this, where, after verdict, the integrity and competency of a juror are in issue, and the evidence on such issue is conflicting. The testimony of one man that another is without knowledge of a fact concerning a third, if not in its nature hearsay, is at least akin to it, and is weak and inconclusive evidence. The authorities require that the accused and his counsel shall both have been ignorant at the time of his acceptance of the facts which render a juror incompetent, in order that the verdict be vacated because thereof, and it has been decided by this court that the affidavit of both the defendant and the counsel to such want of knowledge is necessary. *Brown v. State*, 60 Miss. 447. But, aside from this, the great weight, if not the entire current, of authority, is to the effect that the finding of the court of original jurisdiction on the question we are now consider-

ing, denying a new trial, will not be disturbed where the evidence touching the competency and integrity of a juror is conflicting. We think that the weight of the evidence in this case established the integrity and competency of Davis, and that the court below properly and correctly denied the motion for a new trial. Judgment affirmed.

WOODS and TERRAL, JJ., being disqualified, R. H. THOMPSON and L. W. MAGRUDER were commissioned as special judges in their places.

HEIDELBERG v. TAYLOR et al.
(Supreme Court of Mississippi. March 6, 1899.)
SUIT ON NOTE—PERFORMANCE OF CONDITIONS—PLEADING.

A bill to recover on a note given in payment of land, but not payable until title was perfected, containing no allegation that the title is perfect, is demurrable.

Appeal from chancery court, Jasper county; N. C. Hill, Chancellor.

Action by James A. Taylor and another against W. I. Heidelberg. There was a judgment for plaintiffs, and defendant appeals. Affirmed.

In 1894 James and E. E. Taylor sold to W. I. Heidelberg a tract of land in Jasper county for the sum of \$1,000. \$436.20 of this amount was paid at the time of the sale, and, a short time after this, appellant executed his promissory note for \$563.80, the balance due on said contract. In 1898 appellees filed their bill in chancery against appellant to recover on the promissory note executed by appellant, alleging that they had a vendor's lien on said lands for said sum; the said sum being the purchase money due for said lands. Appellant demurred to this bill on the ground, among others, that, as the sum of money named in this note was not to be paid until the title to the land was made perfect, without an allegation in the bill that the title was perfect the bill is demurrable. The demurrer was by the chancellor overruled, and defendant appealed.

D. W. Heidelberg, for appellant. Hardy & Howell, for appellees.

WHITFIELD, J. Affirmed (see *McIndoe v. Morman*, 7 Am. Rep. 96) and remanded, with leave to answer in 30 days after mandate filed below.

TERRAL, J., took no part in this decision.

(76 Miss. 360)

ILLINOIS CENT. R. CO. v. MCALIP.
(Supreme Court of Mississippi. Feb. 27, 1899.)
RAILROADS—ACCIDENT AT CROSSING—BACKING TRAINS.

Under Code 1892, § 3549, authorizing a recovery by "the party injured," within 50 feet

of a passenger depot, by backing trains moving faster than 3 miles an hour, a person injured by such a train while driving a team across the track may recover.

Appeal from circuit court, Lincoln county; Robert Powell, Judge.

Action by Fielding McCallip against the Illinois Central Railroad Company to recover damages for injuries alleged to have been sustained by the failure of the said railroad company to comply with the requirements of Code 1892, § 3549. McCallip was driving a team of oxen attached to a wagon along a public street in the city of Brookhaven, which street runs east and west across the track of appellant, which runs north and south. The depots are situated opposite each other. The freight depot is on the east side of the tracks, and the passenger depot on the west side. While attempting to cross said railroad track at the north end of said depots, an engine, attached to some freight cars, backing southward, struck the wagon, and McCallip, in jumping from his wagon to avoid the collision, was struck by a car, causing him to fall violently to the ground, from which fall he sustained painful injuries. At the trial in the court below a verdict was rendered in favor of the plaintiff, and defendant appeals. Affirmed.

Mayes & Harris and McWillie & Thompson, for appellant. Cassedy & Cassedy, for appellee.

WOODS, C. J. The evidence before us satisfies us that the appellee has made a case within the letter and spirit of Code 1892, § 3549. There is no other statute governing injuries inflicted by backing trains, and we cannot conceive how a person—intending passenger, idler, or tramp—lounging about the depot grounds, and within 50 feet of a passenger depot, might recover for an injury suffered by the railroad's failure to comply with the requirements of this statute, if he had merely negligently wandered into the street where this accident occurred, and yet a citizen engaged in his ordinary and lawful business may not recover under identically the same circumstances. The statute was designed to compel the railroad to observe a new rule of care and watchfulness in backing trains within 50 feet of a passenger depot, and to afford protection to all persons within the prescribed limits. Affirmed.

(76 Miss. 662)

WALTON v. WALTON.
(Supreme Court of Mississippi. March 6, 1899.)
HUSBAND AND WIFE—DESERPTION—CONVEYANCE OF HOMESTEAD.

Where a husband was compelled to leave his family, residing on their homestead, and to go to another state, in search of employment, intending to return, and take them with him, if he succeeded in bettering his condition, there was no evidence of intent to abandon his family so as to make a conveyance of the homestead by

the wife alone valid, under Code 1892, § 1985, requiring a conveyance of a homestead owned by the wife to be signed by both parties if the husband "be living with his wife."

Appeal from chancery court, Monroe county; Baxter McFarland, Chancellor.

Bill by W. D. Walton, Jr., against W. D. Walton, Sr. From a decree in favor of complainant, defendant appeals. Reversed.

Appellee brought an action of ejectment in the circuit court of Monroe county against appellant to recover of him 135 acres of land. Upon petition of appellee the cause was removed to the chancery court, where appellee filed his original bill. Appellant answered it, and made his answer a cross bill, in which he alleged that he was, in 1893, the owner of the land, and occupied it with his family as a homestead; that early in 1893, by and with the consent of his wife and family, he went to Florida to work, but with no intention of abandoning his family or homestead; that, in order to get money to defray his expenses, he borrowed \$100 from J. A. Johnson, and secured same by a deed of trust on the land in controversy, which was signed by both himself and wife; that he left his family on the place, and remained in Florida continuously till March 6, 1896, and during all this time his family were largely supported by money he sent them and the profits from the land; that while he was absent appellee fraudulently and with intent to get title to the land in himself procured J. A. Johnson, by false and fraudulent representations, to sell said land under his trust deed, and that Johnson would not sell it until he was made to believe the sale was made with appellant's consent; that this was, in fact, without his knowledge, and no opportunity was given him to protect his interest; that he could and would have paid his indebtedness to Johnson had he known Johnson intended to foreclose the deed of trust; that the land was sold under the trust deed, and a deed was made to appellant's wife by the trustee; that in July, 1894, his wife conveyed the land to appellee for the pretended consideration of \$400, and that at the time he had not abandoned his wife and home, and did not join in the conveyance; that appellee sold appellant's personal property, that had been left on the place when he went to Florida, and the proceeds of that more than reimbursed him for the taxes paid and the debt due on the land. He prayed for a cancellation of appellee's deed and the trustee's deed to Mrs. Walton as clouds on his title. Appellee answered, denying all the material allegations of the bill except that the land was mortgaged to Johnson, and sold to Mrs. Walton, and by her conveyed to appellee. The evidence is sufficiently set out in the opinion of the court. The court below rendered a decree confirming complainant's title and dismissing the cross bill. From that decree this appeal was taken.

Ollifson & Eckford, for appellant. Houston & Reynolds, for appellee.

WOODS, C. J. Section 1985, Code 1892, is in these words: "A conveyance, mortgage, deed of trust, or other incumbrance of the homestead, where it is the property of the wife, shall not be valid or binding unless signed and acknowledged by the owner and the husband, if he be living with his wife." The only question necessary to be considered by us is, was the appellant living with his wife at the time of the conveyance of the lands in controversy by the wife, Mrs. W. D. Walton, Sr., to the appellee? The evidence shows that in January, 1893, the appellant, being unable to properly support his family, went to Florida to seek employment, with a view to supplementing the insufficient revenues derived from the little farm constituting the homestead, and he thus went with full consent of his wife and the children who had reached years of discretion. It seems clear to us that the appellant, in thus leaving his family, was not deserting or abandoning his wife and children, nor with a settled determination never to return. The very statement contained in appellant's deposition, to the effect that, if he could better his condition in Florida, and could there get a home, and do better (than in Mississippi), his wife was to go to him,—and upon which counsel for appellee dwell with emphasis in their argument on this branch of the case,—demonstrates that there was no desertion or abandonment on the part of the husband of his wife and family, but only an intention, in certain contingencies, remote and problematical in the extreme, and which, in fact, never had a prospect of realization, to remove his family to Florida. The necessary implication from this statement contained in appellant's deposition is that he intended to return to Mississippi unless two events could be brought about, viz. that he could better his condition in Florida, and could secure a home there; and neither event ever transpired. Moreover, the appellant swears that he never intended to change his domicile, and that he uniformly refused to qualify himself for or perform any acts of citizenship in Florida, though requested by persons there to do so, because he regarded himself as a citizen of Mississippi. When the conveyance of the homestead was made, in a little less than 18 months after the departure of the husband from this state for Florida, and during this period, the transcript before us fails to disclose that the absent husband, or the wife and children at home, had any thought of an abandonment and desertion of the family by the husband. It is true that the appellant did not return to his family and home until the year 1896, but his protracted absence is perfectly explained by him in his evidence, and there is not a scintilla of proof elsewhere in the record which casts suspicion on his explanation. On two former occasions the appellant had gone to California and the Indian Territory on the same quest which carried him later to Florida. On one of these occasions he was absent from home and family for a year. Was there abandonment and de-

sertion then? There is no one who hints a suspicion of that sort. His efforts in California were successful, and he is shown to have fairly divided his earnings while in that state with his family. For the two or three months following his arrival in Florida, and when he had steady employment, at fair wages, he sent about half his earnings to his family. Afterwards, and when with fitful or no employment, he was able to send only pitiful little sums to his children, and the sending of these pitiful sums now and then left the unhappy father without a cent for his own use. Is abandonment and desertion of one's family to be scouted where success crowns the absent husband's labors, but to be assumed where misfortune and disappointment mock his efforts, and blast his hopes? In the legal contemplation, the husband is living with his wife, though driven by stress of pecuniary difficulties to absent himself from wife and home in an effort to better provide for his family; and ceases to live with the wife only when, with intention to sever his domestic relationship, he deserts or abandons her. The agent of his country in diplomatic service in foreign lands, the merchant in the prosecution of his business on the islands of the sea and to better his fortunes, and the traveler for pleasure, or in the interest of science in the polar regions, are each and all living with their wives and in their homes, in the meaning of our statute. The decree should have been for appellant, but any sum that may be found to be due appellee on an accounting between the parties for money advanced by appellee to release the land from the Johnson deed in trust, as well as for money advanced by appellee in payment of taxes due on the lands, should be held to be a charge on the lands. Of course, on such accounting the appellee should be charged with any rents and profits derived from the lands, and with the proceeds of any personal property belonging to appellant which the appellee may be shown to have disposed of, or converted to his own use. Reversed and remanded.

(76 Miss. 627)

HIGGINS et al. v. HABERSTRAW.

(Supreme Court of Mississippi. Feb. 27, 1899.)

MORTGAGES—PAROL CONTRACTS—ENFORCEMENT—ESTOPPEL.

Though a verbal agreement between mortgagee and mortgagor, whereby the former is to take possession until his debt is paid from the rents, and then restore it to the latter, cannot be specifically enforced in an action by mortgagor for an accounting of the rents, and to redeem from a foreclosure and purchase by the mortgagee, it may be relied on as an equitable estoppel against the assertion of title by the mortgagee, and against his right to plead limitation.

Appeal from chancery court, Hinds county; H. C. Conn, Chancellor.

The facts as stated in the bill are as follows: In 1878, Mrs. Roberts, now deceased, the mother of appellants, gave a mortgage

on the property in controversy, a house and lot in Jackson, to secure a debt of \$500 and interest at the rate of 12 per cent., to appellee, Mrs. Haberstraw. Mrs. Roberts died a few years afterwards, and the property descended to appellants. In 1884 the appellants, with the exception of Michael F. Higgins, filed a bill in the chancery court of Hinds county against Mrs. Haberstraw, to enjoin the sale by the trustee in the mortgage, and for an account of the amount legally due on the mortgage debt. On March 19, 1885, a decree was made fixing the amount of the debt at \$498.46, and authorizing the trustee to sell the property. Shortly after the decree was made, the appellants being in possession of the property, Michael F. Higgins and his sister Mrs. Annie Slalter, acting for themselves and the minor heirs, the other appellants, placed Mrs. Haberstraw in possession of the property as mortgagee, to collect the rents and apply the same to the mortgage debt until it was paid. It was understood and agreed that Mrs. Haberstraw was to take and hold possession as mortgagee, and restore the possession of the property when the debt was paid by the rents. A few weeks after this agreement, and after Mrs. Haberstraw had been placed in possession of the property, the appellants all left the state, relying on the arrangement for the payment of the debt. On May 14, 1887, without any notice to appellants, Mrs. Haberstraw had the said property sold under the decree, and the sale was confirmed by the court. Mrs. Haberstraw is still in possession, and claims title to the property under said sale, and refuses to account for the rents, or restore the possession to the appellants. The rents have largely overpaid the mortgage debt. Besides the rents, Mrs. Haberstraw received \$350 from the Alabama & Vicksburg Railroad Company on account of damage to the property caused by a new spur or switch constructed in the vicinity. Of the appellants, Thomas P. Roberts and Eugene Roberts are minors, and Charley and William Roberts attained their majority within three years next preceding the filing of this bill. The bill was for an accounting of the rents, and to redeem the mortgage. The prayer was for a decree for any excess of rents over the mortgage debt, and, if any part of the debt remains unpaid, then for a decree allowing the complainants to redeem. Defendant demurred to this bill, setting up the following grounds: That the alleged agreement was not averred to be in writing, and setting up the statutes of limitation. At the final hearing in the court below, the demurrer was sustained, and the bill dismissed. Appellants presented and asked leave to file an amended bill, which was refused. From a decree sustaining the demurrer, an appeal was prosecuted. Reversed.

Frank Johnston, for appellants. Calhoun & Green, for appellee.

WHITFIELD, J. This is not an effort to specifically enforce the parol agreement. If it were, it would, of course, be obnoxious to the statute of frauds. That agreement is, in effect, not to foreclose the trust deed, under the decree, but to adopt a substituted mode of performance, now completed. The agreement is used defensively, as a shield against the assertion of title fraudulently acquired in violation of the agreement, and against the right to plead the statute of limitations. The agreement operates as an equitable estoppel, to prevent these things; and the appellants then—the sale and the statute of limitations made unavailing by the estoppel—seek affirmatively to redeem, not by virtue of the agreement, but as heirs of their mother, the land descended to them. This is clearly the just view and the real effect of the parol agreement; and, in this view, it is not within the statute of frauds. It is not using parol evidence to establish the declaration or creation of a trust in any proper sense. It is, as held in *Lee v. Hawks*, 68 Miss. 671, 9 South. 828, using "parol evidence to prove, not a substituted contract, but the assent of the defendant to a substituted mode of performance, that performance being completed." The case falls within the principles of *Lee v. Hawks*, supra, and *Perry v. McLain*, 66 Miss., at page 148, 5 South. 518, where the court says: "Although the oral agreement to rescind the contract of sale was not such as a court would specifically enforce, it presents a good ground for refusal by the chancery court to specifically enforce the original contract in writing for the sale of the land." We have not looked at the amended bill. The demurrer to the original bill is overruled, the decree reversed, and the cause remanded, with leave to answer in 60 days from the filing of the mandate in the court below.

(76 Miss. 590)

MOYSE et al. v. COHN et al.

(Supreme Court of Mississippi. Feb. 27, 1899.)

TRUST DEED—FORECLOSURE—PARTIES.

The trustee is a necessary party to a suit to foreclose a deed of trust.

Appeal from chancery court, Lincoln county; H. C. Conn, Chancellor.

Suit by Louis Cohn & Bros. against J. L. Moyse & Bro. and others to foreclose a deed of trust. Decree for complainants. Defendants appeal. Affirmed.

Louis Cohn & Bros., citizens of Lincoln county, were the owners of a debt due from one Cicero Boyd, a citizen of Lawrence county, which debt was secured by a deed of trust on personal property and crops located in Lawrence county. The trustee in the deed of trust was a citizen of Lincoln county. Appellants J. L. Moyse & Bro., citizens of Pike county, purchased a considerable portion of the crops raised by Boyd, the debtor, embraced in and conveyed by the deed of trust. Cohn

& Bros. filed their bill in the chancery court of Lincoln county to foreclose the deed in trust, and made the trustee and Boyd, the debtor, defendants. Complainants also made J. L. Moyse & Bro. defendants, desiring to hold them for the value of the incumbered crops purchased by them from Boyd. A writ of sequestration was sued out and directed to the sheriff of Lawrence county, where the remaining property could be found, and duly executed. Defendant Boyd filed a cross bill seeking to have J. L. Moyse & Bro. held as primarily liable to complainants, and that they should be required to pay before the remaining property should be sold under the decree. J. L. Moyse & Bro. demurred to the bill, raising the question of jurisdiction or venue, and contended that the suit was wrongfully brought in the chancery court of Lincoln county. The demurrer was overruled by the court, and answers and cross bills and answers to cross bills were filed. At the final hearing a decree was rendered in favor of complainants, and defendants appealed.

Will A. Parsons, for appellants. McWille & Thompson, for appellees.

WHITFIELD, J. *Hill v. Boyland*, 40 Miss. 618, and *Harlow v. Mister*, 64 Miss. 25, 8 South. 164, are decisive that the trustee is a necessary party. The very argument ingeniously pressed by learned counsel for appellant here was made and disallowed in *Harlow v. Mister*. There is no merit in the other contentions. Affirmed.

(122 Ala. 409)

POLLARD et al. v. SOUTHERN FERTILIZER CO.

(Supreme Court of Alabama. Feb. 9, 1899.)

RECEIVERS—APPOINTMENT WITHOUT NOTICE—PLEADINGS—VERIFICATION.

1. The mere allegation in a bill that complainant is in great danger of suffering irreparable damage unless the assets in defendant assignee's hands be turned over to a receiver is insufficient to warrant the appointment of a receiver without notice to defendant, where it is not even intimated in the bill that defendant, as an assignee for the benefit of creditors, has been guilty of any misconduct or fraud in the administration of the trust, or is incapable of administering it, or that he is insolvent, or that there is a just and probable cause to apprehend waste or loss.

2. A verification of a bill for an injunction and a receiver, sworn to by the attorney for complainants, deposing that the facts are true so far as within his own knowledge, and that, so far as derived from others, he believes them true, is insufficient to show the truth of the allegations therein.

Appeal from chancery court, Russell county; W. L. Parks, Chancellor.

Bill in equity by the Southern Fertilizer Company against J. L. Pollard, assignee, and others. From a decree appointing a receiver, defendants appeal. Reversed.

The complainant prayed that J. L. Pollard be restrained and enjoined from paying

out or otherwise disposing of any of the funds that were in his hands at the time of the filing of the bill, or that might come into his hands from collections made by him under the authority of the deed of assignment, and for the appointment of a receiver to take charge of the moneys, books, accounts, notes, mortgages, and other evidences of indebtedness which were owned at the time of the deed of assignment by J. L. Henry & Bro., and for such other and further relief as the equities of the bill showed the complainant was entitled to. The only evidence as to the true averments of the bill, as shown in the record, was the verification by one of the attorneys, which verification was as follows: "In person appeared before the undersigned officer, H. M. Land, who, first being sworn, deposes and says that he is attorney at law for the complainant named in the foregoing bill, and that the facts and allegations stated therein, so far as they come within his own knowledge, are true, and, so far as derived from the knowledge of others, he believes them to be true." This verification was fully signed before an officer authorized to administer oaths. The facts, as averred in the bill, upon which the complainant rested its right to the appointment of a receiver, are sufficiently stated in the opinion. Upon the filing of this bill, application was made to the chancellor by the complainant for the appointment of a receiver in vacation, and without notice, and was submitted upon the averments of the bill and the verification thereof. Upon the hearing of this application, the chancellor granted it, and appointed a receiver. From this decree the respondents appeal, and assign the rendition thereof as error.

Smith & Henry, for appellants. Miller & Miller and H. M. Land, for appellee.

TYSON, J. This is an appeal from a decree appointing a receiver without notice. The bill seeks to have the assets of the insolvent firm of J. L. Henry & Bro. taken from the possession of the assignee to whom they made an assignment of all their property for the benefit of their creditors. The facts alleged in the bill upon which the complainant predicates its prayer for relief and its cause of action against Henry & Bro. are very loosely stated. The averments are vague and indefinite, and especially is this true as to the disposition of the money by Henry & Bro. which complainant alleges belonged to it. It is unnecessary, however, to give an extended notice to any of them except in so far as they bear upon the rights of Pollard, the assignee, who, it is averred, is in the possession of the property conveyed to him by the deed of assignment, and in the discharge of the trust imposed upon him by said deed. As to his conduct and administration of the trust, it is averred that he has collected a large sum of money of the assets

of Henry & Bro. which is the property of the complainant, and refused to deliver it to complainant upon demand; that he has given no bond to faithfully administer the estate, and is likely to pay over to various creditors of Henry & Bro. the funds now in his hands and to come into his hands, realized from the collections made from the sale of complainant's property, and which is the money of complainant; "and as complainant has no remedy at common law by which it can wrest said trust funds out of the hands of said Henry & Bro. and J. L. Pollard as assignee, and by which it can compel said assignee to pay over to it said trust funds now in his hands, or that may come into his hands from future collection, your complainant is in great danger of suffering irremediable loss and damage without the interposition of the court of equity, and complainant avers that it is necessary to have a receiver duly appointed to take charge of and administer the assets herein referred to; wherefore complainant prays," etc. In *Thompson v. Manufacturing Co.*, 87 Ala. 733, 6 South. 928, this court said: "It should be a strong case of emergency and peril, well fortified by affidavits, to authorize the appointment of a receiver without notice to the other party." Substantially the same language is used in the opinion in *Dollins v. Lindsey*, 89 Ala. 217, 7 South. 234. In *Satterfield v. John*, 53 Ala. 127, it is said: "A court of equity will compel a trustee to the performance of his duty, and will enjoin him from taking the custody of trust funds, when he has been guilty of such misconduct as creates a reasonable apprehension of their safety, if they pass under his control; or if he is insolvent, and there is a just probability of his wasting or misapplying them. It is the peril of the funds—the just and probable cause to apprehend waste or loss—that induces the interference of the court, and the displacement of the legal right of the trustee to collect and hold them." In the case of *Bank of Florence v. United States Savings & Loan Co.*, 104 Ala. 297, 16 South. 110, it is said: "A receiver may be appointed without notice to the defendant who is to be dispossessed of his property or assets, but the cases in which notice may be dispensed with are exceptional. There must be a strong case of pressing emergency, rendering immediate interference necessary before there is time to give notice; or it must be shown that notice would prejudice the delivery of the property over which the receivership is to be extended." It might be well to say that in this proceeding we are confined to the averments of the bill, and no inferences are to be indulged not legitimately and logically drawn from the facts averred; in other words, amendable defects will not be treated as cured, as would be the case if the bill was before us on a motion to dismiss for want of equity. It will be noted that in the averments which we have set out above at some length it is not intimated, much less

averred, that the assignee has been guilty of any misconduct or fraud in the administration of the trust, or incapable of administering it, or that he is insolvent, or that there is a just and probable cause to apprehend waste or loss. The averment that complainant is in great danger of suffering irremediable loss and damage is a mere conclusion of the pleader, and must, in this case, be referred to the facts averred from which he deduces this conclusion, and therefore can have no weight in determining the question of emergency and peril. In addition to the cases cited and quoted from above, a reference to the following cases will show the utter insufficiency of the averments of this bill: *Randle v. Carter*, 62 Ala. 96; *Bard v. Bingham*, 54 Ala. 463; *Hughes v. Hatchett*, 55 Ala. 631; *Moritz v. Miller*, 87 Ala. 331, 6 South. 269; *Iron Works v. Foster*, 54 Ala. 622; *Jones v. McPhillips*, 77 Ala. 319; *Ashurst v. Lehman*, 86 Ala. 370, 5 South. 731; *Word v. Word*, 90 Ala. 81, 7 South. 412; *Maxwell v. Shoe Co.*, 109 Ala. 371, 19 South. 412; *Warren v. Pitts*, 114 Ala. 65, 21 South. 494. Besides, no facts supposed to create the necessity for the immediate appointment are stated. *Bank of Florence v. United States Savings & Loan Co.*, supra. The only evidence as to the truth of the averments of the bill, as appears from the record, upon which the chancellor acted, was what purports to be a verification, by one of the counsel for the complainant, to the bill. This verification was so defective that it practically amounted to no evidence of the truthfulness of the facts alleged in the bill. It was, in substance, the same as those condemned by this court in the cases of *Corrugating Co. v. Thacher*, 87 Ala. 458, 6 South. 306, *Dennis v. Coker's Adm'r*, 34 Ala. 611, and *Burgess v. Martin*, 111 Ala. 656, 20 South. 506. The order appointing the receiver must be vacated and annulled. The receiver will be required to account for the property which went into his hands, and the assets restored to the assignee. Reversed and remanded.

(122 Ala. 242)

LUNSFORD v. LUNSFORD et al.¹

(Supreme Court of Alabama. Jan. 19, 1899.)

EXECUTORS—RESIGNATION—ADMINISTRATOR DE BONIS NON—APPOINTMENT—JURISDICTION—RECEIVERS.

1. Under Code 1896, § 107, providing that an executor may resign, an executrix appointed by the probate court may at any time file her resignation with such court, though the administration has been removed to the chancery court, since the court from which she received her appointment is the proper tribunal in which to file the resignation.

2. Where an executrix appointed by the probate court, after the administration has been removed to the chancery court, resigns, the probate court alone has jurisdiction to appoint an administrator de bonis non to fill the vacancy.

3. Under Ch. Prac. Rule 103 (Code 1896, p. 1224),—providing that, on the resignation of an executor, a party to a suit, the administrator de bonis non may be made a party,—where, pending an application for the appointment of a receiver of an estate in a chancery court, the executor resigns, such court must, on application of the administrator de bonis non duly appointed by the probate court, make him a party thereto.

4. Where an application for a receiver of an estate, made to a chancery court after the removal of the estate therein, is based on the incompetency of the executrix, her resignation and the appointment of an administrator de bonis non by the probate court will defeat the application.

Appeal from chancery court, Jefferson county; Thomas Cobbs, Chancellor.

Bill by Susan Lunsford against W. G. Lunsford and others to remove administration of estate of George Lunsford into chancery. Petition by William Alkin and others, as creditors of such estate, for the appointment of a receiver. There was a decree appointing the receiver, and refusing the application of S. W. John, as administrator de bonis non, to be made a party. From the decree Susan Lunsford, executrix, appeals. Reversed.

Saml. Will John, for appellant. Garrett & Underwood, Lane & White, and Tillman & Campbell, for appellees.

DOWDELL, J. George Lunsford died leaving a last will and testament, which was duly probated in the probate court of Jefferson county, and letters testamentary were regularly issued to Susan Lunsford, widow of deceased, who took possession of the property of the estate, and entered upon the discharge of the duties of executrix. Subsequently Susan Lunsford, as such executrix, filed her bill in the chancery court of Jefferson county, praying to have said administration removed from the probate court, and into said chancery court. The chancery court, upon the filing of the bill, assumed jurisdiction, and made a decree removing the cause, in accordance with the prayer of the bill, into said court, for the further administration of said estate. The estate was by a decree of said chancery court declared insolvent. On the 6th day of May, 1898, and subsequent to the decree of insolvency, a petition was filed by William Alkin and others, as creditors of said insolvent estate, praying for the appointment of a receiver for said estate, alleging the incompetency, misconduct, etc., of the said Susan Lunsford, as executrix, in the management and administration of said estate. Pending said petition, and on the 12th day of May, 1898, said Susan Lunsford filed, in the probate court from which her letters issued, her resignation, in writing, as executrix of said estate, which was accepted; and thereupon, on the same day, letters of administration de bonis non with the will annexed on said estate were duly issued to Samuel Will John, who entered upon the discharge of the duties of the office as such administrator. On the same day, May 12th, the resignation of Susan Lunsford as executrix was suggested in the chancery

¹ Rehearing denied February 3, 1899.

court, and the following minute entry was made in that court, omitting here the style of the cause, term, etc.: "In this cause the resignation of Susan Lunsford is suggested, and S. W. John, who has been appointed administrator de bonis non, appears in open court, and prays to be made party complainant, which is made in open court, and will be considered on the day set for hearing the application for receiver." Upon the hearing of the petition for a receiver and the application of S. W. John to be made a party complainant, the chancery court rendered a decree in favor of the petition for the appointment of a receiver, and denied and refused the prayer of S. W. John to be made a party complainant as administrator de bonis non. The cause is appealed from the decree of the chancery court appointing a receiver; and, as the order refusing the application of said John to be made a party to the suit is embodied in the decree on the petition for a receiver, the action of the court in denying the application will be considered in connection with the ruling in appointing the receiver.

The jurisdiction of the chancery court over estates of deceased persons is original, and not statutory, and is not impaired or taken away by the statutes conferring upon courts of probate jurisdiction in the administration of such estates. But jurisdiction over estates for the purposes of administration and settlement, and jurisdiction for granting of letters testamentary and of administration, are not one and the same thing. The granting of letters testamentary and of administration by constitutional provision is exclusively within the jurisdiction of the probate court. Const. art. 6, § 9, Code 1896; *Ex parte Lunsford* (Ala.) 23 South. 528. Susan Lunsford received her appointment and letters testamentary from the probate court, and in this court she filed her resignation of office in writing, which, under the statute (Code 1896, § 107), she had the right to do at any time. The fact that the administration had been removed into the chancery court could not affect her right of resignation, and the probate court, from which she received her letters, was the proper tribunal in which to file her resignation.

The chancellor, in his opinion accompanying the decree, treated the resignation of the executrix as valid, but held that the action of the probate court in granting letters de bonis non to S. W. John was *coram non iudice*. In this conclusion the chancellor was in error. The resignation of the executrix created a vacancy in the office to which she had been appointed, and the probate court alone had the authority and jurisdiction to fill this vacancy by the appointment of an administrator de bonis non with the will annexed, as was done in this case. Even if grounds had existed for the appointment of a receiver in the cause, and the appointment had been made prior to the resignation of the executrix, this would not have dispensed with the necessity

of a representative of the estate as a party, since a receiver is an officer of the court, and not a party to the suit wherein he has been appointed receiver. When the resignation of Susan Lunsford as executrix was suggested in the chancery court, and S. W. John voluntarily came in, presenting his letters of administration de bonis non, and asked to be made a party complainant to the suit, his action being in strict compliance with rule 103 of chancery practice (Code 1896, p. 1224), it was the duty of the chancery court to have made him, as such administrator de bonis non, a party.

As stated above, the grounds of the application for a receiver were the alleged incompetency and misconduct of the executrix, Susan Lunsford. Her resignation, therefore, and the appointment of her successor, S. W. John, as administrator de bonis non, removed all objections made to Susan Lunsford in the petition for receiver, and was a complete answer to the same. The chancellor, in his opinion, states, as the sole ground for the appointment of a receiver, that the estate was without an administrator to represent and administer it, and the chancery court had no jurisdiction to appoint one. In this, however, the chancellor was in error. There was an administrator, in the person of Mr. John, duly and regularly appointed by the only court having jurisdiction to appoint. It follows, therefore, that if the chancellor had recognized the appointment made by the probate court of S. W. John as administrator de bonis non, as he should have done, then no reason existed for the appointment of a receiver. Holding, as we do, the above views, the decree of the court appointing a receiver must be reversed, and the cause is remanded.

(123 Ala. 627)

LAND et al. v. BOYKIN.

(Supreme Court of Alabama. Feb. 7, 1899.)

HOMESTEAD—ABANDONMENT—EVIDENCE.

Plaintiff, with his family, removed from his homestead to another state, to work in a turpentine orchard, taking most of his furniture, and remained for more than 18 months, leaving the house unoccupied. He rented the land, reserving the dwelling, orchard, and garden. His family occasionally returned to the place, spending a few days at a time, and during a portion of the time his wife's stepfather occupied the dwelling free of rent. He kept up the garden on the land, and used vegetables therefrom, but did not file a declaration of his claim of exemption before leaving the state. *Held*, that he had abandoned his homestead.

Appeal from circuit court, Choctaw county; John O. Anderson, Judge.

The proceedings in this case were had upon the contest of a claim of homestead exemption. After the levy of the process in favor of the appellants, Land & Rentz, against S. A. Boykin, the latter interposed a homestead claim to the lands so levied upon. To this claim of homestead exemptions the plaintiffs filed a contest. Upon the hearing of this contest the plaintiffs

introduced evidence tending to show that although S. A. Boykin formerly resided on the lands levied upon, as a homestead, he had, prior to the levy, abandoned said homestead. The evidence for the defendant is set forth in the opinion. Upon the introduction of all the evidence the plaintiffs requested the court to give to the jury, among others, the general affirmative charge in their behalf. The court refused to give each of these charges requested by the plaintiffs, and to each of these rulings the plaintiffs duly excepted. There were verdict and judgment in favor of the claimant. The plaintiffs appeal, and assign as error, among the other rulings of the trial court, the refusal to give the general affirmative charge requested by them. Reversed.

Edward J. Gilder and George Stowers, for appellants. Holloway & Holloway and C. R. Gavin, for appellees.

TYSON, J. The land on which was situated a dwelling house, in which defendant, prior to April, 1895, resided with his family, was his homestead, and exempt to him from levy and sale under execution and other process for the collection of debts owing by him. Code 1886, § 2507. From the evidence of defendant and witnesses examined in his behalf, we deduce the following facts: During the first week in April, 1895, defendant left his family in his dwelling, and went to the state of Mississippi to work in a turpentine orchard. After being there a few weeks, he rented a dwelling house, to which he moved his family and the greater portion of his furniture, leaving the dwelling in Alabama without an occupant. He left in this dwelling one bedstead, a spinning wheel, some cooking utensils, a table, two chairs, and "other plunder." He and his family lived in the rented house in Mississippi until after the levy in this case in December, 1896; his family occasionally returning to the place in Alabama during this period, and spending a few days. During the year 1895 he rented to a tenant the tillable land, reserving the dwelling, orchard, and garden. During a part of the year 1896 his wife's stepfather occupied the dwelling, and used the furniture left there by defendant, free of rent. During both of these years "he kept up the garden on said land, and used vegetables therefrom." He did not make and file in the office of the judge of probate of Choctaw county, in which this land is situated, a declaration of his claim of exemptions before going to Mississippi. There is testimony in the record tending to show that defendant made declarations, shortly after going with his family to Mississippi, of his intention never to return to Alabama, which we do not deem necessary to consider for a decision of this case. A casual reading of the foregoing statement of the facts shows that the defendant and his family for more than 18 months prior to the levy were not in the actual occupancy of the land as a homestead. Actual occupancy as a home is

essential to the validity of his claim of exemption. *Turner v. Turner*, 107 Ala. 465, 18 South. 210; *Garrett v. Jones*, 95 Ala. 96, 10 South. 702, and authorities cited under section 2033 of the Code of 1896. If defendant wished to preserve his right to claim his homestead as exempt while he and his family were absent in Mississippi, he should have availed himself of the benefits conferred by the provisions of section 2539 of the Code of 1886. The affirmative charge requested by plaintiff should have been given. The judgment is reversed, and the cause remanded.

(126 Ala. 682)

NATIONAL MUT. BUILDING & LOAN ASS'N OF NEW YORK v. CULBERSON et al.

(Supreme Court of Alabama. Feb. 7, 1899.)

MORTGAGEE AS BONA FIDE PURCHASER—USURY—ADMINISTRATORS—MISAPPROPRIATION OF ASSETS—RIGHTS OF HEIRS.

1. Where an administrator sold lands of the estate and invested the proceeds in other lands, taking the title in his own name and then executing a usurious mortgage thereon, the mortgagee will not be heard to say, as against the heirs, that, the administrator's sale being void, the lands were not purchased with funds of the estate, since, because of the usury, he was not a bona fide purchaser.

2. Where an administrator sold the lands of the estate and invested the proceeds in lands the title to which he took in his own name, the lands so purchased will be charged with a trust in favor of infant heirs to the extent of their distributive shares, even as against a mortgagee thereof having notice, though the sale of the intestate's lands may have been void, where it does not appear that the heirs can otherwise be satisfactorily reimbursed.

Appeal from city court of Anniston; James W. Lapsley, Judge.

Bill by Sarah Culberson, Algernon Culberson, Jr., and Kirtland Culberson, by their next friend, against the appellant, the National Mutual Building & Loan Association of New York and Algernon Culberson, Sr.

The bill avers that complainants are the children and minor heirs of Jennie L. Culberson, deceased, who died intestate in the state of Georgia, leaving an estate consisting of lands and personal property situated in Georgia, which descended to complainants; that the defendant Culberson became the administrator of the estate, sold the lands under an order of the court of ordinary of Bibb county, Ga., collected the purchase money, and invested about \$3,000 thereof in the real estate in question; that said Culberson took the title to said real estate in his own name; and executed a mortgage thereon to the National Mutual Building & Loan Association of New York to secure a loan of \$2,000; that said Building & Loan Association was not a bona fide purchaser, its mortgage being tainted with usury (the facts constituting usury being set out in the bill), and that the said association was proceeding to foreclose its mortgage by sale under the power.

The prayer of the bill was as follows: "That your honor will elect for your orators to charge the said property with the amount of money coming to or belonging to them from and out of the estate of said Jennie L. Culberson and invested in said property by the said Algernon Culberson; that your honor will ascertain or cause to be ascertained the amount thereof so invested, and that the same with the interest thereon may be decreed to be a lien upon said lot and improvements prior to the lien of the mortgage held by said building and loan association, and that the said lot may be ordered sold for the payment of said sum so ascertained; and orators pray for such other general or special relief as in equity they may be entitled to."

The building and loan association answered, denying the allegations of the bill, setting up that its mortgage was a New York contract and not usurious, and claiming to be a bona fide purchaser without notice of appellees' rights. The defendant Culberson answered admitting the material allegations of the bill.

The complainants introduced in evidence the proceedings of the Georgia court of ordinary showing the grant of letters of administration on the estate of Jennie L. Culberson to the defendant Culberson, the inventory of her estate, the proceedings for the sale of her realty, the order and report of the sale and the statement of account filed by defendant Culberson charging himself with the proceeds of sale, which account was passed by the court of ordinary. The complainants also introduced the deposition of A. Culberson showing the execution of the note and mortgage to the building and loan association in Alabama, the sale and conveyance of the lands of Jennie L. Culberson, deceased, in the state of Georgia, appellees' heirship, the purchase of the property involved in this suit and tracing clearly \$2,169 of the funds received from the estate of Jennie L. Culberson into the property in question. They also introduced the statutes of descent and distribution of Georgia, and the rate of interest in New York, which is shown to be 6 per cent. per annum. The mortgage to the building and loan association introduced by it, shows on its face that interest at the rate of 6 per cent. per annum payable monthly was required, and in addition thereto a premium of \$10 per month on a loan of \$2,000, and that this interest and premium were required to be paid, without reduction, for a period of eight years, although monthly payments were required to be made which would materially reduce the principal and would pay it in full in the estimated period of eight years.

After the examination of witness Culberson, on direct interrogatories by the complainants, the building and loan association filed cross interrogatories to him, and introduced his answers to these cross interroga-

tories, together with the deposition of the secretary of the association, the substance of which is, that the association had no notice of the complainants' equities until after the execution of the mortgage, and the conclusion of the witness that the mortgage was a New York contract and governed by the laws of New York as to interest. The building and loan association also introduced certain statutes of Georgia relative to the sale of lands of decedents, etc. There was no evidence that under the laws of New York the building and loan association was authorized to collect 6 per cent. interest per annum and premiums of \$10 per month on a loan of \$2,000.

On the final submission of the cause on the pleadings and proof, the chancellor rendered a decree granting the relief prayed for, rendering at the same time, the following opinion: "The note and mortgage in this case were signed in this state, and delivered to Messrs. Blackwell & Keith for the lender of the money, and they, Blackwell & Keith, then and there delivered to borrower the checks for the loan. They then had the mortgage recorded and forwarded to the lender of the money. It is therefore an Alabama contract and governed by our law, which forbids any higher rate of interest than 8 per cent. per annum. The 6 per cent. interest and \$10 per month premium contracted for by the parties, making altogether 12 per cent. per annum, is usury, and it is to be noted that though payments on the principal were to be made every month, yet this 12 per cent. per annum on \$2,000 was to be continued till the last payment of debt was paid.

"It is sufficiently shown that in June, 1890, Mr. Culberson received \$1,000, and in August, 1890, \$1,169 from sales of real estate that had belonged to complainants' mother, and that he used this in paying for the lot and improvements in Anniston, in the bill mentioned. He also received other large amounts in addition to the above \$2,169, much more than his distributive share of the property. As to this \$2,169 it was part of the direct proceeds of the corpus of the estate. It was received from the sale of lands a three-fourths undivided interest in which belonged to complainants.

"On behalf of complainants it is prayed that this court elect to follow their funds and fix a trust upon this property.

"On behalf of the defendants it is insisted that the court of ordinary of Bibb county, Ga., was without jurisdiction to make the sale of the lands, that the sale was void, and therefore Culberson had no funds of complainants, but the truth is there was an actual sale of complainants' property by Culberson. He actually received money for their interest in the land, and it does not lie in his mouth to say that three-fourths of the \$2,169 was not their money, and respondents stand in no higher position than their mort-

gagor, for their contract being tainted with usury, they lost thereby the character of bona fide purchasers without notice.

"Ought the court to make the election for these infant complainants, and thereby ratify pro tanto the alleged illegal sales and investment of their money by the administrator? It is not clear as to what could be reclaimed in Georgia or the present value of it, nor as to what would be lost by electing to claim this three-fourths of \$2,160. Hence it is best to make the election. Decree will be made making the election prayed for, and declaring a trust in favor of complainants for the amount of their money invested in the property, viz. three-fourths of \$1,000 with interest from date of investment, and three-fourths of \$1,160 with interest from date of its investment."

From the final decree rendered in accordance with this opinion, the National Mutual Building & Loan Association prosecutes the present appeal and assigns the rendition of said decree as error. Affirmed.

Blackwell & Keith, for appellant. John B. Knox and Pelham & Acker, for appellees.

HARALSON, J. We have carefully examined the transcript of the record in this case, and are satisfied with the finding and decree of the court below. The opinion of the learned chancellor set out in the transcript, is a concise and correct statement of the law and his conclusions are fully supported by the facts. The necessities of the case require no further discussion.

Affirmed.

(120 Ala. 269)

EVANS v. STATE

(Supreme Court of Alabama. Feb. 2, 1899.)

HOMICIDE—EVIDENCE—INSTRUCTIONS—HARMLESS ERROR.

1. Under Code, § 4333, establishing the doctrine of error without injury in criminal cases, allowing a witness to improperly state a conclusion, is not ground for reversal, where he also states the facts on which the conclusion is based.

2. Statement in a charge that "life cannot be taken to arrest any other than a felonious assault, or an attempt to commit a felony," is not open to the objection that it authorizes self-defense only to arrest actual danger of a felonious nature, where, in other parts of the charge, the principle is announced that the danger which will justify taking life to save life need only be apparent.

3. Statement in a charge that "life cannot be taken to arrest any other than a felonious assault or an attempt to commit a felony" deals only with cases of actual assault, and does not impinge on the principle that an apparent danger will justify taking life; so that omission to refer to right to act on apparent danger is not error, but calls for request for explanatory charges.

4. Even if, under the definition of felonies in the statute, a charge be faulty in stating that an assault, to justify homicide in self-defense, must be a felonious assault, it is harmless where, if any assault was made by defendant, it was felonious and forcible.

Appeal from city court of Gadsden; John H. Disque, Judge.

Lum Evans was tried under an indictment charging him with the murder of Parker Rowe by cutting him with a knife, was convicted of murder in the second degree, and appeals. Affirmed.

Amos E. Goodhue, for appellant. Charles G. Brown, Atty. Gen., for the State.

McCLELLAN, C. J. Evans, the appellant, was defendant in the court below to an indictment for the murder of Parker Rowe. The evidence showed that Rowe was killed with a knife, the arteries and veins being severed on each side of the throat. There were two or three incisions on each side of the throat and neck. On the trial, the court, against defendant's objection, allowed a nonexpert witness, who examined the wounds, to testify that "they looked like they had been cut from the front of the throat back towards the ear." This witness went on to further testify that "the gashes were deeper in front part of the throat; cuts were almost together, but towards the ears they became shallower, and further apart; the severed skin in edge of gashes were grained towards the ear, one gash left the throat, and cut the lower portion of the ear; [one] gash left the throat, and run up on jaw." It would seem that the admission of the evidence objected to was proper (*Perry v. State*, 87 Ala. 30, 6 South. 425; *Watkins v. State*, 89 Ala. 82, 8 South. 134), though the case of *Nave v. Railroad Co.*, 96 Ala. 264, 11 South. 391, casts some doubt upon it. But, whether so or not, under the influence of section 4333 of the Code, establishing the doctrine of error without injury in criminal cases, the principle that where a witness, though improperly allowed to state a conclusion of fact, states also the specific facts upon which that conclusion is based, so that the jury can draw their own conclusions therefrom, no presumption of injury arises from the admission of his conclusion, and a reversal cannot be based upon it. *Underh. Ev.* § 186; *Langworthy v. Green Tp.*, 88 Mich. 207, 50 N. W. 130; *Pennsylvania Co. v. Frund* (Ind. App.) 30 N. E. 1116. This is analogous to the rule long established in this state that a nonexpert witness may give his opinion or conclusion as to sanity if he details the facts upon which it is predicated. *Fountain v. Brown*, 38 Ala. 72; *Murphree v. Senn*, 107 Ala. 424, 18 South. 264; *Burney v. Torrey*, 100 Ala. 157, 14 South. 685.

The court, in its general charge, instructed the jury as follows: "Life cannot be taken to arrest any other than a felonious assault, or an attempt to commit a forcible felony;" and again: "If an assault is not felonious, however it may mitigate, it cannot justify, the taking of human life." In other parts of the general charge, the principle that the danger which will justify taking life to save life need only be apparent. So that, construing the

whole charge, as we must, together, the clauses copied above are not open to the objection that they authorize self-defense only to arrest actual danger of a felonious nature. Moreover, these charges, considered abstractly, do not impinge upon that principle. They deal only with cases of actual assault, and they mean only that, where there is an actual assault, it must be of the character stated, else life cannot be taken in resistance of it. And at most it would seem that the omission of reference in the charges to defendant's right to act upon apparent as well as upon actual danger could only serve to give them a misleading tendency, which should have been corrected by requests for explanatory charges, and which will not justify a reversal of the judgment. *Poe v. State*, 87 Ala. 65, 69, 70, 6 South. 378.

But, coming to the merits of the instructions, apart from the objection to them we have been considering, it is found that they were taken bodily and literally from the opinion of this court in the case of *Elland v. State*, 52 Ala. 322, 331, where it is said that a charge under discussion, "if given without explanation, would probably have induced the jury to believe that any peril to the person, though it was of mere indignity, or of mere battery, from which great bodily harm could not have been reasonably apprehended, would justify the taking of life if it could not be escaped by retreat, or if retreat would increase the peril of it. *Life cannot be taken to arrest any other than a felonious assault, or an attempt to commit a forcible felony. If an assault is not felonious, however it may mitigate, it cannot justify, a homicide.* If a felonious assault is so violent that the assailed cannot retreat from it without manifest danger to his life, or of enormous bodily harm, the duty of retreat does not rest on him." A strong argument is made against the soundness of that part of the opinion which we have italicized, and which is embodied in the instructions. It is said by counsel: "The vice of these charges consists * * * in the fact that they deny the right of self-defense in all cases in which the object of the assailant is to inflict great bodily harm, not amounting to a felony. To constitute a felonious assault, the intent of the assailant must be to murder, maim, rob, or ravish. Suppose the intention of the assailant is to inflict great bodily harm short of murder, mayhem, or rape, and this intention is known to the defendant, may he not lawfully take life to arrest such an assault, provided, of course, the other elements of self-defense are shown?" In line with these suggestions, it has been frequently said in this court, in definition of the assault which may be resisted under certain conditions to the taking of life, that it must be of such a character as, if perpetrated, it is likely to produce death, or grievous bodily harm. *Jackson v. State*, 94 Ala. 85, 90, 10 South. 509, and cases there cited. It would seem, under these decisions, that an assault which will justify homi-

cide in self-defense, other conditions existing, need not be a felonious assault, or an attempt to commit a forcible felony, as felonies are defined by our statutes. It is probable that the terms used in these instructions came into vogue, and accurately declared the law, when they had different meanings from that which attaches to them under our statutory demarkation between felonies and misdemeanors. However that may be, whether the charges are faulty or not in the respect pointed out for appellant, no injury could have resulted to the defendant from their being given, since the evidence was without conflict that, if any assault was made by the deceased, it was a felonious assault, and forcible, being no less than an attempt by him to take defendant's life by cutting him with a knife, accompanied by a declaration of his deadly purpose. Under these circumstances, the fault of the instructions insisted upon will not avail to reverse the judgment.

We have discussed the questions treated of in appellant's brief. There are several other questions presented by the record. These we have duly considered. The rulings involving them are, however, so patently free from error, or lacking in prejudice to the appellant, that we deem it unnecessary to discuss them. The judgment is affirmed.

(120 Ala. 286)

TERRY v. STATE.

(Supreme Court of Alabama. Feb. 2, 1899.)

CRIMINAL LAW—CHANGE OF VENUE—DISCRETION OF COURT—WITNESSES—CONTINUANCES—HOMICIDE—EVIDENCE.

1. Affidavits for a change of venue on account of the prejudices of the people, filed after a reversal on appeal, must relate to the feelings of the people at the time of the filing.

2. Two persons made affidavit that certain persons had told them that they had heard, on that day, several persons, whose names were not stated, talk of hanging defendant if a change of venue was granted. The sheriff, probate judge, county treasurer, and a justice made affidavit that they had talked with many people from all over the county, and that they believed defendant could obtain a fair trial. *Held* not error to refuse a change of venue.

3. An attachment for a witness shown to be sick, and unable to attend court, is properly refused.

4. A motion for a continuance on account of the absence of a witness is properly overruled where the state admitted the showing by the defense as to what the witness would testify to.

5. In a prosecution for murder, a witness who examined the deceased may testify that "the flesh moved, and it appeared her skull was broken or crushed."

6. On a trial under an indictment for murder by striking deceased with an unknown weapon, it was proper to refuse to instruct that, if the jury believed deceased was killed by the combined effect of choking and a blow struck with a weapon, they should acquit.

7. In a prosecution for murder it was proper to refuse to instruct that, if the jury believed defendant's character for peace and quietude was good, they should consider it in favor of his innocence, even though they believed his character for veracity bad.

8. The fact that the indictment alleged the

murder to have been committed with an instrument unknown does not prevent a conviction, unless the grand jury actually knew the weapon employed; it not being enough that they could have found out by reasonable diligence.

Appeal from circuit court, Coffee county; J. W. Foster, Judge.

Major Terry was convicted of murder in the first degree, and he appeals. Affirmed.

The appellant, Major Terry, was tried under an indictment which charged him with unlawfully and with malice aforethought killing "Mary Thomas by striking her with some weapon to the grand jury unknown," was convicted of murder in the first degree, and sentenced to be hung. When the cause was called for trial the appellant made application to the court for a change of venue. The grounds of this application are sufficiently stated in the opinion. Upon the hearing of the application the court overruled it, and refused to allow the change of venue, and to this ruling the defendant duly excepted. Thereupon the state announced ready, but the defendant announced that he was not ready for trial on account of the absence of several witnesses, among whom was one Dr. Grubbs; and the defendant submitted a sworn statement as to what he expected to prove by each of these witnesses, and asked for an attachment for each of them. The court ordered attachments, returnable instant, for all of the witnesses, with the exception of Dr. Grubbs. In reference to this witness it was shown that he was sick, and unable to attend court. Thereupon the court declined to issue an attachment for Dr. Grubbs, and defendant excepted to this action of the court. The court then put the state on the showing made by the defendant as to what the witness Dr. Grubbs would testify, which showing the state admitted. The defendant objected to being put to trial in the absence of said witness, and moved the court for a continuance of the cause on account of his business. The court overruled the motion, declined to allow a continuance, and to this ruling the defendant duly excepted. It was shown that Mary Van Thomas had been killed; that when her body was found it was discovered that she had received a severe blow on her head, fracturing her skull; and there were marks upon her throat as if she had been choked. The state introduced evidence tending to show that the defendant had inflicted the wounds upon the deceased which resulted in her death. Upon the examination of one Mrs. Crumpler, a witness for the state, she testified that she went to the house of deceased a short time after she was killed, and while there she examined her. That there was a large gash on the left side of her head, and all along the left side of her head there were bruises; "that the flesh moved, and it appeared that the skull was broken or crushed; it gave way and moved about easily." The defendant separately objected and moved to ex-

clude the sentence quoted above, upon the grounds that it was irrelevant and immaterial evidence, and that the statements were the mere conclusion or expression of the opinion of the witness. The court overruled this motion, and the defendant duly excepted. There was no definite evidence as to what was the instrument with which the blow producing the death of the deceased was inflicted, but it was shown that the blow upon the head was sufficient to produce death. The testimony for the defendant tended to show that he was not guilty of the offense charged. He introduced evidence proving his general character for peace and quietude was good. Upon the introduction of all the evidence, the court, at the request of the solicitor for the state, gave to the jury the following written charge: "If the grand jury had proof of and knew the weapon employed whereby the deceased was killed, then it was necessary, to a valid indictment, that such weapon be named therein; but, if the weapon was unknown to the grand jury, such averment was sufficient, even if it could have been ascertained by reasonable diligence." The defendant duly excepted to the giving of this charge, and also separately excepted to the court's refusal to give each of the following charges requested by him: (1) "If the jury believe the evidence, they must acquit the defendant." (2) "If the jury believe from the evidence that the death of the deceased was produced by the combined effect of the choking and a blow struck with a weapon, they must find the defendant not guilty." (3) "If the jury believe that the defendant's character for peace and quietude is good, they must consider his character, in determining his guilt or innocence, as a circumstance in favor of his innocence, even though they believe his character for truth and veracity bad."

Chas. G. Brown, Atty. Gen., for the State.

TYSON, J. The facts averred by defendant in his application for a change of venue were: That on the day after the alleged murder with which he was charged he was given a preliminary hearing, and bound over to await the action of the grand jury. That about night of that day a mob was formed, and began to make demonstrations indicating a disposition to take him from the custody of the constable, who had him in charge, and kill him, when he made a dash, and escaped to the woods, pursued by some of the persons composing the mob. Afterwards searching parties were organized to apprehend him, without avail. Just prior to the next term of the circuit court he surrendered, and was imprisoned in the jail of another county. That, after his trial was finished, and while the jury were considering their verdict, a large crowd of enraged persons gathered about the court house, and threatened to kill him should the jury acquit him.

That he was convicted, and sentenced to death, from which judgment he appealed to the supreme court, but on the day fixed by the court for his execution a large crowd of people gathered in Elba, and when informed of his appeal, and that the sheriff had the day before taken him to another county, another mob formed, and threatened to go after him, take him from the officers of the law, and kill him. That since the reversal of his case by the supreme court (23 South. 776) there have been "expressions to the effect that he has put the county to expense enough, and ought to be killed, and the county rid of him." That, after it became known that he would apply for a change of venue, "he has learned of various threats that, if the change of venue was granted, a mob would be formed to take his life, and not allow him again to go from the county. And he alleges that the public sentiment in the county is such as that he cannot get a fair and impartial trial in this county from the facts aforesaid."

Before entering upon a consideration of the affidavits offered by defendant in support of this application and those by the state in opposition, it will be well to note that his preliminary examination was had the 14th day of July, 1897, that his trial and conviction were on September 10, 1897, that the judgment of reversal by this court was on the 23d day of June, 1898, and this application was filed the 6th day of September, 1898. The defendant filed the affidavits of seven persons, which may be grouped into four classes. Two relate exclusively to the facts as alleged in the application as to the demonstrations made by the crowd on the day of the preliminary examination; two relate to what took place during the day fixed for his execution; one recites that one Dubose, a few days after the reversal, told affiant that the county had been put to enough expense by the defendant, and that he was in favor of the citizens of the county taking him, and killing him, and that he knew others of the same opinion; and the two others recite that certain persons named had told each of the affiants that they had heard, that day, several persons, whose names are not stated, talk of hanging defendant if a change of venue was granted. Under the principles declared in the case of *Hawes v. State*, 88 Ala. 37, 7 South. 302, only the two last-mentioned affidavits could have had any influence in determining the question presented by the application. It is worthy of note that the persons making each of these affidavits do not state their knowledge of the condition of the public mind in regard to the defendant, but simply what some other person had told them that he had heard. Whether the sentiments inimical to the rights of the defendant to have a fair trial were expressed by kinspeople or partisan friends of the deceased or her family is not shown. To what extent this sentiment prevailed, beyond a few persons, there is an

entire absence of proof. But, conceding that the affidavits show there existed at one time some bitterness of feeling towards defendant throughout the county, the affidavits introduced by the state clearly show that it did not exist at the time of this trial. These affidavits were made by the sheriff, probate judge, county treasurer, and a justice of the peace, in which it is stated that they have talked with a great many people of the county, and from all portions of the county, and heard many expressions made by many people, and that, in their opinion, the defendant could obtain a fair trial. There was no error committed by the court in refusing the application. *Hawes v. State*, supra.

There was no error in the refusal of the court to issue an attachment for witness Dr. Grubbs at the instance of the defendant. He was shown to have been sick, and unable to attend court. Neither was there error in the action of the court in overruling the defendant's motion for a continuance on account of his absence, since the defendant had the benefit of his testimony in a showing introduced in evidence by him.

It was competent for the witness Mrs. Crumpler to testify that "the flesh moved, and it appeared her skull was broken or crushed." *Evans v. State* (present term) 25 South. 175, and authorities there cited.

The other exceptions reserved to the rulings of the court upon the admission of evidence are so wanting in merit that we will not discuss them. *Terry v. State* (Ala.) 23 South. 776.

The three charges refused to the defendant each invaded the province of the jury, and were properly refused. The written charge given at the request of the solicitor was proper. *Duvall v. State*, 63 Ala. 12.

There is no error in the record, and the judgment is affirmed. The day fixed by the court below for the execution of the sentence of death pronounced against the defendant having passed, it becomes our duty to specify a day for his execution. It is accordingly ordered and adjudged that on Friday, 17th day of March, 1899, the sheriff of Coffee county execute the sentence of the law by hanging the defendant, the said Major Terry, by the neck, until he is dead, in obedience to the judgment and sentence of the circuit court of Coffee county, as herein affirmed.

(120 Ala. 329)

KING v. STATE.

(Supreme Court of Alabama. Feb. 2, 1899.)

RAPE—INDICTMENT—EVIDENCE—INSTRUCTIONS.

1. The crime of abusing a female under 10 years of age in the attempt to have carnal knowledge of her (Code, § 4346) is charged by an indictment alleging that defendant "did assault * * * a girl under the age of 10 years, with the intent forcibly to ravish her."

2. The charge given by the court of its own motion not being set out in the bill of exceptions, it cannot be said that it erred in charging,

at the request of the solicitor, that "the definition given by the court of a reasonable doubt is the legal definition of the same," and that "all the charges given for the defendant are in harmony with the charge of the court, * * * but only a different way of expressing the law."

3. It is not every hypothesis, but every "reasonable" hypothesis but that of guilt, which the evidence must exclude to justify a conviction.

4. The court not only is not obliged to single out the testimony of one witness, or a particular statement of a witness, and charge that the jury should consider it in favor of defendant, but to do so is error.

5. Where the bill of exceptions states that there was other evidence, which is not deemed necessary to set out, it cannot be said that it was error to refuse to charge that, "if the jury can reconcile the testimony consistently with the innocence of the defendant, it is their duty to do so, and to acquit the defendant," as, if the evidence is palpably irreconcilable with any theory of defendant's innocence, such charge should not be given.

Appeal from circuit court, Henry county; J. W. Foster, Judge.

Joe King was convicted of an assault with intent to ravish, and appeals. Affirmed.

The appellant was indicted and tried under the following indictment: "The grand jury of said county charge that before the finding of this indictment that Joe King did assault Minnie Douglass, a girl under the age of ten years, with the intent forcibly to ravish her, against the peace and dignity of the state of Alabama." The defendant demurred to the indictment upon the ground that the charge contained therein was unwarranted by statute or statutory form, and was insufficient as a statutory or common-law indictment. This demurrer was overruled, and the defendant duly excepted. The state introduced the girl alleged to have been assaulted, who testified to the facts of the assault, but on cross-examination further testified that she did not know who it was who assaulted her. Defendant's counsel pointed out the defendant, and asked the witness if he was the man. She looked at the defendant, and answered, "No." There was other evidence introduced by the state, showing that the assault complained of had been committed. There was also testimony offered by the state for the purpose of identifying the defendant as the person who committed the alleged assault, and there was testimony offered by the defendant, including his own testimony, to the effect that he did not commit the alleged assault. The recital of the bill of exceptions as to its not containing all the evidence is copied in the opinion. The bill of exceptions contains the following recital: "The court, in the general charge, among other things, defined to the jury a reasonable doubt, after which the court gave, at the request of the defendant, the following written charges, which were read by the defendant's counsel to the jury, as follows." Then follow the first and second charges given at the request of the solicitor, which are copied in the opinion, and to the giving of each of which the defendant separately excepted. The defendant requested the court to give to

the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "Unless the evidence against the defendant should be such as to exclude to a moral certainty every hypothesis but that of his guilt of the offense imputed to him, they must find the defendant not guilty." (5) "If the jury can reconcile the testimony consistent with the innocence of the defendant, it is their duty to do so, and acquit the defendant." (7) "If the child testified that the defendant was not the man, while looking at him, the jury should take that, and duly consider it in favor of the defendant."

R. H. Walker and T. M. Espy, for appellant. Chas. G. Brown, Atty. Gen., for the State.

MCLELLAN, C. J. The indictment is in the Code form, except in the substitution of the words "a girl under the age of ten years" for the word "woman," used in the form; and, as has been in substance held by this court, it sufficiently charges an offense under section 4346 of the Code. *Toulet v. State*, 100 Ala. 72, 14 South. 403; *Vasser v. State*, 55 Ala. 264. The bill of exceptions does not set out the charge given by the court of its own motion. We are, therefore, in no position to adjudge that the definition given by the court of a reasonable doubt was not a legal definition of the same, nor that the charges given for defendant were not in harmony with the charge of the court. It follows that we cannot revise the court's action in charging the jury, at the request of the solicitor, (1) "that the definition given by the court of a reasonable doubt is the legal definition of the same," and (2) "that all the charges given for the defendant are in harmony with the charge of the court, and they are not in conflict with, but only a different way of expressing, the law." The charges given for the state at the most were explanatory, rather than qualifying, in respect of defendant's charges. *Lewis v. State*, 96 Ala. 9-11, 11 South. 259. The first charge refused to defendant requires too high a degree of proof. It is every reasonable hypothesis but that of guilt which the evidence must exclude to justify a conviction. The court is not only under no duty to single out the testimony of one witness, or a particular statement of a witness, and tell the jury that they should consider it in favor of the defendant, but such an instruction has been often affirmatively condemned by this court as giving undue prominence and importance to the testimony so referred to. Charge 7 asked by the defendant was, therefore, properly refused. Charge 5 asked by the defendant is not faulty for not postulating a reasonable reconciliation of the testimony consistent with innocence, as is insisted. A reconciliation of testimony necessarily implies and involves a reasonable reconciliation. But testimony so conflicting as to preclude satisfactory considerations upon which it may be made to comport with itself, or to a

stated conclusion, cannot be reconciled at all; and, where the court sees this to be the case, charges like this should not be given. The bill of exceptions does not purport to set out all the evidence. To the contrary, it is therein stated that "there was other testimony, both for the state and for the defendant, which is not deemed necessary to set out in full." On this state of the record we will presume, in support of the refusal of this instruction, that the evidence not set out was of a character palpably irreconcilable with any theory of defendant's innocence. Error in this ruling of the court is, therefore, not made to affirmatively appear, and appellant can take nothing by his exception to it. Affirmed.

(120 Ala. 369)

SCROGGINS et al. v. STATE.

(Supreme Court of Alabama. Feb. 2, 1899.)

ASSAULT WITH INTENT TO MURDER—PROVOKING DIFFICULTY—EVIDENCE—INSTRUCTIONS.

1. One assaulting another with intent to murder cannot invoke the doctrine of self-defense, where just prior to the assault he charged prosecuting witness with seducing his sister, as he was not free from fault in bringing on the difficulty.

2. Defendants approached prosecutor, and asked him why he had seduced their sister, and he denied doing so; and, on being told that they knew he did, he placed his hand to his pistol pocket, when one of the defendants began firing on him. *Held* proper to charge that defendants were guilty of assault with intent to murder, in the language of Code 1896, § 4856 (3727), defining murder in the second degree, if they assaulted prosecutor in a sudden affray, by the use of deadly weapons, before the commencement of the fight, while he had no weapon drawn.

3. A charge that defendants were entitled to fire first, if prosecutor spoke angrily and insultingly and placed his hand on his pistol pocket, is erroneous, as ignoring defendants' duty to retreat, if they could do so safely.

4. One accused of assault with intent to murder may be guilty of having provoked the difficulty, precluding him from invoking the doctrine of self-defense, though he did not intend to provoke any difficulty when he approached prosecutor.

5. It is not proper to hypothesize, in an instruction, as doubtful, a fact which defendant has admitted.

Appeal from circuit court, Lawrence county; Thomas R. Roulhac, Judge.

Hollis Scroggins and Chassie Scroggins were indicted, tried and convicted for an assault upon one Gabe Chilcoat, with a pistol, with the intent to murder, and were sentenced to the penitentiary for four years, and they appeal. Affirmed.

On the trial of the cause, the evidence for the state tended to show that while Gabe Chilcoat was riding horseback along a country road, to town, defendants stopped him by catching hold of the horse's bridle, and after exchanging a few words, one of the defendants fired upon him, and after said Chilcoat had fallen from his horse and turned to run, said defendant continued to fire; that said

Chilcoat was shot by the defendants, or one of them, seven times.

The evidence for the defendants tended to show that said Chilcoat had seduced their sister; that they learned of this fact the night before the shooting, and that when they approached said Chilcoat they asked him why he seduced their sister; that Chilcoat replied that he had not done so, and upon being told that they knew he had, Chilcoat cursed them, and after saying that he was ready for them, threw his right hand behind him to his pistol pocket, and that when that was done, one of the defendants drew his pistol and began firing at him. There were other witnesses introduced by the defendants, whose testimony tended to show that Chilcoat had ruined the defendants' sister.

Upon the examination of the said sister, after she had testified to her seduction by said Chilcoat, she was asked whether or not said Chilcoat had had illicit relations with her the last time he was at her father's house, and if he told her on said day that if her father and brothers ever said anything about it to him he would kill them. The solicitor objected to this question, the court sustained the objection and the defendants excepted. Thereupon the defendants asked said witness whether or not said Chilcoat was the father of her illegitimate child. The solicitor objected to this question, the court sustained the objection and the defendants duly excepted.

Upon the introduction of all the evidence, the court in its general charge to the jury, among others, gave the following instructions: (1) "I charge you, gentlemen of the jury, that if the defendants approached Chilcoat and asked him why he had seduced their sister and that Chilcoat replied that he had not done so, and that the defendants then said to him, 'You need not deny it for you know you are guilty,' the defendants are not without fault in bringing on the difficulty and cannot invoke the doctrine of self-defense." (2) "I charge you that if you believe the evidence beyond a reasonable doubt that the assault in this case, if one was committed, was in a sudden encounter or affray and caused by the defendant by the use of deadly weapons which were concealed before the commencement of the fight, Chilcoat, their adversary, having no deadly weapon drawn, then the defendants would be guilty of an assault with intent to murder." To the giving of each of these charges the defendants separately excepted, and also separately excepted to the court's refusal to give each of the following charges requested by them. (3) "If the defendants in this case did not provoke or bring on the difficulty, but approached Chilcoat in an orderly and peaceful manner, and Chilcoat replied angrily and insultingly, placed his hands upon or in the direction of his pistol pocket in such a manner as to indicate to a reasonable man that his purpose was to draw and fire, the defendants were authorized to anticipate him and fire first. I charge you further that

the defendants would be entitled to an acquittal at your hands, if it should turn out that Chilcoat was unarmed, provided they were without fault." (4) "Gentlemen, the defendants are charged with the offense of an assault with intent to murder Gabe Chilcoat, which under our law is a felony. The law is given you in charge by the court, but you are the sole judges of the testimony. As jurors it is your duty to give the evidence your most careful consideration. If from all the evidence you believe beyond all reasonable doubt that the defendants are guilty of an assault with intent to murder you should so find, but I further charge you that sudden passion upon adequate provocation may deprive the assault of its felonious character, and if you believe from all the evidence in this case that the defendants were so actuated by a sudden passion engendered by an adequate provocation, then, in that event, you should not find the defendants guilty of an assault with intent to murder." (5) "If the defendants, with no intention of bringing on a difficulty, approached Chilcoat in a peaceable manner, and Chilcoat made a hostile demonstration by appearing to draw a pistol, in such a manner as to indicate to a reasonable man that his purpose was to draw and fire, and if the defendants were in such proximity to Chilcoat as to render it hazardous to attempt flight, then the law would not require the accused to endanger his safety by attempting flight." (6) "Gentlemen, the defendants are charged with the offense of assault with intent to murder Gabe Chilcoat, which under our law is a felony. The law is given you in charge by the court, but you are the sole judges of the facts. As good citizens and as jurors it is your duty to give the evidence your most careful consideration. If from all the evidence you believe beyond all reasonable doubt that the defendants are guilty of an assault with intent to murder, you should so find, but I further charge you that sudden passion upon adequate provocation may deprive the assault of its felonious character, and in such case, if the evidence convinces you it is true, you should not convict the defendants of assault with intent to murder. If you have a reasonable doubt from the evidence of defendants' guilt of an assault with intent to murder, then you should consider whether they are guilty of an assault. If you are satisfied from all the evidence beyond all reasonable doubt that the defendants are guilty of an assault, then you should find them guilty, and (may) assess a fine of not more than \$500." (7) "I charge you that if you believe the evidence you must find the defendants not guilty."

James Jackson and Lowe & Abercrombie, for appellants. Wm. C. Fitts, Atty. Gen., for the State.

HARALSON, J. The first charge given by the court asserts a correct proposition of law. The settled rule in this court is, that a defend-

ant must be entirely free from fault in bringing on the difficulty, before he can set up the plea of self-defense. If the facts hypothesized were true, the defendants were not free from fault. *Ellis v. State* (Ala.) 25 South. 1.

The second charge is in the substantial language of section 4856 (3727) of the Code, in defining murder in the second degree on the facts hypothesized, and the charge as given was a very proper instruction in a case of this character.

The rule is familiar that no one can avail himself of the plea of self-defense, in a case of homicide, or assault with intent to murder, when the defendant was himself the aggressor, and willfully brought on himself, without legal excuse, the necessity for the killing, or the assault made. He who provokes a personal encounter, in any case, thereby disables himself from relying on the plea of self-defense in justification of a blow which he struck during the encounter. *Page v. State*, 69 Ala. 229; *Leonard v. State*, 66 Ala. 461; *Kimbrough v. State*, 62 Ala. 248. Refused charge numbered 3, under the undisputed evidence, is in contravention of the foregoing rule. Moreover, it ignores the duty of retreat by defendants if they could have done so safely.

The fourth and sixth charges carefully ignore freedom from fault in defendants in provoking the encounter in which they shot the party assaulted, as well as their duty to retreat, and were properly refused. Besides, there is no evidence that defendants in making the assault were actuated by passion suddenly aroused. Their own admissions show that no such passion existed, and that their assault did not result therefrom.

The fifth charge was properly refused. It does not sufficiently hypothesize freedom from fault in bringing on difficulty. Defendants may have approached the party they assaulted, with no intention of bringing on a difficulty, and yet, they may have been guilty of doing an act or saying something at the time, that made them the aggressors.

The evidence is without conflict that defendants were in fault in producing their alleged necessity to shoot the party assaulted. Their own evidence admits it. It was not proper, therefore, to hypothesize in their defense, as this charge did, for the consideration and ascertainment by the jury, a fact as doubtful, which the defendants themselves admitted to be true.

From what has been said, it will appear, that there was no error in sustaining the objections to the questions propounded by defendants to their witness, Annie Scroggins. There is no question of self-defense in the case, the evidence being without conflict, as has been stated, that defendants were in fault in bringing on the difficulty.

We find no error in the record, and the judgment and sentence of the court below are affirmed.

Affirmed.

(126 Ala. 342)

BROWN v. STATE.

(Supreme Court of Alabama. Feb. 2, 1899.)

INDICTMENT—DESCRIPTION OF PROPERTY—VARIANCE—SERVICE OF COPY—ROBBERY—EVIDENCE—CONFESSIONS.

1. It sufficiently appears that a copy of the indictment was served on accused, as required by law, where the record shows that accused at the trial and at the arraignment admitted in open court that he had been duly served with such copy.

2. In a prosecution for robbery the person assaulted may show the nature and extent of the violence inflicted upon his person by the robber, robbery being an offense against the person as well as against property.

3. Though accused may show that another committed the crime for which he is charged, he cannot show another to be "suspected" merely.

4. Witnesses may testify as to confessions shown to have been made voluntarily, and without inducement or threats.

5. An indictment charged accused with taking one \$2 United States treasury note and \$13 in the silver coin of the United States, "a further description of which is to the grand jury unknown." *Held*, that the words quoted referred to the silver coins, and not to the note, which was sufficiently described; and hence it was not necessary for the state to prove that a tear in the note was a description "unknown to the grand jury."

6. The note being before the grand jury, but not the coins, it was not a variance to admit the note, and prove its theft, without identifying the coins.

7. Under an indictment charging taking money, the fact that receipts of nominal value were in the purse stolen does not prevent a conviction.

Appeal from city court of Montgomery; A. D. Sayre, Judge.

William Brown was convicted of robbery, and he appeals. Affirmed.

The appellant, William Brown, was tried under the following indictment: "The grand jury of said county charge that before the finding of this indictment, William Brown feloniously took one two-dollar United States treasury note and thirteen dollars in the silver coin of the United States, a further description of which is to the grand jury unknown, the property of Jasper Hicks from his person, and against his will, by violence to his person, or by putting him in such fear as unwillingly to part with the same, against the peace," etc. The defendant was convicted of the offense charged and sentenced to be hanged. The indictment was presented July 23, 1898. On November 4, 1898, the defendant was arraigned and the day set for his trial, and a special venire was ordered summoned and a list of the names of the several jurors to be served on the defendant. The minute entry of this arraignment and order of the court contained the following recital: "And defendant acknowledges in open court that he has heretofore been served with a copy of the indictment in this case." The judgment entry of the defendant's conviction recited that the defendant, did, on November 4, 1898, acknowledge in open court and at the former term of the court, that he

had been duly served with a copy of the indictment.

Before entering upon the trial, the defendant moved the court to quash the venire, because a copy of the indictment had not been served upon the defendant according to law. The court overruled this motion, and to this ruling the defendant duly excepted.

The state introduced as a witness Jasper Hicks, the man alleged to have been robbed, who testified that on the evening of April 29, 1898, as he was going home along one of the streets in the city of Montgomery, he was knocked down by a severe blow on his head and rendered insensible; that at the time he was struck he had on his person \$27 altogether, having in his pocketbook a \$2 bill and several receipts for money paid out by witness, and in his pocket he had 13 silver \$1 pieces, and in another pocket he had the balance of the money; that the pocketbook containing the \$2 bill, and the 13 silver dollars were taken. Upon being shown a \$2 bill, the witness stated that he recognized the bill as the one which had been in the pocketbook at the time he was robbed. The bill had a piece torn out of one corner, and the presiding judge asked the witness if at the time he was robbed the bill was torn in the same way, to which the witness replied that it was. The witness also examined the receipts and testified that they were the same that were in his pocketbook at the time he was robbed. Prior to the examination of this witness, the state had introduced as a witness the physician who had sewed up the wound inflicted upon Jasper Hicks, and this witness testified as to the character of the wound. Upon further examination of J. H. Hicks as a witness, he was asked the following question: "What has been the effect upon you of this assault?" The defendant objected to this question, on the ground that it called for illegal and irrelevant evidence. The court overruled the objection and the defendant duly excepted. The witness in answer to the question testified that he was sick for some time afterwards; that he had been permanently affected by the blow, in that his sense of smell and taste had been impaired; that he has a dizzy feeling when he goes to get up, and that when he stoops over he has a feeling like vertigo; and none of these affections he had before he was struck. The defendant moved to exclude this answer from the jury, on the ground that such testimony was illegal and irrelevant and had no connection with the issue involved in this case. The court overruled this motion, and the defendant duly excepted. This witness, on cross-examination, testified that he was a witness before the grand jury and that during his examination before the grand jury he stated to them that the money taken from him was the \$2 bill referred to and \$13 in silver money, and that the receipts and pocketbook and the \$2 bill were all exhibited to him while being examined as a witness before the grand jury. The witness was

asked by the defendant if any one else than the defendant was suspected of the robbery. The solicitor objected to this question, which objection the court sustained, and the defendant duly excepted. Upon the examination of the two special officers of the police department of the city of Montgomery, they each testified to facts which traced the possession of the \$2 bill identified as being in the possession of Jasper Hicks at the time of the robbery to the defendant William Brown, just after the robbery. They each also testified that the defendant told them, when together, how he had disposed of said \$2 bill, and to other statements by the defendant in which he incriminated himself. The defendant objected to each of these statements upon the ground that what the defendant said by way of an admission or confession was not shown to have been voluntary and the evidence was illegal and inadmissible. Thereupon the solicitor for the state asked each of the witnesses, on their separate examinations, if he had offered any inducement or made any promises or threats to the defendant to cause him to tell what the witness testified to. Upon each of the witnesses answering that he had offered no inducement and made no promises or threats to the defendant, the court overruled each of the objections of the defendant and to these rulings the defendant separately excepted.

The state offered in evidence the two-dollar bill which as recited in the bill of exceptions "was a two-dollar United States treasury note, and which had been exhibited to the different witnesses"; and the state also offered the receipts which the witness Hicks testified were in the pocketbook at the time he was robbed. The defendant objected to the introduction of the two-dollar bill and these receipts, upon the ground of variance from the paper described in the indictment. The court overruled the objection, and the defendant duly excepted. Upon the cross-examination of several of the witnesses introduced for the state, the defendant asked the said witnesses if any one else had been suspected of the robbery with which the defendant was charged. To each of such questions the solicitor objected, upon the grounds interposed to similar questions, as set out above, the court sustained each of such objections, and the defendant separately excepted.

Upon the introduction of all the evidence, the defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (a) "If the jury find from the evidence that the property stolen was money in a pocketbook, which pocketbook also contained receipts and other papers even of nominal value to the owner, which papers were also stolen, and the indictment specifies only the following property: one two-dollar United States treasury note and thirteen dollars in the silver coin of the United States, then the jury cannot

convict under the indictment." (b) "The court charges the jury that if they find from the evidence that several things of value were the subject of this robbery, and that each was of a distinct description and belonged to a separate species, and if the grand jury which found the indictment knew at the time of finding the indictment that several kinds of property were stolen and knew the description of each kind, then the jury must acquit." (c) "If the number and denomination of the coins taken from the defendant or some of them were known to the grand jury, the court instructs the jury to acquit under the indictment." (d) "If the jury believe the evidence in this case they should find the defendant not guilty." (8) "The court instructs you to acquit under this indictment, if the evidence shows the two-dollar treasury note was capable of a further material description and such further material description was known to the grand jury." (9) "If it be a fact that the two-dollar treasury note alleged to have been taken by this defendant had a mark on it which served to distinguish it from any other two-dollar treasury note, and such mark was known to the grand jury, a conviction cannot be had under this indictment." (10) "If the jury believe from the evidence that the grand jury, which found the indictment, under which the defendant is here prosecuted, knew when it found said indictment, a further description of the two-dollar treasury note said to have been taken, and that said further description was such as would serve and did so serve to materially distinguish the two-dollar treasury note from any other two-dollar treasury note, the defendant cannot be convicted under this indictment." (11) "If the jury believe that the evidence about the two-dollar bill applied entirely to the marked two-dollar bill, and that without such mark Hicks and the other witnesses would not be able to identify it, as the two-dollar treasury note described in the indictment, it will be the duty of the jury to acquit." (12) "If the defendant names the person from whom he obtained the stolen property, the burden is upon the prosecution to produce as a witness the person so named in order that the jury may judge of such person's testimony, and the jury may consider the failure to produce him, along with the other circumstances of the case."

Hugh Nelson, for appellant. Charles G. Brown, Atty. Gen., for the State.

HARALSON, J. 1. There is nothing in the objection that it did not appear a copy of the indictment had been served on the defendant as required by statute. It does appear, that defendant admitted in open court at the trial that at the preceding July term, 1898, when the case was set for trial but afterwards continued, he had been duly served with a copy of the indictment. This was sufficient.

2. Robbery is an offense against the person as well as against the property of the party robbed,—against the person by violence, and against the property by manupation with felonious intent of taking the property. *James v. State*, 53 Ala. 381; *Thomas v. State*, 91 Ala. 34, 9 South. 81. There was no error, therefore, in allowing the prosecutor, Hicks, to show the nature and extent of the violence to his person, employed by the robber.

3. It is always permissible for a defendant accused of a specific crime, to show that another, and not he, was the guilty party; but it is not competent for the accused to show, merely, that another was suspected of the commission of the crime. The several offers of defendant to prove such a fact were properly disallowed. *Levison v. State*, 54 Ala. 520, 527; *Banks v. State*, 72 Ala. 522; *West v. State*, 76 Ala. 98.

4. The confessions of defendant admitted against the objections of defendant, were not allowed to go to the jury, until the witnesses testifying to them had shown that they were voluntary,—made without inducement or threats on their part to procure them,—and were, therefore, properly admitted.

5. The indictment was in due form and unchallenged by demurrer. It did not charge that defendant took two dollars in United States treasury notes, but as to the note mentioned, it charged that he "feloniously took, one two-dollar United States treasury note." The description designates the bill circulating as money by authority of the general government, and *ex vi termini* the kind or species of money,—national paper currency. It identifies it as one of the things stolen, and shows it to be a subject of larceny. The kind, denomination and value are sufficiently averred. Such was the decision of this court in *Carden v. State*, 89 Ala. 130, 7 South. 801, as to a similar averment, in which case, the court said: "The description in the indictment being sufficient, whether a more particular description was to the grand jury unknown, becomes an immaterial inquiry. Such an averment, in an indictment sufficiently describing the thing stolen, must be regarded as surplusage."

The averment of the taking of the treasury note is followed by another averment in a separate clause, the two connected by the conjunction "and," as follows, "and thirteen dollars in the silver coin of the United States, a further description of which is to the grand jury unknown,"—the whole averment as to each species of property being, that defendant "feloniously took, one two-dollar United States treasury note and thirteen dollars in the silver coin of the United States, a further description," etc. This latter averment, as to the silver coin, in the first place, is uncertain as to the denominations of the coin stolen, whether they were in whole or in part in one dollar, half dollar, quarter, ten or five cent pieces. If they had

been in either or in mixed silver coins, they would have answered the description. This description was, therefore, without more, not sufficient, and it became necessary, as to these, to add the averment, found in the indictment, as to their being unknown. That this averment, which we have quoted and italicized above, must be construed as referring to the silver, and not to the treasury note, arises from more than one consideration. The note, as we have seen, was sufficiently described, without these words, and there was no necessity or propriety in employing them in aid of an indefinite or insufficient description of it. The words "a description," indicate that reference was made to one of the two preceding clauses in the sentence in which they occur, and to one species of property described, and not to both. If intended to apply to both clauses and to each subject of the larceny, the words "further descriptions," would have been more correctly employed. The averment of the taking of the silver coins being of a separate species of property taken from that of the treasury note, and being an insufficient description of them, the compound relative pronoun, "which," in the phrase, "a further description of which," must be held to refer to the latter insufficiently described species of property, and not to the former, which was sufficiently described. If the averment had been, as to the treasury note, that a further description of it than that given was unknown to the grand jury, and it appeared as it did, that the grand jury had the bill before them, when they found the indictment, then the defendant could not have been convicted under such an indictment, on the ground that it would have been an untrue averment. *James v. State*, 115 Ala. 83, 22 South. 565; *Leonard v. State*, 115 Ala. 80, 22 South. 564.

6. The evidence showed that the identical two-dollar treasury note stolen from the party robbed, was before the grand jury, but none of the silver coins were, so far as is made to appear. Indeed, it reasonably appears they were not. It further shows, without conflict, that the silver taken was in the denominations of one-dollar pieces.

There was no error in allowing the two-dollar bill, identified as the one taken, to go to the jury, on the ground urged against its admission, that there was a variance in the bill from the property described in the indictment.

7. There is nothing in the contention, if the pocketbook stolen contained, besides the money mentioned in the indictment, receipts and other papers of nominal value to the owner, which papers were also stolen, that the defendant could not be convicted for having robbed the owner merely of his money. It was not incumbent on the state to aver and describe everything the pocketbook contained when stolen, but it might, as it did do, proceed for the taking of any part of its con-

tents which were of value. The contention is the same as, if a thief steals two or more horses, he cannot be indicted and convicted for stealing one of them.

The charges asked and refused will, without special comment on each, appear to have been properly refused.

We discover no error in the record and the judgment and sentence of the court below are affirmed.

Affirmed.

(120 Ala. 300)

DUBOSE v. STATE.

(Supreme Court of Alabama. Feb. 1, 1899.)
HOMICIDE—EVIDENCE—DYING DECLARATIONS—INSTRUCTIONS.

1. Where, on a trial for murder, it is shown that decedent, a few hours before his death, remarked to his physician that he would die, and was informed that he had only a few hours to live, a sufficient predicate is laid for the admission of his dying declarations.

2. An instruction that dying declarations admitted in evidence are not entitled to the same force as if deceased was still alive, and testifying under oath before the jury, is properly refused.

Appeal from circuit court, Henry county; J. M. Carmichael, Judge.

Lum Dubose was indicted and tried for the murder of Jim McSwain, and was convicted of murder in the first degree, and sentenced to be hung, and appeals. Affirmed.

After the state had introduced evidence showing that Jim McSwain had been shot, and died from the wound, and also evidence tending to show that the defendant did the shooting, it introduced Dr. W. E. Pate as a witness, who testified that he was a practicing physician, and was called in to see Jim McSwain on the night he was shot; that during the next day McSwain told him that he thought he would die, to which the witness replied that he thought so too; that later during the day witness told McSwain that he would surely die, and had only a few hours to live, and, upon being told this, McSwain said that he thought he would die. The witness then testified that McSwain lived only a few hours after this declaration. Thereupon the state asked the witness if McSwain made any statement, and what was such statement. The defendant objected to such question upon the ground that it was not shown that the witness was conscious of an early dissolution, and that no proper predicate was laid for the admission of dying declarations. The court overruled this objection, and the defendant duly excepted. The witness Pate answered that McSwain stated at that time that Lum Dubose, the defendant, killed him and shot him with a pistol. The defendant moved to exclude this evidence from the jury upon the same ground upon which the objection to the question was based. The court overruled the motion, and to this ruling the defendant duly excepted. Upon the introduction of all the evidence the defendant requested the court to

give to the jury the following written charge, and separately excepted to the court's refusal to give the same as asked: "The court instructs the jury that the dying declarations of the deceased made to Dr. Pate are not entitled to the same credit and force as if deceased was still alive, and testifying in the presence of the jury on oath; that it is a species of hearsay evidence, and is intrinsically weaker than if the declarant was present and subject to cross-examination, and the jury alone are the judges of its weight and force."

R. H. Walker and W. L. Lee, for appellant.
Charles G. Brown, Atty. Gen., for the State.

McCLELLAN, C. J. The court very properly admitted the dying declarations testified to by Dr. Pate on the predicate laid in the evidence of that witness. *McQueen v. State*, 94 Ala. 50, 10 South. 433.

The charge refused to defendant was clearly an invasion of the province of the jury. It was for them to determine what weight to give to the dying declarations of the wounded man, and not for the court to instruct them that such declarations were "not entitled to the same credit and force as if deceased was still alive, and testifying in the presence of the jury on oath," etc. *Kennedy v. State*, 85 Ala. 326, 5 South. 300.

There is no other question in this case. The fact stated in the brief for appellant, that one of the grand jury which found the indictment was on the jury which tried the defendant, does not appear by the record; and, if it had, no ruling was had upon it in the trial court, and, of course, no exception was reserved in that connection for the consideration of this court.

The judgment of the circuit court must be affirmed; and, the day fixed for the execution of the sentence of death imposed upon the defendant by the court below having passed, Friday, March 10, 1899, is fixed by this court for the execution of said sentence.

(122 Ala. 441)

GRIFFIN v. HEAD.

(Supreme Court of Alabama. Feb. 2, 1899.)
ACTIONS—SEVERANCE AFTER VERDICT—EVIDENCE.

1. After verdict, the court cannot sever the cause of action without consent of parties, and render judgment for part of the property sued for, and continue the cause as to the remainder.

2. Where plaintiff, on an issue as to possession of property sued for, testifies to receiving a letter from defendant warning him to keep off the premises where the property was situated, defendant may show in rebuttal that the letter contained no such warning, notwithstanding it was the best evidence of its contents.

Appeal from circuit court, Bullock county; J. M. Carmichael, Judge.

Detinue by T. L. Head against J. E. Griffin to recover a boiler and engine, a pair of scales commonly used for weighing wagons, a gin with condenser and feeder, and the belting and shafting used in the ginney, and one

Nance self-packing cotton press. The defendant pleaded non detinet, and in a special plea set up the defense that at the time of the institution of the suit the defendant was not in possession of the property sued for, but the plaintiff was in possession; this plea going into the details of the arrangement between the plaintiff and the defendant, by which the defendant alleged the plaintiff was in possession of the property at the time of the institution of the suit. On the trial of the case, the evidence for the plaintiff tended to show that he claimed title to the boiler and engine, belting and shafting, and the scales described in the complaint, under a mortgage given by the defendant to him, the execution of which mortgage was admitted by the defendant; that he claimed title to the gin, condenser, and feeder described in the complaint by purchase from one McLauren, and claimed title to the Nance self-packing press, by purchase from J. P. Wood & Bros. The plaintiff then proved the value of the several articles sued for, and his evidence tended further to show that said property was in possession of the defendant at the institution of the suit, and that the debt evidenced by said mortgage was due and unpaid. The evidence for the defendant tended to show that, after the execution of the said mortgage given by him to the plaintiff, the building in which the machinery described in the mortgage was placed was destroyed by fire; that, being unable to rebuild the buildings, the plaintiff agreed with him that if he would rebuild said houses, and put his ginnery in running order, and turn it over to him, he (the plaintiff) would assist the defendant in purchasing any machinery necessary, and, after the ginnery was put in running order, he (the plaintiff) would take charge of it and operate it until he was paid, by the income therefrom, the amount the defendant owed him on the mortgage; that, under this agreement, the defendant rebuilt the houses for his ginnery; that he and the plaintiff together purchased the cotton press, and the gin, feeder, and condenser, but that the plaintiff paid the money for all of the property so purchased, but that the defendant owned an interest in said property, and placed it in possession of the ginnery; that after completing the ginnery, and after it was in running order, the defendant turned the same over to the plaintiff, and had not been in possession since, nor had he had anything to do with the output; and that he was not in possession at the time the suit was instituted. During the progress of the trial, the plaintiff, as a witness in his own behalf, testified that the defendant was in possession of the property sued for at the commencement of the suit, and had warned him, the plaintiff, in a note, to get off the premises where the machinery was located. The plaintiff, as a witness, testified that he had the note at home, but had neglected to bring it into court. In rebuttal of this testimony, the defendant introduced as a witness one John Taylor, and

offered to prove by him that he (the witness) read the note for the defendant, which the plaintiff had testified contained a warning to him to keep off of the premises where the machinery involved in this suit was placed, and that said note did not contain any such warning. The defendant also offered to prove by this witness the contents of said note, but the plaintiff objected to said testimony. The court sustained the objection, and refused to allow the witness to testify as to the contents of said note; and to this ruling of the court the defendant duly excepted. Upon the return of a verdict in favor of the plaintiff, there was judgment entered accordingly. The judgment entry, after stating as to the amendment of the complaint, a reference to which is unnecessary on this appeal, then recites as follows: "Then came a jury of good and lawful men, to wit, John Falkner, foreman, and eleven others, who on their oaths say they find for plaintiff the property sued for, to wit: One boiler and engine, value \$150; belting and shafting, \$25; Fairbanks scales, \$25; 1 Pratt gin and fixtures, \$200; half interest in Nance press, \$175,—and find for the defendant the property sued for, to wit, half interest in Nance press, value \$175. It is considered by the court that the plaintiff recover of the defendant the property sued for, except half interest in the Nance press, and also the costs, for which let execution issue. It is ordered by the court that verdict as to Nance press be set aside, and parties allowed to litigate as to press at next term." The defendant appeals, and assigns as error the ruling of the court in refusing to allow the defendant to prove the contents of the note referred to in the plaintiff's testimony, and the rendition of the judgment as above set forth. Reversed.

J. D. Norman, for appellant. Holloway & Holloway, for appellee.

SHARPE, J. The verdict being sufficient as to some of the property sued for, it was competent, the plaintiff consenting, to render judgment for that part only; and the defendant not being injured by the exclusion from the judgment of the Nance press, such exclusion merely furnishes no cause for him to complain. *Alexander v. Wheeler*, 78 Ala. 167. But, after verdict upon the issues formed, the court was without authority, in the absence of consent of parties, to sever the cause of action so put in issue, and tried by the jury, by rendering judgment for part of the property sued for, and continuing the cause in court for future litigation therein as to the remainder. *Dale v. Mosely*, 4 Stew. & P. 371; *Brown v. Peters*, 94 Ala. 459, 10 South. 261. It appears that the main issue under the special plea was as to whether the defendant had possession of the machinery sued for when the suit was brought, the plea averring that he had previously delivered it into the possession of the plaintiff.

since which delivery he had not been in possession.

The note referred to in the first and second assignments of error, and which the plaintiff testified warned him to keep off the premises where the machinery in controversy was situated, was material evidence bearing on the question as to whether the defendant had delivered the property to the plaintiff, or was still withholding it. The note was itself the primary evidence of such warning; and, had the defendant been the first seeking to prove its contents, the general rule would have required of him the writing or an unfruitful notice to the plaintiff to produce it, before permitting the proof to be by parol. But the plaintiff, having testified to his version of the note, could not properly take advantage of the rule to preclude the defendant from contradicting his testimony by evidence of the same class. *Bogk v. Gassert*, 149 U. S. 17, 13 Sup. Ct. 738; *Barranco v. Towner* (City Ct. Brook.) 32 N. Y. Supp. 914. The exclusion of evidence offered in disproof of the plaintiff's testimony as to such warning was error. The judgment must be reversed, and the cause remanded.

(122 Ala. 221)

GARNER v. HALL et al.

(Supreme Court of Alabama. Feb. 2, 1899.)

RAILROADS—STOCK SUBSCRIPTIONS—SUBSCRIPTION NOTES—MATURITY—COMPLETION OF ROAD—PRESIDENT—DECLARATIONS—AUTHORITY—ESTOPPEL.

1. A railroad stock subscription note matured on the decision of the directors that the road was completed, publication in certain papers of such decision to be conclusive notice thereof. *Held*, that such decision and publication did not mature the note unless the road was in fact completed.

2. Where a railroad stock subscription note did not mature until a decision by the directors had been rendered that the road was completed, a demand of the president for payment, reciting that the note was due, and that the road was finished, is a mere declaration of an agent, which would not estop the road from denying such facts, in the absence of proof of authority in the president to make them.

3. Where a railroad stock subscription note did not mature until a decision of the directors, and notice given, that the road had been completed, the company is not estopped, to prevent the running of limitations, to deny that the road was not finished by such a decision and notice, on which the maker of the note refused to act.

4. A railroad is not "finished," within the terms of a stock subscription note not maturing until its completion, so long as its cars are transferred across a river by ferry, pending the completion of a bridge contracted for.

Appeal from circuit court, Dale county; J. M. Carmichael, Judge.

Action by J. L. Hall and L. B. Farley, trustees, against B. P. Garner. From a judgment for plaintiffs, defendant appeals. Affirmed.

This action was instituted on December 24, 1895, by the appellees, J. L. Hall and L. B. Farley, trustees, against the appellant, B. P. Garner, and counted upon a note which was

in words and figures as follows: "\$100.00. Ozark, Ala., April 2d, 1887. I promise to pay to the Alabama Midland Railway Company, as now chartered under the general railroad laws of this state, or any amendment that may hereafter be made either by general law or by act of legislature, its order or assigns, one hundred dollars, at the banking house of Farmers' & Merchants' Bank, Troy, Ala., to be paid in cash on demand at maturity of this note; this amount being the total amount of my subscription to the capital stock of the Alabama Midland Railway Company. It is agreed that said amount, to wit, one hundred dollars, mature and become due and payable whenever the board of directors of said railway company shall decide that the railroad has been finished to a point within one-half mile from the center of the city of Ozark, from one or the other of its terminal points, and that said road is of standard gauge, laid with steel rails. Publication of said decision of said board of directors, to be made in one of the daily papers of the city of Montgomery, Ala., shall be final and conclusive notice to me of the same. It is hereby agreed and made part of the condition of the contract that if the said Alabama Midland Railway Company should fail to complete the work necessary to make this obligation binding by the 1st day of October, 1890, then this instrument is null and void. I hereby waive all and every right which I may now or hereafter have, under the constitution and laws of Alabama, to have any personal property exempt from levy and sale under legal process and chooses in action from garnishment. [Signed] B. P. Garner." After setting out this note in the complaint, the plaintiff averred that the railroad of the Alabama Midland Railway Company was finished within one-half mile of the center of the city of Ozark, Ala., from one or the other of its terminal points, to wit, Bainbridge, Ga., and Montgomery, Ala., prior to October 1, 1890, on, to wit, May 1, 1890, and that said road was in every way built and constructed as required under the stipulations of the instrument sued upon. The defendant filed two pleas, in which he set up as a defense the statute of limitations of six years, averring that the railroad was completed as stipulated for in the note sued upon, and that the board of directors declared and decided that it has been finished as provided for in said contract, and that, in compliance with said contract in the note sued on, the board of directors published, in a daily paper published in the city of Montgomery, that said road had been finished from Ozark, Ala., to one of its terminal points, and that it was completed, as provided for in said contract, on September 27, 1889, more than six years previous to the commencement of the suit in this case. After demurrers were overruled to these pleas, the cause was tried upon issues joined thereon. The plaintiff introduced in evidence the note sued on, and also introduced evidence tending to show that said railroad was completed within one-half mile of the city of Ozark, Ala., laid

with steel rails of standard gauge from Montgomery, Ala., to Bainbridge, Ga., including the construction of the bridge over the Chattahoochee river, in May, 1890. The undisputed facts, as disclosed on the trial, are stated in the opinion. The plaintiff, as a witness in his own behalf, testified that trains were running on regular schedule time on said road in August, 1889, and that the road was regarded as completed on September 27, 1889. The defendant testified that on October 1, 1889, he received a note from the Bank of Troy, Ala., addressed to him, in which he was notified that the note here sued on was at that time due and payable, and he was asked to call at the Farmers' & Merchants' Bank of Troy, and pay the same. This note was signed by "O. C. Wiley, President," and "J. W. Woolfolk, V. President"; and at the same time he received a notice from the cashier of the Farmers' & Merchants' Bank of Troy, Ala., notifying him that his note (the one here sued on) was due and payable. The defendant introduced in evidence the following notice, which was printed in the Montgomery Daily Advertiser, a newspaper published in the city of Montgomery, Ala., in the year 1889, and it appeared in said paper for 10 days, from September 27 to October 7, 1889, inclusive: "Notice to Subscribers. The State of Alabama, Montgomery County. Notice is hereby given that the Alabama Midland Railway has been constructed and completed into and through the counties of Henry and Dale, in Alabama, passing through and into Garden, Ashford, Dothan, Midland City, Newton, and Ozark; that said road is laid with sixty-pound steel rail, and thoroughly equipped, and built in a thoroughly first-class manner, as prescribed in the contract, and subscriptions to the stock of said railway company at the several points named are now declared by the board of directors to be due and payable, according to the terms of subscription. O. C. Wiley, President." The defendant also offered in evidence the following notice, published in Ozark, Ala., for three weeks, commencing October 1, 1889: "Notice to Subscribers. Notice is hereby given that the Alabama Midland Railway having been finished to a point within a half mile of the town of Ozark, and that said road having been built in a substantial and first-class manner, and in conformity with the notice published in the Montgomery Advertiser, the subscriptions to the capital stock of said company are declared by the board of directors to be due and payable, and notes of subscribers can be found with Farmers' & Merchants' Bank at Troy, Alabama, where the subscribers will call or send and pay them. Mr. G. Peterson is the authorized agent to receive and remit the amount and issue the stock. Mr. J. F. McDonald is appointed special agent in collections. J. W. Woolfolk, President, and O. C. Wiley, V. President." The defendant then further testified as a witness that one J. F. McDonald, as the agent of said Alabama Midland Railway Company, came to him between September 17 and October 10, 1889, with the

note here sued on, and demanded payment thereof, and said McDonald had with him, and showed defendant, a copy of the notice published in the Montgomery Advertiser and in Ozark, as above set forth. O. C. Wiley, as a witness for the defendant, testified that in the year 1889 he was the president of the Alabama Midland Railway Company; that on September 27, 1889, he, as said president, called a meeting of the directors of said railway, at which meeting a majority of the directors, in compliance with the laws of said railway company, voted for the passage of a resolution declaring that the subscription notes payable to said railway, including the note sued on, were due and collectible; that said resolution was in substance the same as said notice published in the Montgomery Advertiser on September 27, 1889; that the notice published in Ozark, and sent out by the Bank of Troy, and the demand by McDonald, were issued and directed by authority of said directors; that while there was a regular schedule for the running of freight and passenger trains between Ozark, Ala., and Bainbridge, Ga., in September, 1889, there was no bridge over the Chattahoochee river until May, 1890; and that such bridge constituted a part of the company's line of railroad between Ozark, Ala., and Bainbridge, Ga. The other facts of the case are sufficiently stated in the opinion. Upon the introduction of all the evidence, the court, at the request of the plaintiff, gave to the jury the following written charge: "The court charges the jury that, if they believe the evidence, they should find for the plaintiff for the amount sued for." To the giving of this charge the defendant duly excepted. There were verdict and judgment for the plaintiff. The defendant appeals, and assigns as error the giving of the general affirmative charge in favor of the plaintiff.

Blackman & Wilkinson, for appellant. R. L. Harmon, for appellees.

TYSON, J. The complaint in this case, after setting out the contract in *hæc verba*, avers "that the road was finished to a point within one-half mile from the center of the city of Ozark, from one or the other of its terminal points, to wit, Bainbridge, Ga., and Montgomery, Ala., prior to the 1st day of October, 1890, on, to wit, the 1st day of May, 1890, and that said road was of standard gauge, and laid with steel rails, and the note matured October 1, 1890." The only defense interposed at the trial from which this appeal is prosecuted was the statute of limitations of six years. In the pleas it was averred that the road was completed according to the contract sued on prior to and on the 27th day of September, 1889, this being more than six years before the commencement of this suit. When this case was here on a former appeal, this court said: "It is evident the parties understood that the road might be completed at an earlier date than the 1st of October, 1890, and that it was their design to mature the

note earlier than that date, if and when the road should be earlier completed. The question, then, is: Were the conditions and terms necessary to mature the note complied with and performed more than six years before the bringing of the suit? These were that the railroad should be finished according to the contract, a decision by the board of directors to that effect, and notice to the obligor. Certainly, upon proof of these facts at any time after the execution of the contract, the obligor could not have defeated a recovery upon the ground that the note did not mature until October 1, 1890; and if the obligation matured as to defendant prior to October 1, 1890, it must have matured also as to the plaintiffs.

* * * The finishing of the road was indispensable to fix a liability upon the defendant.

* * * The real intention of the parties was to fasten a matured liability whenever and as soon as the road was finished according to contract, provided it was finished not later than October 1, 1890." *Garner v. Hall*, 114 Ala. 166, 21 South. 835. In *Hall v. Sims*, 106 Ala. 561, 17 South. 534, Justice Haralson, in construing a contract containing substantially the same conditions and terms as the one under consideration, said: "It was the reasonable bona fide completion of the work, according to the terms of subscription, and not the declaration of the directors, that bound the defendant to pay his note. If they made a false declaration, defendant would not have been bound thereby to pay. * * * It was the truth of the fact declared, and not the mere declaration of it, that was important and controlling." The court held in that case that, notwithstanding the directors had made a declaration that was insufficient to mature the note, it might be shown by the holder of the contract by parol that the road had been completed according to its terms, thereby maturing it on the 1st day of October, 1890. The declaration made by the directors on the 27th day of September, 1889, and the notices published in the *Montgomery Advertiser* and the *Ozark Star*, were insufficient to mature the note. *Hall v. Sims*, *supra*. The written demand of date October 1, 1889, upon the defendant, for the payment of the note signed by Woolfolk, president, and Wiley, president, reciting that it was due, and the road had been completed according to the terms of the contract, were mere declarations by an agent; and, in the absence of all evidence touching the scope of their authority by the railway company to make them, they could not affect the rights of plaintiffs. *Brush Electric Light & Power Co. v. City Council of Montgomery*, 114 Ala. 433, 21 South. 960, and authorities there cited. The contention that plaintiffs were estopped by the resolution of the directors and the published notices is without merit, it affirmatively appearing that defendant refused to act upon the representations contained in them. *Sullivan v. Conway*, 81 Ala. 154, 1 South. 647; *Caldwell v. Smith*, 77 Ala. 159; *Bigelow, Estop.* p. 638.

The undisputed facts are that the road was finished from within one-half of a mile of the center of Ozark, of standard gauge, and laid with steel rails, to the Chattahoochee river, on September 27, 1889; that trains, both freight and passenger, were being operated over it between these points; that at the Chattahoochee river the company used boats to transfer freight and passengers across the river from September 27, 1889, to about May, 1890, where they were transported from that point over the road to Bainbridge, Ga., but this was only a temporary arrangement until the bridge could be built; that, when the railway company was incorporated for the construction of the road, it contemplated the building of a bridge across the river, and to this end procured an act of congress to be passed allowing it; the contract for the construction of the road embraced and included the construction of this bridge, and it was constructed and completed under this contract about February 1, 1890; that this bridge constitutes a part of the road between Ozark and Bainbridge. The road from the other terminal point, Montgomery, was completed in May, 1890.

The only remaining question presented for decision is whether the construction of the bridge across the Chattahoochee river was necessary, by the terms of the contract, to the completion of the road between Ozark and Bainbridge. It will be observed that, by the terms of the contract, the railway company was to finish its road to a point within one-half mile of the center of the city of Ozark, from one or the other of its terminal points, by the 1st day of October, 1890, in a certain manner, and its failure to do so rendered the contract void. Had this company undertaken to enforce the collection of this note before building the bridge, it would have been a perfect answer that the road had not been finished. The bridge was necessary to a successful operation of the trains over the road as a continuous line. In the case of *Freeman v. Matlock*, 67 Ind. 99, the suit was on a promissory note given for the common capital stock in a certain railroad, containing the stipulation that the maker, for the purpose of aiding in the construction of said railroad and in consideration thereof, promised to pay, upon the arrival of the first train of cars on said road at a certain place, to the order of the railroad company, a certain sum of money, and that if said road was not completed by a certain day, and the cars running to said place, said note should be null and void. The evidence showed that the cars which ran to the place, and on the day mentioned in the note, were not run over the located and established line of the road, but over a temporary track laid down for the purpose, and that it was four months after that day before the cars were running to said place on said road. The court held that it was not necessary that the road should be perfect and finished in every particular, and its tracks well ballasted; but it should have been so far completed on its located and established

line that the cars might have been and were run as stipulated in the note, and with reasonable regularity thereafter, and that the road was not completed, within the meaning of the note, and that it was therefore void. See, also, the following cases, which support these views: *Railroad Co. v. Holmes*, 101 Ind. 348; *Railway Co. v. Thompson*, 24 Kan. 170; *People v. Tewn of Clayton*, 88 Ill. 45. The case of *Cass Co. v. Chicago, B. & Q. R. Co.*, 25 Neb. 348, 41 N. W. 246, is not, in our opinion, in conflict with the principles announced in these cases; and, if it can be so construed, we would decline to follow it. Had, before the construction of the bridge, the cars and engines of the railroad company been transferred across the river by means of boats or other temporary instrumentalities, this would not affect our conclusion. We hold, therefore, that the note never matured until October 1, 1890, as the bridge was not completed in such manner as to allow trains to pass over it with reasonable safety until between the 22d day of January and the 1st day of February, 1890. The affirmative charge was properly given for the plaintiffs. Judgment affirmed.

(120 Ala. 388)

BURDEN v. STATE.

(Supreme Court of Alabama. Feb. 11, 1899.)

FORGERY—WHAT CONSTITUTES—INDICTMENT.

1. Code, § 4720, provides that any person who falsely forges any instrument purporting in any way to affect any right or interest in property, "or any instrument, being or purporting to be the act of another," is guilty of forgery. Held, that a letter addressed to a person named, stating that the value of a chain was \$10, and signed, is not, on its face, the subject of forgery.

2. Where a paper does not on its face have a capacity to injure or defraud, so as to be the subject of forgery, but is so by reason of extrinsic facts, such facts should be averred in the indictment.

Appeal from city court of Selma; John W. Mabry, Judge.

Willie Burden was convicted of forgery, and appeals. Reversed.

The appellant was indicted, tried, and convicted under the following indictment: "The grand jury of said county charge that, before the finding of this indictment, Willie Burden, alias William Burden, with intent to injure or defraud, did falsely make, alter, forge, or counterfeit an instrument in writing in words and figures substantially as follows, to wit: 'Selma, Ala., Nov. 11th, 1897. Mr. Holmes, Selma, Ala.—Dear Sir: The value of this chain is \$10.00 (ten). Yours, truly, E. H. Hobs.' The grand jury of said county further charge that, before the finding of this indictment, Will Burden, alias William Burden, with intent to injure or defraud, did utter and publish as true a falsely made, altered, forged, or counterfeited instrument in writing, in words and figures substantially as follows, to wit: 'Selma, Ala., Nov. 11th, 1897. Mr. Holmes, Selma, Ala.—Dear Sir: The value of this chain

is \$10.00 (ten). Yours, truly, E. H. Hobs,'—against the peace and dignity of the state of Alabama." The defendant demurred to this indictment upon the grounds (1) that said indictment charges no offense, in that the paper set out therein is not such a paper as the statute makes the subject of forgery; (2) that the paper set out in the indictment is not one by which a pecuniary demand or obligation purports to be created, and the false making of which with intent to defraud is forgery; (3) that the indictment, while setting out the alleged forged instrument, does not set out any writing by which, on its face, any person could be injured or defrauded, and no extrinsic facts are averred showing such intent to injure or defraud. This demurrer was overruled, and the defendant duly excepted. The ruling upon the demurrer to the indictment is the only question presented for review on this appeal.

Mallory, McLeod & Mallory, for appellant.
Charles G. Brown, Atty. Gen., and W. W. Quarles, for the State.

McCLELLAN, C. J. It may be that a writing in the following words, viz.: "Mr. Holmes, Selma, Ala.—Dear Sir: The value of this chain is \$10.00 (ten),"—is the subject of forgery, under certain circumstances extrinsic to the paper itself. Even this we do not decide, however. But it is most clear that on its face this writing, by whomsoever signed or purporting to be signed, does not create, discharge, increase, or diminish a money liability, or transfer or incumber property, or release or impair an existing claim to or lien upon property; and if extrinsic facts exist, which, taken in connection with the paper, impart to it a capacity to injure or defraud, they should have been averred in the indictment. No such facts are alleged in this indictment, and therefore neither of its counts charges any offense. *Rembert v. State*, 53 Ala. 467; *Dixon v. State*, 81 Ala. 61, 1 South. 69; *Williams v. State*, 90 Ala. 649, 8 South. 825. The construction put upon the words, "or any instrument or writing, being or purporting to be the act of another," in section 4720 of the Code, would lead to this: that if a man signed the name of another to a statement that the earth is round, or that the moon is made of green cheese, or other like entirely innocuous assertion, by means of which there is no possibility of any person being injured or defrauded, he would be guilty of forgery. The statute is not open to such interpretation, we think; and we reiterate, with respect to the present form of the provision, what has been many times declared by this court: A writing, to be the subject of forgery, must, either upon its face, or by reason of attendant circumstances, have, upon the assumption of its genuineness, a capacity to injure or defraud. The trial court erred in overruling the demurrer to the indictment. For this the judgment of conviction will be reversed, and the cause will be remanded.

(122 Ala. 320)

COLLIER v. WERTHEIMER-SCHWARTZ SHOE CO.

(Supreme Court of Alabama. Feb. 11, 1899.)

FRAUDULENT CONVEYANCES—COLLUSIVE ATTACHMENT.

An attachment of an insolvent debtor's goods, issued through collusion between himself and the attaching creditor, on a ground which did not exist, and for the purpose of giving the attaching creditor a preference and defrauding other creditors, may be set aside at the instance of another creditor, under Code, § 818 (3544), authorizing the filing of a bill by a creditor to subject to the payment of his claim any property fraudulently transferred by the debtor, and section 2156 (1735), making suits commenced, and decrees or judgments suffered, with intent to hinder, delay, and defraud creditors, void as against them.

Appeal from chancery court, Pike county; Jere N. Williams, Chancellor.

Bill by the Wertheimer-Schwartz Shoe Company, a creditor of M. F. McBryde, against J. M. Collier to set aside as fraudulent and void an attachment sued out by the appellant, J. M. Collier, against the said McBryde. J. M. Collier is made a party defendant. The material averments of the bill are sufficiently stated in the opinion. To this bill the defendant demurred upon the following grounds: (1) That said bill of complaint fails to set forth facts constituting the alleged fraud with sufficient precision and definiteness. (2) That said bill of complaint fails to allege that said attachment proceedings were fraudulent. (3) That said bill of complaint fails to deny that any one of the grounds upon which an attachment may legally issue existed. (4) That said bill of complaint fails to allege that ground upon which attachment could legally have issued, other than the grounds upon which said attachment was issued, did not exist. (5) Said bill of complaint fails to deny that other grounds than the grounds upon which said attachment issued, existed upon which said attachment could legally have issued. (6) Said bill of complaint fails to allege that said suit of attachment was commenced with the intent to hinder, delay and defraud the creditors of said M. F. McBryde.

Upon the submission of the cause upon this demurrer, the chancellor rendered a decree overruling it. From this decree the defendant J. M. Collier appeals, and assigns the rendition thereof as error. Affirmed.

W. A. Collier and W. H. Parks, for appellant. C. P. De Yampert, for appellee.

HARALSON, J. 1. The bill in this case avers that the attachment was sued out by the plaintiff against the defendant in attachment on the statutory ground that the defendant, "McBryde, has moneys, property or effects liable to satisfy his debts, which he fraudulently withholds; * * * that said ground of attachment did not exist; that the

plaintiff knew that there was no probable cause for the issuance of said attachment upon said ground, or on any other ground under the statute." It further avers, that the defendant was insolvent, and the plaintiff and defendant in attachment, knowing that there was no ground for said attachment, conspired and agreed together, expressly or impliedly, that said attachment should be sued out and levied, and that they thereby fraudulently and illegally perverted the spirit and purposes of the attachment law in a manner that deprived complainant of the power of making and collecting his debt out of the effects of the said McBryde—the defendant in attachment.

2. The statute provides, that "all conveyances, or assignments in writing of any estate or interest in real or personal property, and every charge upon the same, made with the intent to hinder, delay, or defraud creditors, purchasers, or other persons of their lawful suits, damages, forfeitures, debts or demands; and every bond, or other evidence of debt given, suit commenced, decree or judgment suffered, with the like intent, against the persons who are or may be so hindered, delayed or defrauded, their heirs, personal representatives and assigns, are void." Code, § 2156 (1735). In construing this statute it was said by this court: "No one doubts that a writ of attachment, issued collusively between creditor and insolvent debtor, for the purpose of giving preference, and with the intent to effect a fraudulent transfer of the debtor's property to the plaintiff in attachment, through the machinery of the attachment process is a void suit within the meaning of section 1735 of the Code. Nor can we see any reason why the suffering such an attachment by the debtor, with like fraudulent intent, is not an 'attempt' to fraudulently transfer the attached property within the meaning of section 3544 of the Code" (section 818 of the Code of 1896), which authorizes a simple contract creditor to file a bill to subject to the payment of his debt any property which has been fraudulently transferred or conveyed, or attempted to be fraudulently transferred or conveyed by his debtor. *Cartwright v. Bamberger*, 90 Ala. 405, 8 South. 264; *Bank v. Lauchheimer*, 102 Ala. 454, 14 South. 776; *Rice v. Less*, 105 Ala. 298, 16 South. 917; *Comer v. Heidelbach*, 109 Ala. 220, 19 South. 719.

3. If the facts averred in the bill are true, there can remain no doubt that under our own decisions, well supported by reason and authority elsewhere, the deceitful agreement charged against the parties to this attachment proceeding, was a fraud perpetrated on the defendant's other creditors, the direct effect of which was to hinder and delay them in the collection of their debt against the defendant. We need not here repeat, in support of the equity of the bill, what has been so fully said in the cases cited above on this subject.

There was no error in overruling the demurrer to the bill.

Affirmed.

(122 Ala. 349)

BIRMINGHAM RAILWAY & ELECTRIC CO. v. BIRMINGHAM TRACTION CO.

(Supreme Court of Alabama. Feb. 1, 1899.)

APPEAL—DISMISSAL—DELAY IN FILING TRANSCRIPT—STREET RAILROADS CROSSING OTHER ROADS—PRIOR RIGHTS.

1. An appeal will not be dismissed because the recitals of the certificate and the bond as to the term to which it is taken are conflicting, since the term to which an appeal is returnable is fixed by law.

2. Delay in filing a transcript is not cause for dismissal of the appeal where it is not prejudicial to the appellee.

3. Where a street-railway company had authority, under its charter and license from the city, to operate its road by electricity, prior to the construction of another electric road across its tracks, its undertaking to exercise such right by erecting its trolley wire across the latter road without first condemning the right of way and making compensation is not violative of the constitution guarantying that property shall not be taken until compensation be first made.

Appeal from chancery court, Jefferson county; Thomas Cobbs, Chancellor.

Bill by the Birmingham Railway & Electric Company against the Birmingham Traction Company for an injunction restraining the defendant, its officers and agents, from erecting or causing to be erected an overhead trolley wire across the trolley wire of the complainant at Eighth avenue and Twenty-Fourth street in the city of Birmingham. Upon the filing of the bill a temporary injunction was issued. The averments of the answer material to the questions presented on the present appeal are sufficiently stated in the opinion. The defendant moved to dismiss the bill for the want of equity, and also moved the court to dissolve the injunction for the want of equity in the bill and on the denials of the answer. Upon the submission of the cause upon these motions, the chancellor overruled the motion to dismiss the bill for the want of equity, and dissolved the injunction on the denials of the answer. From this decree dissolving the injunction the complainant appeals, and assigns the rendition thereof as error. Affirmed.

Walker, Porter & Walker, for appellant. Alex. T. London and John London, for appellee.

TYSON, J. This cause was submitted on a motion to dismiss the appeal, and, if that is overruled, then upon its merits. The appeal and supersedeas bond were filed on the 1st day of June, 1898. The certificate and the notice of appeal recite that the appeal was taken to the present term of this court. The supersedeas bond recites that complainant "has this day applied for and obtained an appeal, returnable to the next term (1898) of the supreme court." Under our decisions, it can make no

difference what the recitals of the certificate of appeal or bond were; the appeal was returnable to the then term of the court. *Collier v. Coggins*, 103 Ala. 281, 15 South. 578; *Capehart v. Granite Mills*, 97 Ala. 353, 12 South. 44. Section 437 of the Code of 1896 required this appeal to be made returnable to the first Monday of the term next after the expiration of 20 days from the date of the appeal, to wit, the 27th day of June, 1898. It appears, however, that the court adjourned on the 23d day of June; and this is offered as an excuse for not filing the transcript until the 6th day of December following, being the first day upon which the case could have been called, under the rules of this court. The rule on this question is as follows: "Upon satisfactory excuse being shown for the delay, the court may, in its discretion, permit the transcript to be filed, and the cause docketed, for the first time, after the adjournment of the term to or during which the appeal is returnable, upon such terms as the court may impose." It does not appear that the appellee was, and, indeed, it is inconceivable how it could have been, prejudiced by the delay in not filing the transcript at an earlier date. The motion to dismiss the appeal must be overruled. *Collier v. Coggins*, *supra*.

This brings us to a consideration of the merits of the controversy which is presented by this appeal from the decree of the chancellor dissolving the injunction sued out by complainant against the respondent, upon the denials in the answer. It appears from the averments of the bill that complainant was operating, at the time of its filing, and had been for a long time prior thereto, a street railway, using electric power, along and over certain streets in the city of Birmingham; that respondent was also operating a street railway upon certain streets, using steam power, whose tracks crossed the tracks of complainant's line at the intersection of Eighth avenue and Twenty-Fourth street. It is averred in the bill that respondent proposes to convert its road at the point of intersection into an electric road, and to this end has a large force of men at work near this point, engaged in erecting poles, wires, etc., on each side of, and within a short distance of, complainant's railroad tracks; and complainant believes and alleges that respondent will erect and place its trolley wires across complainant's trolley wire within a short space of time, without giving to it any notice, and obtaining its consent; that respondent has, without its consent, already crossed two of its tracks at another place. The bill further alleges that the erection of an overhead trolley wire at the point above specified will greatly injure and damage the complainant in the enjoyment of its franchise, by destroying the alignment of its trolley wire, thereby causing its trolley poles and wheels to leave the trolley wire, thus breaking complainant's span, guy, or stay cables, causing the trolley wire to lower or sag to short-circuit or ground the current of electricity, which would

necessarily stop all of its cars while the current was so short-circuited or grounded; that, as a result of the poles leaving or being displaced from the trolley wire, the cross-arms and poles, to which the span or guy wires are attached, would likely fall on complainant's cars, containing passengers, thereby endangering their lives, and the lives of persons and animals upon the street at that point. The bill alleges as a further element of injury to complainant's enjoyment of the franchise that the trolley wire about to be erected by respondent would be so defective as to interfere with the electric current used by it, by creating frequent short circuits of the current, thereby impeding the operation of its cars, its traffic, and increasing its schedule time between the termini of its line of road, and injuriously affecting the delicate machinery in the power house, from which its supply of electric current is drawn; and, further, that in case an uninsulated or defective overhead trolley wire is erected, it would have a tendency to intermix the electric currents used by complainant and respondent, and would give the latter an undue advantage by reason of its being able to draw a supply of current from the trolley wire of complainant, and would work a hardship upon complainant by having its supply of current drawn away from its cars, and used by cars of respondent. In the concluding paragraph of the bill it is averred that respondent has not offered to pay complainant any compensation or damages for the right to cross its track and trolley wire with the trolley wire which it is about to construct and erect, and that respondent has taken no steps to condemn to its use the right of way across complainant's track and trolley wire.

In view of the fact that appellant's counsel, in their brief, rest their entire contention for a reversal of the decree dissolving the injunction upon an alleged defect in the answer in respect to this concluding paragraph, we will only set forth such averments contained in the answer as are pertinent to a decision of the question thus presented for consideration and decision. These averments are that respondent's assignors owned and operated the line of street railroad at the point of intersection, complained of in the bill, long before the complainant constructed its track and erected its trolley wire across the track belonging to the respondent; and that respondent, or the corporations whose rights and franchises it acquired, a long time before the line being operated by complainant was built or projected, had full power and authority under its charter, and by the license and consent of the municipal authorities of the city of Birmingham, to equip and operate its road by means of electricity, which was well known to the officers and agents of complainant. The specific averments relating to the concluding paragraph are in the following language: "Respondent admits that it has not offered to pay to complain-

ant any compensation for stringing its trolley wire above its own right of way, acquired by its assignor long before the complainant had any rights at that place, and respondent is advised and believes, and upon such advice and belief avers, that it was not incumbent upon this respondent to make such offer." It must be conceded from this averment that the averments in the concluding paragraph of the bill that respondent has not offered to pay complainant any compensation for the right of way across its track and trolley wire, and has taken no steps to condemn to its use such right of way, are true. The averment of the answer is a mere denial by respondent, predicated upon its priority of right, in point of time, over the street at the point in controversy, of its liability to compensate complainant for a right of way. And upon the question of prior occupancy by respondent of the street there appears to be no serious controversy. While the bill avers nothing specifically as to this, no legitimate inference to the contrary can, by the rules governing the construction of pleadings, be drawn. We have, then, the sole question to deal with whether or not the respondent, in undertaking to erect its trolley wire along its own right of way, acquired prior to the construction of the road by respondent or its assignors, was violating that clause of the constitution guarantying to complainant that its property shall not be taken until just compensation be first paid. In the absence of any objection interposed by the city to the maintenance and use of the respective structures of complainant and of respondent, it will be presumed that the privilege of occupying the streets, as exercised by them both, is acquiesced in by the municipal authorities. Highland Ave. & B. R. Co. v. Birmingham Union Ry. Co., 93 Ala. 505, 9 South. 568. Indeed, it appears from the answer that respondent was erecting its wires for the purpose of converting the power by which its cars were being propelled, under compulsion of the city authorities, and by their express license. So, then, each of these companies were in the lawful exercise of the respective franchises when the respondent began its work of converting its system of steam power into that of electric power; having the right, if the averments of the answer are true, from the date of its corporate existence to exercise its franchise by the use of electricity. The mere postponement by respondent of the exercise of this right, which, it is averred, was known to complainant, cannot, in our opinion, preclude it from exercising it, and invest in the complainant such a superior interest in the use of the street, which it acquired subsequent to the acquisition by respondent of the right to use electricity, as that entitles it to demand compensation for such use. Whether the complainant would be entitled to compensation had it acquired a prior servitude is not involved, and we do not decide it. Decree affirmed.

(122 Ala. 394)

TRAPP v. STATE ex rel. BURGIN, Clerk.
(Supreme Court of Alabama. Feb. 1, 1899.)

SHERIFFS—FEES—WARRANTS OF ARREST—SERVICE
—COSTS—PAYMENT—CONVICT FUND.

1. Act Feb. 18, 1897, § 1, provides that a sheriff's fee of \$2 shall be paid out of the convict fund for executing a warrant of arrest where a defendant is sentenced to the penitentiary. Code, § 3741, authorizes sheriffs to execute process required of constables, and provides that they shall receive the same fees fixed for such service. *Held*, that the latter section does not apply to warrants of arrest issued by a committing magistrate, executed by a sheriff as authorized by Id. § 5209, and hence the sheriff was entitled to a fee of \$2 therefor, though the constable's fee for such service, fixed by Id. § 4570, was only 50 cents.

2. Act Feb. 18, 1897, § 3, requiring the clerk, "presently after a defendant's conviction and sentence to the penitentiary to make out a bill of costs to be paid from the convict fund," renders Code, § 4570, inapplicable so far as it requires the return of an execution nulla bona against the convict as a condition to payment of costs by the state, in view of section 4559, requiring the sheriff to retain the execution 30 days before making such return.

Appeal from city court of Montgomery; A. D. Sayre, Judge.

Mandamus by the state, on relation of W. M. Burgin, clerk of the criminal court, against S. B. Trapp, as president of the board of inspectors of convicts, to compel respondent to request the state auditor to draw a warrant for the payment of a bill of costs. Judgment for relator, and respondent appeals. Affirmed.

The state, on the relation of W. M. Burgin, clerk of the criminal court of Jefferson county, filed his petition, addressed to the judge of the city court of Montgomery, in which he alleged that in the criminal court of Jefferson county one Collins was indicted and tried for murder, was convicted of murder in the second degree, and sentenced to imprisonment in the penitentiary for a term of 10 years, and that at the time of the filing of said petition he was serving out said sentence in the penitentiary. The petition then averred that presently after such conviction and sentence the relator made out a bill of costs in said cause, containing no item not enumerated in section 1 of the act approved February 18, 1897, and that said bill of costs, duly verified by affidavit, as required by section 3 of said act, was sent to S. B. Trapp, as president of the board of inspectors of convicts, but that, after the examination of said bill of costs, the said Trapp, as such president of the board of inspectors of convicts, refused to request the auditor, in writing, to draw his warrant upon the treasurer for the payment of said bill of costs, on the ground, as alleged by said Trapp, that the bill contained an item of two dollars as sheriff's fee for executing a warrant of arrest issued by a justice of the peace as committing magistrate. It is alleged that the facts in reference to the warrant of arrest were that the warrant of arrest charging said Collins with murder was duly issued by the justice of the peace of Jefferson county, and

by him placed in the hands of the sheriff of said county, and was by said sheriff duly executed by arresting said Collins, and carrying him before said magistrate, before whom he was committed to jail to await the grand jury, and was thereafter duly tried and convicted as above set forth. It was then averred in said petition that said Trapp, as president of the board of inspectors of convicts, based his refusal upon the further and additional ground that said Collins was not shown to have been insolvent by the return of execution for said costs against him of "No property found." The prayer of the petition was for the issuance of a writ of mandamus to compel said Trapp to request the auditor, in writing, to draw his warrant on the state treasurer in favor of the relator for the payment of said bill of costs. The answer of the respondent, filed by the attorney general, was as follows: "The respondent for answer to the petition in the above-entitled cause admits the truth of the facts therein stated, and denies the legal conclusion drawn therefrom; and respondent expressly denies that the sheriff is entitled to a fee of two dollars for executing the writ of arrest in said cause, issued by the justice of the peace." Upon the hearing of the cause the prayer of the petition was granted, and a peremptory writ of mandamus ordered issued to the respondent, requiring him to request the auditor, in writing, to draw his warrant on the state treasurer in favor of the relator for the payment of the bill of costs, as prayed for in the petition. From this judgment the respondent appeals, and assigns the rendition thereof as error.

Charles G. Brown, Atty. Gen., for appellant.
Wm. L. Martin, for appellee.

SHARPE, J. The act of February 26, 1875, which is embodied in section 3741 of the Code, provides that "the sheriff is authorized to execute all mesne and final process which is required of constables and shall receive the same fees and compensation therefor." Its purpose was to extend the authority and duties of the sheriff to matters in which he had theretofore been without authority or duty. That section 3741 had no reference to the execution of warrants of arrest, appears from the consideration that at the time of its enactment, and for a long time prior thereto, the sheriff had full authority to execute such warrants, and the statutes giving such authority have been carried into each of the Codes thereafter adopted. Code, § 5209. By section 4576 of the Code the constable's fee for executing a warrant of arrest is 50 cents, and by section 4565 the sheriff's fee for the like service is \$2. But the seeming conflict between these provisions for fees disappears with the exclusion of warrants of arrest from the operation of section 3741. The case here under consideration falls within the class mentioned in the act of February 18, 1897 (note to section 4511 of the Code), and may,

therefore, be determined independently of other statutes relating to such fees. Section 1 of this last act provides that "whenever a defendant is convicted and sentenced to the penitentiary the following items of costs in the case shall be paid out of the convict fund to the extent and in the manner hereinafter prescribed," and, following an enumeration of other items, is, "Sheriff's fees executing each warrant or writ of arrest, two dollars." Section 3 of that act is as follows: "That, presently, after such conviction, the clerk of the court in which the conviction is had, shall make out a bill of the costs in the case, containing no items, not enumerated in section 1, of this act; he shall make oath to the correctness of each item of said bill, and that the same is a legal charge against the defendant. He shall forward the bill of costs to the president of the board of inspectors of convicts, or the officer discharging his duties, who shall carefully examine the same, and, if found correct, he shall request the auditor in writing to draw his warrant upon the treasurer for the payment of said bill to said clerk out of the convict fund. Provided, that no costs shall be paid, until the convict has been delivered to the penitentiary officials, and, where a convict is sentenced in more than one case, the costs in the succeeding cases shall not be paid, until he has served the preceding sentences." This statute was enacted after the adoption of the Code, and is an alteration of the law as it had existed in section 4570 of the Code in so far as that section required execution against a penitentiary convict, and a return thereon of "No property" as a condition precedent to the payment of costs by the state. The later statute applies "whenever a defendant is convicted and sentenced to the penitentiary," whether he is solvent or insolvent; and in view of the peremptory direction therein given that the proceedings for such collection of costs shall be had "presently after conviction" there is no time allowed for the exhaustion of an execution, which, under section 4559 of the Code, could not have been returned within 30 days after it had gone into the hands of the sheriff. It is the plain duty of the respondent, as president of the board of inspectors, enjoined upon him by the statute, to request the auditor, in writing, to draw his warrant on the treasurer as prayed in the petition; and the judgment of the city court awarding the mandamus will be here affirmed.

(122 Ala. 289)

FIRST NAT. BANK OF TUSCALOOSA v. LELAND.

(Supreme Court of Alabama. Feb. 7, 1899.)

PLEADING—ESTOPPEL—REPLICATION—BILLS OF EXCHANGE—PAROL EVIDENCE—FILED INTERROGATORIES—MOTION TO STRIKE—MARRIED WOMEN—POWER TO CONTRACT—AGENCY OF HUSBAND—PARTNERSHIP—DECLARATIONS.

1. A plea, of a drawer of a bill of exchange accepted by L. & Co., alleging that she drew the

bill to secure a debt of her husband, L., does not on its face show that she drew the bill to secure L. & Co., and that she is estopped to assert that her husband was the sole proprietor of the firm of L. & Co.; and hence the issue of such estoppel can be raised only by replication, and not by demurrer.

2. A woman who drew a bill of exchange accepted by a firm may show by parol that it was drawn by her to secure a debt of her husband, who was a member of the firm.

3. Answers to filed interrogatories propounded by an adverse party under Code, § 1850 (2816), are properly stricken where they are not responsive to the questions.

4. Under Code, § 1855 (2819), authorizing the suppression of impertinent questions in filed interrogatories propounded by a party to his opponent, it is not error to permit answers to propounded questions to stand, after striking out answers to impertinent questions.

5. Authority of a husband to declare that his wife is his partner in business cannot be implied from his authority to attend to her business generally.

6. Under Code, § 2526 (2346), giving a wife capacity to contract in writing as if she were sole, with her husband's written assent, she has no power to confer parol authority on her husband to make a contract in her name.

7. Declarations of an alleged partner, not made in the presence of the alleged co-partner, are inadmissible to prove the partnership.

Appeal from circuit court, Tuscaloosa county; S. H. Spratt, Judge.

This action was brought by the First National Bank of Tuscaloosa against Ella M. Leland. Upon the introduction of all the evidence, the court at the request of the defendant gave to the jury the general affirmative charge in her behalf, to the giving of which charge the plaintiff duly excepted. There were verdict and judgment for the defendant. The plaintiff appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved. Affirmed.

Frank S. Moody and Jones & Brown, for appellant. Foster & Oliver, for appellee.

HARALSON, J. 1. The appellant sued the appellee on two bills of exchange, each drawn by appellee,—who was the wife of W. A. Leland, though the complaint does not show that fact,—in favor of the appellant, the plaintiff below, on W. A. Leland & Co., one bearing date, 18th March, 1893, for \$150, payable on 20th May, 1893, the other for \$423.65, dated 13th April, 1893, and payable on 15th July, 1893, each bill containing by indorsement on its back signed by defendant, a waiver of exemptions as to personal property, and a waiver of presentment, protest and notice thereof.

The defendant pleaded two pleas to the complaint, the first, "that she was, at the time of the making of said bills of exchange, and now is, a married woman, the wife of W. A. Leland, that said bills of exchange were given to secure, renew, or extend a debt, owing to plaintiff by her said husband, W. A. Leland, she standing in the relation of surety on said bills of exchange for her said husband," and the second, "that at the time of the making of the bills of exchange sued on, she was a

married woman, W. A. Leland being her husband, and that she did not have the assent in writing of her said husband, to make the contracts here sued on."

Under our statutes, if either of these pleas was true, it presented a good and meritorious defense to the suit; and if both were true, they presented a double defense to the maintenance of the action.

The plaintiff demurred to the first plea on many grounds, among them, that the plea does not show that W. A. Leland & Co., the acceptors of the bills, is the same person as W. A. Leland, the defendant's husband; that the bills of exchange show that the debts are those of defendant, the drawer or of W. A. Leland & Co., the acceptors, the only parties to the bills; that the plea does not aver, that W. A. Leland & Co. are the same as W. A. Leland, the defendant's husband, and she cannot contradict the written contract, by saying that the debt secured by the bill is the debt of a stranger; that she cannot contradict the written instruments by showing that the debtor is a party other than one of those who the said bills show are the debtors, and for the further reason, that if it be true as averred in the plea, that the debts secured by the bills are the debts of W. A. Leland, the defendant is estopped from setting up that fact against the plaintiff, because the defendant drew said bills on W. A. Leland & Co., and cannot now be heard to say as a defense to an action thereon, that W. A. Leland & Co. is not a corporation or a partnership composed of two or more persons.

The plea on its face does not show that the defendant is estopped to set up the defenses thereby interposed. The matter of estoppel set up in the demurrer arises dehors the plea, and the demurrer setting up such facts is a mere speaking demurrer. It was an attempt to reach by demurrer, that which should have been set up by replication to the plea. Matters of estoppel in pais are the subjects of pleas in bar.

2. The plea itself, furthermore, plainly enough shows, that the debts sued on were the debts of W. A. Leland, the defendant's husband; and that W. A. Leland, of W. A. Leland & Co., whether that firm consisted of W. A. Leland alone, doing business under a firm name, or in partnership with others, was the husband of the defendant. If it was true as averred in the plea, that the bills sued on, "were given to secure, renew, or extend debts of her said husband, W. A. Leland, and that she stands in relation of surety on said bills of exchange for her said husband," it could scarcely make any difference who composed said firm, if said Leland was a member of it, or whether it consisted of one or more persons trading under a name indicating a partnership. Code, § 2529 (2349); *McNeil v. Davis*, 105 Ala. 657, 17 South. 101; *Clement v. Draper*, 108 Ala. 211, 19 South. 25; *Richardson v. Stephens*, 114 Ala. 238, 21 South. 949. The name of Leland & Co. imports a partnership, but if

a person does business under a firm name, the reputed firm may be sued by such name, and the execution will run against the partnership in name, leviable only on its property, being in the nature of a proceeding in rem, and not in personam. *Birmingham Loan & Auction Co. v. First Nat. Bank*, 100 Ala. 249, 13 South. 945. The demurrer to the plea was properly overruled.

3. The defendant below, under the provisions of Code, § 1850 (2816), filed interrogatories to the plaintiff. One of the officers answered the interrogatories. The answers were not responsive to the questions propounded, and were, besides, illegal evidence. There was no error in striking them, nor in allowing what remained thereafter of the deposition to be read in evidence by defendant. Code, § 1855 (2819); *Culver v. Railway Co.*, 108 Ala. 330, 333, 18 South. 827.

4. The witness, Moody, for plaintiff testified, that he had not seen the books of the firm of W. A. Leland & Co., was not present when it was formed, and that he only knew of the members of said firm from what he had been told. It was not attempted to be shown by him that he ever received any information on the subject from the defendant, Mrs. Leland. Nor was there any proof that she ever admitted that such a partnership existed, or that she ever held herself out as a partner, or had anything to do with said firm. Several questions were propounded to said witness, the object of which was, to show by the declarations of W. A. Leland, defendant's husband, or from others besides Mrs. Leland, who composed it, and that Mrs. Leland constituted the company; that she owned a farm, and her husband attended to it and all her business, and that at the time the money was loaned for which the bills of exchange were given, said Leland told witness, who was president of the plaintiff corporation, that defendant was a member of said firm.

It is well settled, that admissions of the husband in relation to the business of the wife, not made in her presence, are not binding on her, especially when acting as her agent, as to any past transaction, or which are not explanatory of some contemporaneous one within the scope of his authority, or made in the execution of his agency. Certainly if an agent to attend to her business generally, such an agency would not imply an authority to declare her to be his partner in business. *Mitcham v. Schuessler*, 98 Ala. 635, 13 South. 617; *Agnew v. McGill*, 96 Ala. 496, 11 South. 537. Moreover, under section 2346 of the Code of 1886, the wife could not contract so as to bind herself, except in writing, and with the written assent or concurrence of the husband expressed in writing; and she was incapable of conferring authority resting in parol, upon her husband, or any other person, to make or sign a contract in her name. *Clement v. Draper*, 108 Ala. 211, 19 South. 25. And, so far as the declarations of the husband sought to be introduced for the purpose of showing a part-

nership between himself and the defendant are concerned, it may be said, that the declarations of one partner not made in the presence of his co-partner are never competent to prove the existence of the partnership between them. It is only when the partnership has been otherwise proved, that the declarations of one partner are admissible against the other, in the conduct of the partnership business. The existence of a partnership is a fact, to which a witness may testify when he has knowledge of its existence, but it can never be established by general reputation, or on hearsay evidence. *Clark v. Taylor*, 68 Ala. 454; *Banking Co. v. Smith*, 76 Ala. 572. All this evidence, then, of said witness, Moody, which was excluded, constituting the basis for assignments of error from 6 to 12, inclusive, was properly excluded.

5. Mrs. Leland testified, that she signed her name where it appears on said bills introduced in evidence and to the waiver of exemptions, protest and notice thereon, and that her husband, who was doing business under the name of W. A. Leland & Co., requested her to sign said bills, and at the same time, he signed the name of W. A. Leland & Co. as acceptor, and to the waivers of protest and exemptions where it appears on the bills; that at the time, she owed the plaintiff nothing, and said bills were made to secure a debt which her said husband owed the plaintiff; that at the time of the trial and at the time said bills were signed and for a long time prior thereto, she was a married woman, the wife of said W. A. Leland, the same person who had carried on business under the name of W. A. Leland & Co., who contracted the debts for which said bills were given, and who had signed the name of W. A. Leland & Co. as acceptor of said bills; that her husband had not signed any writing in connection with or in reference to said bills and the drawing of the same by her, other than the bills themselves and the waivers on the backs of them show; that her husband requested her to sign the bills, and at the same time he signed the name of W. A. Leland & Co. on them, where that name appears, and that W. A. Leland & Co. was not a partnership, but was her husband, carrying on business in that name. On the cross-examination she testified, that she did not know for whose debt the bills were given, nor the consideration for the same, but that the debt was not her own, and she signed them at the request of her husband. There was no evidence in conflict with these statements of hers.

6. It sufficiently appears, that the debts for which the bills were given were owing by W. A. Leland, and that they were in renewal of former bills; that the wife signed them at the request of her said husband; that she was, really, an accommodation drawer, and was in substance no more than a surety for her husband for the payment of the bills. Under the first plea, therefore, the defendant was entitled to the general charge.

It is unnecessary to consider other assignments of error.

Affirmed.

(122 Ala. 362)

CHATTANOOGA S. R. CO. v. DANIEL
et al.

(Supreme Court of Alabama. Feb. 8, 1899.)

STOCK-KILLING CASE—DUTY OF RAILROAD COMPANY—BURDEN OF PROOF—CONFLICTING EVIDENCE.

1. The killing of plaintiff's ox by defendant's train being admitted, defendant has the burden of showing compliance with the duties imposed by the statute.

2. Defendant's request for the general affirmative charge is properly denied, though the engineer in charge of the train which killed plaintiff's ox stated that the engine and train were provided with all modern appliances for stopping trains, and that, when the ox ran on the track, proper signals were given and the brakes applied; a witness for plaintiff testifying that the train was 100 or 150 yards from the ox when the whistle blew, and that the ox was then standing still, and the speed of the train was never checked.

3. Though the statute imposes no duty on a railroad company as to stock seen near the track, the common law requires it to give signals to frighten the stock away when seen near the track under circumstances indicating a disposition to go onto it, and, if necessary, to check or stop the train.

Appeal from circuit court, Cherokee county; J. A. Bilbro, Judge.

Action by L. A. Daniel and another against the Chattanooga Southern Railroad Company for the killing of an ox. Judgment for plaintiffs. Defendant appeals. Affirmed.

The only rulings of the trial court which are assigned as error in this court are the refusals of the court to give the several charges requested by the defendant. The facts of the case necessary to an understanding of these charges, and the rulings thereon, on this appeal, are sufficiently stated in the opinion. Upon the introduction of all the evidence, the defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(1) The court charges the jury, if they believe all the evidence, they will find the issues in favor of the defendant. (2) The court charges the jury, if the jury believe all the evidence, they will find for the defendant as to the cow." "(4) The court charges the jury that if the ox was grazing 25 yards away, showing no intention of running towards train, no duty to apply the brakes or blow the whistle arose until the ox started towards the train. (5) The court charges the jury, if they believe from all the evidence that when the train first came in sight of the steer he was grazing off some 20 or 25 yards from the track, not showing any disposition to come towards the track, and if the jury believe from the evidence that when the steer started towards the track the train was so near that it could not

have been stopped, by the use of all appliances used on well-regulated trains, before it struck the steer, then the defendant is not liable as to the steer." The third charge is not here copied, since, as stated in the opinion, the assignment of error as to the court's refusal to give said charge is not insisted upon by the appellant.

Burnett & Cull, for appellant. Daniel & Brindley, for appellees.

DOWDELL, J. This was an action for damages for the negligent killing of an ox, the property of plaintiffs in the suit, by defendant's locomotive and train. The killing by defendant's train was a conceded fact. This made a prima facie case for plaintiffs, and placed upon the defendant the burden of exculpating itself from negligence in the killing by showing a compliance with the duties imposed by the statute. *Railroad Co. v. Harris*, 98 Ala. 326, 13 South. 377; *Railroad Co. v. Blanton*, 84 Ala. 157, 4 South. 621; *Railroad Co. v. McAlpine*, 75 Ala. 114; *Railroad Co. v. Bayliss*, Id. 466; *Railroad Co. v. Posey*, 96 Ala. 262, 11 South. 423.

The defendant requested, in writing, five charges, as shown by the record. The refusals of the trial court to give these charges are the only errors assigned. The first and second charges requested are, in effect, the same, and nothing more nor less than the general affirmative charge. The engineer in charge of the locomotive which did the killing, testifying in behalf of the defendant, stated that the locomotive and train were provided with all the modern appliances for stopping trains used on well-regulated railroads, and that when the ox ran upon the track the proper signals were given, and the brakes were applied. This being true, the natural result would have been to check the speed of the train. The witness Joe Edge, who was examined on behalf of the plaintiffs, testified that the train was about 100 or 150 yards from the ox when the whistle blew, and that the ox then seemed to be standing still on the track, and that the speed of the train was never checked. There was therefore clearly a conflict in the evidence as to a material fact. Where there is a conflict in the evidence as to a material fact, or where the evidence is of that character that it will authorize a reasonable inference of a material fact negativing the right of recovery of the party requesting the general charge, in such cases the general charge should never be given. *Anderson v. Railroad Co.*, 109 Ala. 129, 19 South. 519; *Moody v. Railroad Co.*, 99 Ala. 553, 13 South. 233.

The statute imposes no duty or requirement upon a railroad company, in the operation and running of its trains, as to stock when seen in proximity to the railroad track. By the express terms of the statute the duties of applying the brakes and reversing the

engine are exacted and required when the obstruction is perceived upon the track. But, independent of the statute, there are duties and obligations imposed under the common law. Among such duties is that of ringing the bell or blowing the whistle to frighten away stock, when seen, or by due diligence could have been seen, in close proximity to the track, under circumstances indicating a disposition of going upon the track; and, if necessary to prevent injury to the stock, the further duty of checking the speed or stopping the train. *Railroad Co. v. Jones*, 56 Ala. 507; *Railroad Co. v. Bayliss*, 77 Ala. 429; *Railroad Co. v. Watson*, 91 Ala. 483, 8 South. 793. In all of these cases, however, it must be observed that the mere fact of close proximity alone of the animal is not sufficient to exact a performance of these duties by the railroad company or its agents, but such close proximity must be attended with circumstances or conditions indicating danger.

There was evidence on the part of the defendant that when the ox was first seen by the engineer the animal was grazing, with head down, in an open field, and about 25 yards from the railroad track, and manifested no disposition of going towards the track, and not until the train was in about 75 yards of the ox, when he raised his head, and started suddenly and rapidly towards the track, at which time the engineer says he sounded the cattle alarm, applied brakes, etc. There is no evidence that the ox started towards the train, and this, being the fact hypothesized in written charge 4, rendered the charge abstract, and for that reason it was properly refused.

The fifth charge requested by the defendant was bad in that it ignored the duty of the defendant's engineer to use the precautionary means of checking the speed of the train in order to afford an opportunity of escape to the animal. The duty to check the speed of the train to prevent injury may be as imperative as the duty to stop the train.

The assignment of error as to the third charge not being insisted on, it is unnecessary to notice the same. We find no error in the record, and the judgment of the circuit court is affirmed.

(122 Ala. 374)

RODEN v. JASPER TOWN & LANDS, Limited, et al.

(Supreme Court of Alabama. Feb. 8, 1899.)

RECEIVERS — APPOINTMENT — REVIEW — PERSONS ENTITLED.

A creditor of a corporation dissolved on a proper petition by the stockholders, who has not made himself a party to the record, except by a petition for an order to compel the payment of his debt, cannot appeal from the order appointing a receiver.

Appeal from chancery court, Jefferson county; Thomas Cobbs, Chancellor.

Petition by the Jasper Town & Lands, Limited, and others against one Davidson for the dissolution of the Corona Coal & Coke Company. From an order appointing a receiver, B. F. Roden, who had filed a petition for an order to compel the receiver to pay him a debt owing by the company, appeals. Dismissed.

Appellant assigns as error: (1) "The court below erred in the decree appointing a receiver in this case;" (2) "the court erred in not sustaining appellant's objection to appointment of J. H. Bartlett as receiver in this case." After the appeal to this court, the appellees moved the court to dismiss the bill, upon the grounds (1) that the appellant was and is no party to the original suit; (2) that the appellant was and is not party to the decree appealed from; (3) because the appellant is neither a party to this cause, nor does he occupy any relation of privity to any party in this suit, and therefore has no appealable interest in this cause. The appellees also moved to strike from the file the assignments of error made by the appellants, upon the same grounds that the motion to dismiss the bill was based. The cause was submitted on the merits, and on these two motions.

R. H. Pearson, for appellant. R. H. Thach and Coleman & Bankhead, for appellees.

TYSON, J. This cause originated in the chancery court upon the filing of a petition by appellees, who were the owners of all the stock of the Corona Coal & Coke Company, a private corporation, organized under the general incorporation laws, except one share, which was owned by Davidson, the sole respondent, for the purpose of dissolving the corporation, under section 1291 of the Code of 1896. The proceeding appears in all respects regular and in strict compliance with section 1291 et seq. After the rendition of the decree by the chancellor dissolving the corporation, in which it was ordered that the person who shall be nominated by the majority of the stockholders of said corporation, when so nominated, shall be appointed receiver of all the property and assets of said corporation, provided such nomination be made in 10 days, and after a nomination was made by the majority of the stockholders, within the time prescribed, of J. H. Bartlett as a suitable person to be appointed receiver, and a certified copy of the minutes of the meeting of the stockholders showing the nomination was filed in the cause, appellant filed a petition, in which he averred that the corporation was indebted to him in the sum of \$7,844.75, in such manner as to entitle him to have an order made requiring Bartlett, who was receiver of this corporation, in a proceeding pending in Walker chancery court, to pay over to him this money which belonged to him. On the day that appellant's petition was filed, a decree was entered, reciting that it appeared that, on the 10th day of August last, the parties to this

suit filed in this cause an instrument in writing showing the nomination of Bartlett as a suitable person to be appointed receiver by a majority of the stockholders of the Corona Coal & Coke Company, and that it further appeared that he was, within the 10 days prescribed in the decree dissolving the corporation, nominated receiver by a majority of the stockholders of said corporation, and adjudging that said nomination so made be ratified and confirmed. It does not appear that any order or decree was ever made with reference to the petition of appellant, or that he ever made any objection to the appointment or ratification or confirmation of the nomination of Bartlett as receiver. It is true that the record contains several affidavits filed in the cause on the same day the decree last above referred to was entered, tending to establish that Bartlett was an unsuitable person to be appointed. But it nowhere appears by whom they are filed, or that they were ever called to the attention of the chancellor; nor is there anything in the record, in the remotest degree, prior to the decree rendered confirming Bartlett's nomination, tending to connect the appellant with the filing of these affidavits as objections to his appointment. On the contrary, the logical inference to be drawn from the language contained in the petition is that Bartlett's confirmation would be satisfactory to him. Again, it will be observed that, in this petition, appellant does not request to be made a party to the cause, or signify in any way his desire to intervene for the purpose of becoming a party, in order to object or contest any order or decree of the court made or to be made with reference to the appointment of Bartlett or his confirmation. At most, his purpose seems to have been to have the court to direct its receiver to pay him the sum he claimed of the corporation as a trust fund in the hands of said receiver. The only other paper filed by appellant in the cause was a petition, filed nearly 30 days after the rendition of the decree confirming Bartlett's nomination, reciting that, as a creditor of the corporation, having a lien upon the property of said corporation for the payment of his claim, he, before the decree appointing Bartlett receiver was made, filed his said claim, and praying an appeal to this court from the order appointing the receiver, and to fix the amount of a supersedeas bond. The chancellor declined to set a bond for a supersedeas. Whether or not appellant could have, by proper petition, intervened and made himself a party to the record for the purpose of contesting the appointment of Bartlett as receiver, is not a question presented by this record for our consideration. It is obvious from what we have stated that he did not do so, and therefore he cannot prosecute an appeal to this court. Code 1896, § 426; Reese v. Nolan, 99 Ala. 203, 13 South. 677, and authorities therein cited. It follows that the motion to dismiss this appeal must be granted. Appeal dismissed.

(122 Ala. 545)

HARRIS v. AMERICAN BUILDING & LOAN ASS'N et al.

(Supreme Court of Alabama. Feb. 8, 1899.)

ESTOPPEL BY SILENCE—BANKS—KNOWLEDGE OF OFFICERS.

1. A note and mortgage was executed to one C., and subsequently assigned to a bank. The owner of the property thereafter applied to a building association for a loan. The application showed the prior mortgage outstanding in C. A local board of appraisers was appointed, among whom was the cashier of the bank. He did not communicate to the building association that the bank had any claim on the property, though he recommended it to take the mortgage. The president of the bank also wrote to the association recommending that the mortgage should be taken. The president did not disclose that the bank had any claim on the property. It was understood by all parties that the loan was to be made to take up the original mortgage. *Held*, that the bank was estopped, where the money was paid to C. and the mortgage canceled, to claim, as against the association, that the satisfaction was invalid.

2. Knowledge of a president and cashier of a bank of a proposed loan, and their conduct in assisting to procure it, was the knowledge and act of the bank.

Appeal from chancery court, Colbert county; Wm. H. Simpson, Chancellor.

Suit by C. L. Harris against the American Building & Loan Association and others. Decree for defendants, and plaintiff appeals. Affirmed.

On September 12, 1887, Harvey H. Brumbach and Susan H. Brumbach, his wife, became indebted, nominally, to one James R. Crowe, in the sum of \$4,000, for which they executed their note, payable to his order, 90 days after date, at the First National Bank, of Sheffield, Ala., and to secure its payment executed a mortgage to the payee on seven lots in the city of Sheffield, on two of which was situated an hotel building, with other improvements, styled the "Park House." These lots were numbered 10 and 11, in block 15½; and the bone of contention in this cause is, to which mortgagee, complainant or the American Building & Loan Association, belongs the priority of lien upon them. The note of Brumbach and wife was transferred and indorsed, at or soon after its execution, to the First National Bank of Sheffield, by the payee named, James R. Crowe. There is evidence tending to show that the money for which the note was made was lent the Brumbachs by that bank. The note first made was not paid at maturity, but was renewed in the same form and terms, with the same parties several times, and was, eventually, divided into four notes of \$1,000 each. These, in turn, were several times renewed, in like form and terms, payable to said Crowe, by whom they were indorsed to the bank, which held the mortgage from the inception of the transaction.

This method of doing things continued until the failure of the bank on November 29, 1889, at which time the four Brumbach notes were

owned by the bank, but held as collateral for its indebtedness to certain of its creditors. The mortgage given to secure the indebtedness, when originally contracted, remained in the hands of the bank, the agreement having been, as the various renewals occurred, that it should stand as security for the indebtedness. It was filed for record January 16, 1889. It was conditioned for the payment of an indebtedness of \$4,000, on September 12, 1888; and was expressly subject to any indebtedness of the purchase money for the property embraced in it. The last four notes in the series of renewals were unpaid at the time of failure of the bank, viz. one by the Sheffield Land, Iron & Coal Company of Alabama, which was afterwards paid to it; two were then held by two New York banks, and were by them turned over and surrendered to the receiver of the Sheffield bank, R. W. Austin, from whom the creditor banks took receiver's certificates of claims proved, entitling them to share in the dividends distributed; and the Nashville Trust & Banking Company, having realized its debt from other collateral in its hands, returned the other Brumbach note, which it held, to the receiver of the Sheffield bank.

In the summer of 1889, long after the debt to the bank had been contracted, and after the mortgage executed to secure the same had been duly recorded, H. H. Brumbach applied to the American Building & Loan Association, appellee, for a loan of \$5,000, offering as security therefor his stock in said association and a mortgage on said lots, 11 and 12 in block 15½, in Sheffield, on which was the Park House and improvements, and which were embraced in the mortgage to Crowe for the bank loan, and then held by the bank. At the time of such application the building and loan association had created and established at Sheffield, a local board or branch of the association, under sections 1, 2 and 5 of article 9 of the by-laws of the corporation. This board consisted of a president, secretary, treasurer, attorney and board of directors, who were to hold office for one year, and until election of successors. In pursuance of the system of the building and loan association, H. H. Brumbach applied on July 31, 1889, for a loan of \$5,000, the face value of 50 shares of stock in the association, offering a premium of \$50 per share for the loan. He then held 100 shares of the stock of the association. In his application, after giving a description of the property he proposed to mortgage as security, its value, rental and improvements, he says, in response to the question in the application blank: "Are there any mortgages or judgments against the property?" "Four thousand dollars mortgage on it." This application first passed through the hands of the local board at Sheffield, by which the property was appraised, and the loan was recommended over the signatures of the directors of the said local board. When this application and appraisal and recommendation

of the local board reached the main office, it was approved, on September 5, 1889, for \$4,500. An abstract of title was furnished at the expense of Brumbach, which was prepared, it seems, by Mr. Joseph Nathan, the attorney of the local board of the building and loan association at Sheffield. The abstract traces the title of the property from the government, through intermediate owners, to Brumbach, notes the mortgage made by Brumbach to the appellee, the building and loan association, recorded December 31, 1889, but omits any reference to the mortgage on the property, made to Crowe but held by the bank, which was recorded on January 16, 1889, nearly a year before that to the association. Why this omission occurred is explained by the testimony of Nathan, Allen, Crowe and Brumbach, to the effect that it was agreed by the persons just named that the money received by Brumbach, on the loan from the building and loan company, was to be applied to the payment of the four notes, into which, by renewals, the debt secured by the mortgage to Crowe had been divided. But there was no authority from the First National Bank of Sheffield, or any of its officers, or any of the holders of the notes, except Allen, for the Sheffield Land, Iron & Coal Company of Alabama, to satisfy the mortgage, or affect, dispose of, or bind their several interests in any manner. It appeared from the testimony of Crowe that, although he knew that the notes had been transferred, that the loan they represented had been, in fact, made by the First National Bank to Brumbach, and that none of these notes had then been paid, but were then held by others, he supposed he had the right to satisfy and discharge the mortgage.

While Austin was receiver of the bank, which had indorsed the notes to other banks as collateral, he filed a bill in the chancery court of Colbert county to set aside the cancellation of the mortgage, and thus protect the bank as indorser of the Brumbach notes. During its pendency, the banks which held the Brumbach notes turned them into the receiver's hands, taking his certificate of their debts, and sharing in the dividends of the bank's funds, except the Nashville Bank, which returned its collaterals after its debt was realized; and after this, upon the orders of the comptroller of the currency, to sell all the uncollected assets of the bank and wind up his receivership trust, these notes, with the mortgage, were sold by Austin, and bought by the complainant. Thereupon the receiver having no further interest for his bank, directly or as indorser, in the notes, the suit in chancery was allowed to be dismissed by default.

The object of Austin's bill, as already stated, was to annul the entry of satisfaction of the mortgage of Brumbach and wife to James R. Crowe, which Crowe, after the transfer of the notes for the secured debt and his delivery of the mortgage to the First National Bank, had undertaken to satisfy and discharge by

the following entry on the margin of the record of said mortgage, "This mortgage is satisfied in full. January 18th, 1890. James R. Crowe." This was after the execution of the mortgage of Brumbach and wife to the building and loan association, which was done on December 23, 1889, and was acknowledged and filed for record on the 7th day of January, 1890. Brumbach and wife failing to pay the debt to the building and loan association, that corporation foreclosed by sale under the power contained in the mortgage, and purchased the Park House property at its own sale, executed a deed to itself on the 5th day of December, 1892. It went into the possession of the property immediately after the sale, and is still in possession of it, receiving the rents and profits, and claiming the same under its purchase.

The bill in this case was filed on January 5, 1895, by the purchaser of the three unpaid Brumbach notes, at the sale by Austin, the receiver of the First National Bank of Sheffield, and the mortgagors, Brumbach and wife, and the American Building & Loan Association, of Minneapolis, Minn., are made defendants. It prays that the attempted and unauthorized cancellation of the mortgage record by Crowe may be annulled and treated as of no effect, and that the indebtedness represented by the notes held by the complainant may be secured by said mortgage, and the same enforced and foreclosed as a first and paramount incumbrance on the said Park House property, prior and superior to that of the Brumbachs to the said building and loan association, and the proceeds of the foreclosure sale applied primarily to the complainant's debt.

The answer of the defendant the building and loan association avers that the indebtedness created by Brumbach and wife, and secured by the mortgage sought to be foreclosed, was nominally to Crowe, but was actually a debt to the First National Bank of Sheffield, by which it is alleged \$2,500 was applied to paying a debt of that amount due from Brumbach for the property involved in this suit, to the Sheffield Land, Iron & Coal Company of Alabama, and \$1,500 additional advanced by the bank to Brumbach, thereby making the \$4,000 for which the mortgage from the Brumbachs and the first note of \$4,000 to Crowe was executed; in which, the answer claims, in order to evade the national banking law, prohibiting a national bank from lending money on real estate security, the bank used Crowe simply as a dummy on the note and mortgage, and as its agent to effect this transaction. In addition to this ground, the answer sets up, that the mortgage was satisfied and canceled of record by James R. Crowe, the mortgagee named therein, with the knowledge and consent of the First National Bank, which was then the holder and owner of the notes, and that neither the receiver of the bank, nor complainant, as purchaser from him, can now ask to have said satisfaction annulled, and that complainant knew that said mortgage had been discharged when he bought said notes. In

another part of its answer, said association avers that the bank was not the owner or holder of the notes at the time of the Brumbach loan and mortgage, but had transferred them to other parties, denies that the mortgage was executed and delivered to the association before the one to Crowe was satisfied, and repeats, that the bank knew of Brumbach's application for a loan from the association, and assented to the cancellation of the Crowe mortgage. It does not deny the execution and renewals of the Brumbach notes, or the agreement that the mortgage to Crowe should stand as security for the renewals, or the transfers of the notes to creditors of the bank, their redelivery to Austin, the bank receiver, and the sale by him to complainant. It admits that Brumbach's application showed an incumbrance on the property of \$4,000, secured by mortgage, the failure of the abstract of title furnished the association to disclose the mortgage, or its satisfaction of record, the want of interest in Crowe, the mortgagee in the first mortgage, in the debt secured by that instrument, and his entry of satisfaction on the record at a date subsequent to the filing of its mortgage.

Upon these pleadings and undisputed facts, the chancellor made a final decree, holding that the complainant was not entitled to any relief against the American Building & Loan Association, that the mortgage to the latter from the Brumbachs was superior to that which complainant sought to foreclose, and dismissed the bill as to said association.

From this decree the present appeal is prosecuted, and the rendition thereof is assigned as error.

Robert H. Wilhoyte, for appellant. Kirk & Almon, for appellees.

HARALSON, J. We may waive consideration of all other questions presented in this record, except the one, that complainant is estopped to claim any rights as growing out of the Crowe mortgage to H. H. Brumbach.

It was shown that C. D. Woodson was the president of the Sheffield bank at the time Brumbach made application to the defendant for the loan, and that T. L. Benham was its cashier. It also appears, that the defendant had in Sheffield at the time, a local board of appraisers, one of whom was the said Benham; that he with others having the application of said Brumbach for the loan to the association in writing before them stated that the condition of the property was truly set forth by the applicant in his statement which accompanied their report; that the loan was a desirable one for the association to make and they recommended it to be made. The application showed the \$4,000 mortgage, and the proof is abundantly satisfactory, that the Crowe mortgage and none other was referred to in the application. Here we have, then, the indubitable proof that the Sheffield bank, through this officer, was engaged in aiding to procure this loan to be made by respondent, that he neither said

nor communicated anything to the lender about any claim his bank had on the property, he was recommending it to take a mortgage on to secure the loan, which loan, as appears, the borrower, Brumbach, was seeking in the interest of the bank. Moreover, Charles D. Woodson, the president of said bank, on the 16th September, 1889, wrote a letter to the respondent association, which appears in the transcript, telling them that the stockholders in Sheffield were very much dissatisfied at the way the association treated them in getting loans, and complains especially of Brumbach's not getting the money on his application. He, and the cashier both knew of this application, were insistent for the loan to be made, for purposes not left open to doubt, and never disclosed that their bank had any claim or lien on the property to be mortgaged to the association to secure the loan. Knowledge on their part of this proposed loan, and their conduct to procure it to be made, was the knowledge and act of the bank. The corporation cannot see or know or do anything except through the intelligence and act of its officers. It was said by this court in the case of Birmingham Trust & Savings Co. v. Louisiana Nat. Bank, 99 Ala. 379, 13 South. 112, in respect to its cashier: "He is the executive officer, held out to the public as having authority to act according to the general usage, practice and course of business of such institutions; and his acts and dealings within the scope of such usage, practice and course of business, bind the corporation in favor of those dealing with him, not having other knowledge."

It is a just and well-recognized principle, that "he who is silent when conscience requires him to speak, shall be debarred from speaking when conscience requires him to keep silent;" and again, "when a party negligently and culpably stands by and allows another to contract on the faith of an understanding which he can contradict, he is afterwards estopped from disputing the facts in an action against the person whom he has assisted in deceiving, upon the principle, that between innocent parties, he who causes the injury must suffer." 2 Herm. Estop. §§ 937, 938. Or, to state the principle still more pertinently to the facts of this case, "if one having an incumbrance or security upon an estate conceals his interest, and thereby enables the owner to procure an additional advance upon it, he must be postponed to the second incumbrance." 1 Story, Eq. Jur. § 390; Chapman v. Hamilton, 19 Ala. 124; Ashurst v. Ashurst (Ala.) 24 South. 760.

The mortgage of respondent is superior in equity to that of the bank through which complainant claims. The complainant can claim no greater rights in opposition to respondent than the bank could, if it were suing. If the bank in such case would be estopped to set up the Crowe mortgage as superior to that of respondent, the complainant deriving his alleged claim through the bank, is also estopped. There is no pretense of any fraud, but the utmost good faith on the part of the respondent

in the transaction is shown. § Brick. Dig. p. 448, § 20.

Affirmed.

(120 Ala. 373)

BROWN v. STATE.

(Supreme Court of Alabama. Feb. 9, 1899.)

LARCENY OF A COW—PLEA OF FORMER JEOPARDY—SUFFICIENCY.

On an indictment for the larceny of a cow, a special plea of former jeopardy, on the ground that defendant was convicted and fined by a justice of the peace for the same offense, is insufficient, since justices, under Code 1896, § 4630 (4233), have only a limited final jurisdiction of petit-larceny cases, and larceny of a cow, under Code 1896, § 5049 (3789), is made a felony, without reference to its value, and is also a felony at common law.

Appeal from circuit court, Madison county; H. C. Speake, Judge.

Zeke Brown was convicted of larceny of a cow, and he appeals. **Affirmed.**

The defendant pleaded the following special plea: "That heretofore, to wit, on the — day of June, 1897, defendant was arrested on the charge preferred against him in said indictment, and carried before one R. P. Whitman, a justice of the peace in and for said county. Said justice of the peace put defendant on his plea, and proceeded to the trial of said cause. The evidence was heard on both sides by said justice of the peace, and after hearing said evidence said justice of the peace rendered his judgment in said cause, adjudging defendant guilty as charged, and imposing a fine of twenty-five dollars and the costs. Said fine was afterwards remitted by said justice of the peace, upon condition that defendant would pay said costs. The said costs were therefore paid by defendant, amounting to ten dollars, and he was accordingly discharged. Defendant avers that the said charge upon which he was on trial before said justice of the peace is the same as preferred in this indictment, and said conviction was had for the same offense of which he is now charged; hence, the defendant pleads that he has been in jeopardy for said offense, and should not be put upon another trial; and defendant further says he is not guilty as charged." To this plea the state demurred upon the ground that a justice of the peace had no final jurisdiction of a case of felony, and therefore could not have put the defendant in jeopardy. This demurrer was sustained, and thereupon the defendant filed a second plea, which was in words and figures as follows: "Heretofore, to wit, on the — day of June, 1897, defendant was arrested on the charge preferred against him in said indictment, and carried before one R. P. Whitman, a justice of the peace in and for said county, who had jurisdiction in the premises. Said justice of the peace put defendant on his plea, and proceeded to the trial of said cause. The evidence was heard on both sides by said justice of the peace, and after hearing the

evidence said justice of the peace rendered his judgment in said cause, adjudging defendant guilty as charged, and imposing a fine of twenty-five dollars and the costs. Said fine was afterwards remitted by said justice of the peace upon condition that defendant would pay said costs. The said costs were therefore paid by the defendant, amounting to ten dollars, and defendant was accordingly discharged. Defendant avers that the said charge upon which he was put on trial before said justice of the peace is the same as preferred in this indictment, and said conviction was had for the same offense of which he is now charged; hence, defendant pleads that he has been in jeopardy for said offense, and should not be put upon another trial." To this plea the state demurred upon the following grounds: "That said plea is fatally repugnant, in that it states that the justice of the peace had jurisdiction of said felony, whereas the facts stated in the plea, to wit, the larceny of a cow, show that he had no such jurisdiction." This demurrer was sustained. The rulings upon the demurrers to the defendant's pleas present the only questions for review on the present appeal.

Grayson & Foster, for appellant. Charles G. Brown, Atty. Gen., for the State.

DOWDELL, J. The defendant was indicted and convicted for the larceny of a cow. The only question reserved for review upon the trial arises out of the ruling of the court upon the sufficiency of two pleas filed by defendant, setting up a conviction for the same offense by a justice of the peace. To each of these pleas a demurrer was sustained. The sole ground of demurrer to each was, in effect, that the justice of the peace had no jurisdiction to hear and determine the guilt of the defendant and adjudge a punishment therefor, but that he could only hear and determine the question of probable cause of his guilt, and adjudge that he be committed to jail, to await the action of the grand jury, unless he enter into bond, or discharge him. The statute makes the larceny of a cow a felony, without reference to its value. Code 1886, § 3789 (Code 1896, § 5049). Justices of the peace have final jurisdiction of petit larceny when the value of the commodity which is the subject of the crime does not exceed \$10. Code 1886, § 4233 (Code 1896, § 4630). Unless the crime of petit larceny could have been carved out of the offense with which the defendant was charged, the judgment of conviction by the justice was void. And the cases of *Powell v. State*, 89 Ala. 172, 8 South. 109, *Moore v. State*, 71 Ala. 311, and *Drake v. State*, 68 Ala. 511, have no application. The larceny of a cow is not only a felony under our statute, but was so at common law. 1 Bish. New Cr. Law, 679. So it was impossible for a lesser offense, over which the justice had jurisdiction, to be included in the charge against the defendant. The defendant

was never in jeopardy, and there was no error in sustaining the demurrer to each of the pleas. Judgment affirmed.

(122 Ala. 323)

JACKSON v. SINGLETON.

(Supreme Court of Alabama. Feb. 9, 1899.)

EJECTMENT—HARMLESS ERROR—CHAMPERTOUS MORTGAGE.

1. Plaintiff in ejectment, claiming under a mortgage, is not harmed by the rejection of evidence of his mortgagor's title, where defendants show title by adverse possession commencing before the mortgage was executed.

2. A mortgage of lands is void as against a third person in adverse possession.

Appeal from circuit court, Marshall county; J. A. Bilbro, Judge.

This was a statutory action of ejectment brought by J. L. Jackson against W. L. Singleton to recover certain lands specifically described in the complaint. Upon the introduction of all the evidence, the court, at the request of the defendant, gave the general affirmative charge in his behalf, to the giving of which charge the plaintiff duly excepted. There were verdict and judgment for the defendant. The plaintiff appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved. Affirmed.

Davis & Haralson, for appellant. O. D. Street, for appellee.

TYSON, J. This was a statutory action, in the nature of ejectment, for the recovery of lands described in the complaint. The facts as disclosed by the record are without dispute: In 1860 one Pitts and wife conveyed the lands to James H. Moore, who went into possession, and remained in possession to the date of his death, in 1881. In 1875 Moore made a deed to the land to his wife, Martha A. Prior to Moore's death (the date is not shown), he put Peter Fennell in possession of the land, who held it until his death, in 1887. Prior to his death, and after the death of Moore, Martha A. Moore sold the land to Fennell, but never executed to him a deed. On the 23d day of February, 1896, Martha A. (who was at that date Martha A. Harrison, having intermarried with John S. Harrison) obtained a judgment against Peter Fennell on a note given for the balance of the purchase money due her upon the land, upon which execution was issued. This land was levied upon by the sheriff, and sold by him to satisfy this execution; and at the sale J. T. Sparks became the purchaser, to whom the sheriff made a deed, properly executed, and went into possession of the lands, cultivating them as his own, until he sold them to defendant, in 1888, when defendant went into possession, and has been in possession ever since under his deed from Sparks. After Peter Fennell's death, on the 6th day of August, 1887, John S. and Martha A. Harrison and James W. Moore, one of the children of James H. and Martha A. Moore, executed a deed to

the lands to Martha Fennell, the widow of said Peter. On the 22d day of December, 1890, Martha Fennell executed to plaintiff a mortgage upon the land, upon which he relied for a recovery in this case. Upon the foregoing statement of facts, the court gave the general affirmative charge for the defendant.

There are several assignments of error based upon the rulings of the court in permitting the defendant to introduce certain testimony against the objection of appellant. If erroneous, they are without injury, as the testimony admitted in no wise affected the question of the adverse holding by defendant of the land sued for at the date of the execution and delivery of the mortgage by Martha Fennell to appellant. For the same reason, the exclusion of the deed of James H. Moore to Martha Moore on the objection of defendant could not have prejudiced appellant's rights. The mortgage upon which he relied as a conveyance of the legal title was void as against the defendant. *Bernstein v. Humes*, 60 Ala. 582, and authorities therein cited; *Chapman v. Holding*, Id. 532; 3 Brick. Dig. p. 18, §§ 51-55.

This conclusion dispenses with the consideration and decision of the question as to the effect of the act of February 28, 1887 (Code 1886, § 2351), upon the conveyance made by James H. Moore to his wife, Martha A. Moore. The judgment of the circuit court is affirmed.

(120 Ala. 308)

JONES et al. v. STATE.

(Supreme Court of Alabama. Feb. 9, 1899.)

JURY—CHALLENGES—CRIMINAL LAW—CHARACTER—CONFESSIONS—WITNESSES—REASONABLE DOUBT—MURDER.

1. The fact that a juror has heard the trial of a person jointly indicted with defendant, but separately tried, is not ground of challenge for cause, where he testifies on the voir dire that what he heard will not bias his verdict, since Code 1896, § 5017, provides that the question whether a juror has a fixed opinion as to the guilt of defendant must be determined by the oath of the juror alone.

2. Where defendant offers evidence of good character, the state may cross-examine the witness as to whether he has not heard of a difficulty in which defendant assaulted deceased with a knife.

3. A statement of defendant giving the details of how a murder was perpetrated by others (defendant being present, but professing to have taken no part in it) was admissible against defendant on a trial for the murder, in connection with evidence connecting him with the crime.

4. The state may show that testimony voluntarily given by defendant on the coroner's inquest is in conflict with other statements made by him.

5. A reasonable doubt may be defined as a doubt for which a reason may be given.

6. The mere fact that it appears that one man did the killing cannot acquit defendants jointly indicted and tried for murder, since they might have aided, abetted, or encouraged the killing.

Appeal from city court of Montgomery; A. D. Sayre, Judge.

The appellants, Richard Jones and Tom Freeman, were jointly indicted with Sam

Jones for the murder of William Henry Durden; and, after a severance was granted from Sam Jones, the appellants were jointly tried, and the defendant Richard Jones was convicted of murder in the first degree, and sentenced to the penitentiary for life, and the defendant Tom Freeman was convicted of murder in the second degree, and sentenced to the penitentiary for 15 years. Defendants appeal. Affirmed.

On the trial of the cause there was evidence introduced tending to show that one of the defendants was guilty as charged in the indictment, and that the deceased was killed according to a prearranged plan between these defendants and said Sam Jones. Some of the evidence for the state tended to show that one of these defendants fired the fatal shots, while there was other evidence to the effect that the fatal shots were fired by Sam Jones, the deceased having been shot twice. The evidence for the defendants tended to show that they did not do the shooting, and were not present at the time the deceased was killed. Upon the introduction of all the evidence, the defendants requested the court to give to the jury three written charges, and separately excepted to the court's refusal to give each of them as asked. The substance of the first and third of these charges is sufficiently stated in the opinion. The second of these charges was as follows: "(2) If the jury have a reasonable doubt as to whether William Henry Durden was killed by more than one man, they must acquit the defendants."

C. P. McIntyre, for appellants. Charles G. Brown, Atty. Gen., for the State.

DOWDELL, J. Sam Jones, Tom Freeman, and Richard Jones had been jointly indicted at the October term, 1898, of the city court of Montgomery, for the murder of William Henry Durden; and the said Tom Freeman and Richard Jones asked for and obtained a severance from Sam Jones, and were tried together. This case being called for trial, both the state and defendants announced "Ready." The sheriff was directed by the court to draw the names of the jury out of the hat. He drew out of the hat the name of J. M. Chamley, who was on the special venire served on the defendants. Sam Jones had been tried on the day preceding the trial of defendants, and had been convicted of murder in the first degree, and was to be hanged. After said Chamley had answered, under oath, being questioned by the court, that he had no fixed opinion as to the guilt or innocence of the defendants, or either of them, which would bias his verdict, he was asked by defendants if he was present in the court and had heard the evidence in the case of the state against Sam Jones, and he answered "Yes." The defendants thereupon challenged the said Chamley, as a juror, for cause. The court then asked said Chamley

if what he had heard would bias his verdict, and he answered "No," and then the court denied defendants' right to challenge the said juror for cause. To this ruling of the court the defendants excepted. The juror was examined as to his qualification in the manner provided by the statute. Whether the juror had a fixed opinion as to the guilt or innocence of the defendants which would bias his verdict, the statute expressly provides, must be determined by the oath of the juror alone. Code 1896, § 5017. The fact that he had heard the evidence in the trial of Sam Jones, who had been jointly indicted with these defendants, but was separately tried on a severance, was not a ground of challenge for cause, unless a fixed opinion as to the guilt or innocence of these defendants, which would bias his verdict, had thereby been produced on his mind; and this he expressly denied when examined by the court on his *voir dire*. The ruling of the court in denying to the defendants the challenge for cause was without error.

The defendant Richard Jones offered evidence as to his good character, thereby putting the same in issue. Upon cross-examination by the state of the witness Cochran, who testified to the good character of this defendant, he was asked if he had not heard of a previous difficulty that defendant Richard Jones and the deceased had, in which said Richard assaulted deceased with a knife. This question was objected to by the defendant, and the court overruled the objection, but refused to allow the witness to state any of the particulars of the difficulty, to which ruling of the court the defendant excepted. The witness answered "Yes." The action by the court in permitting the question and allowing the answer, as limited and restricted by the court, was free from error. *Goodwin v. State*, 102 Ala. 87, 15 South. 571; *Hawes v. State*, 88 Ala. 37, 7 South. 302; *De Arman v. State*, 71 Ala. 351; *Ingram v. State*, 67 Ala. 67.

There was no error in overruling the motion of the defendant Tom Freeman to exclude the testimony of the witness Gus Brown on the ground that it was irrelevant, and did not tend to incriminate the defendant Freeman. This testimony was as to a voluntary statement made by defendant to the witness several days after the offense was committed, and while defendant was under arrest and being conveyed to prison, giving the details of how the crime was perpetrated by others; he (defendant) being present, but taking no part in it. Other testimony had already been introduced tending to connect this defendant with the killing of the deceased. It was clearly relevant and competent to go to the jury, and for the jury to determine whether or not it incriminated the defendant. The jury were not bound to accept the whole statement as true, but only that part they believed to be true.

The defendant Freeman testified as a wit-

ness before the coroner's inquest, and at that time no charge had been made against him, and, so far as the evidence discloses, he had not been suspected. He testified there without objection. It was competent for the state to show on the present trial what he then testified as being contradictory of his statements made at another time in relation to the homicide. There is nothing in defendant Freeman's objection as to this evidence, and the court properly overruled it.

The court, in its oral charge to the jury, in defining "reasonable doubt" (among other things), said, "It is a doubt for which a reason may be given;" and to this definition the defendants excepted. This court has settled that this is one of the correct definitions of a "reasonable doubt." *Walker v. State* (Ala.) 23 South. 153; *Hodge v. State*, 97 Ala. 37, 12 South. 164; *Ellis v. State* (Ala.; present term) 25 South. 1.

There were three written charges requested by the defendants. The first was the affirmative charge in behalf of both of the defendants; and the third, the affirmative charge in behalf of the defendant Freeman. Both of these charges the court very properly refused. The second charge was not only misleading, but faulty in other respects. While the jury might have believed, under the evidence, that one man did the killing, this could not possibly acquit the defendants, if the jury further believed that they in any manner aided or abetted or encouraged the killing. The charge ignores this principle of law and phase of the evidence. We find no error in the record, and the judgment of the city court is affirmed.

(122 Ala. 256)

HOWSER v. CRUIKSHANK.

(Supreme Court of Alabama. Feb. 11, 1899.)
MORTGAGE FORECLOSURE—SALE—ORDER OF ALIENATION—NOTICE—REDEMPTION BEFORE FORECLOSURE.

1. Where a mortgagor conveys a portion of the mortgaged premises by warranty containing no reference to the mortgage, that part of the premises retained by him is primarily liable for the entire mortgage debt, and must be sold before the portion conveyed can be resorted to, even though the consideration of the conveyance was one dollar and love and affection.

2. The fact that subsequent to the conveyance the mortgagor executed a second mortgage on that part of the premises retained by him, to the owner of the first one, does not deprive the grantee of such parcel of the right to compel the mortgagee to first resort to the unsold part, where the mortgagee took the second mortgage with notice, since he acquired only the rights which the mortgagor had.

3. Where mortgaged premises are conveyed by warranty, without reference to the mortgage, and the grantee takes possession and records the deed, a mortgagor of the remaining portion is chargeable with notice of the right of such grantee to have the parcels applied in satisfaction of the first mortgage in the inverse order of their alienation.

4. The grantee of a part of the mortgaged premises may redeem from the mortgage before a foreclosure thereof.

Appeal from chancery court, Jefferson county; Thomas Cobbs, Chancellor.

Suit by Mary R. Cruikshank against Louis A. Howser. From a decree overruling a demurrer to the bill, defendant appeals. Affirmed.

The bill, as amended, averred the following facts: On December 10, 1884, M. T. Smith and his wife, Mary Smith, executed a mortgage to one Pat Fahey to secure a promissory note for the sum of \$500 made by said M. T. Smith and wife to Pat Fahey on November 1, 1884, and payable one day after date. In this mortgage there was conveyed a certain specifically described parcel of land, laid off into lots, and situated in Birmingham. Said mortgage contained a power of sale, authorizing the mortgagee, in default of payment of the note, to take possession of the mortgaged premises, and sell the same at public outcry for the satisfaction of said indebtedness. On March 5, 1889, the said M. T. Smith and his wife, Mary Smith, who were the parents of the complainant, executed a deed of bargain and sale to the complainant, conveying to her a portion of the premises previously conveyed in the mortgage to Fahey, the same being known and designated as lot No. 1 in block No. 621. This deed was upon the recited consideration of love and affection, and upon the further consideration of one dollar, and contained a covenant against incumbrances, as well as other customary covenants. Immediately upon the execution of said deed, the complainant went into possession of the lot conveyed therein, and has been in possession ever since, claiming the same as her own under said deed. Said deed was filed for record in the office of the probate judge of Jefferson county on April 8, 1891, and was duly recorded. Subsequent to January 1, 1892, Pat Fahey assigned and transferred the note and mortgage of M. T. Smith and Mary Smith to him to Louis A. Howser, the appellant, who now owns and holds said mortgage, and is threatening to foreclose the mortgage, by selling the whole premises conveyed therein, for the payment of the balance due upon said note and mortgage. After the execution by M. T. Smith and his wife of the deed of conveyance to the complainant, the said M. T. Smith and his wife executed the mortgage to Louis A. Howser, conveying therein all of the property included in the mortgage to Fahey, except the lot conveyed to the complainant. Subsequently Louis A. Howser foreclosed this mortgage given to him, and became the purchaser of said property, and is now the owner thereof, by virtue of the foreclosure of said mortgage. The complainant then avers in the amended bill that Louis A. Howser purchased the said mortgage from Pat Fahey, and "is now using the same, or attempting to use it, for the purpose of compelling complainant to contribute towards the payment of said prior mortgage, although the complainant is advised, and so avers, that said first mortgage is primarily a lien on that portion of the property

which is not conveyed to the complainant." The complainant then avers that the residue of the block of land conveyed in the mortgage to Fahey, excluding the lot conveyed to her, is worth largely more than the balance due on said mortgage, and that the same should be subjected to the payment of said mortgage debt before recourse is had to the property of the complainant. The complainant, in her bill, offers to redeem by paying the balance due on said mortgage, and submits herself to the orders of the court. L. A. Howser was made a party defendant to the bill, and the prayer was that a decree be rendered declaring the complainant entitled to redeem the said mortgage from Louis A. Howser, and, in any event, that said Howser be compelled to resort first to the property conveyed by said mortgage, other than the lot conveyed to complainant; that he be restrained from resorting to said lot of complainant, unless it should become necessary to do so to obtain satisfaction of said mortgage indebtedness. There was also a prayer for general relief. To this bill as amended the defendant demurred upon the following grounds: (1) Said bill does not show that the complainant is a junior lienholder, and therefore she has not the right to a marshaling of the assets of the debtor; (2) because the bill shows on its face that the complainant became the owner of said lot No. 1 in block No. 621 after the execution of the mortgage named in the bill, and therefore took the deed subject to all the burdens resting on the real estate covered by the same; (3) because the bill shows on its face that the complainant was not a bona fide purchaser for value; (4) because the bill shows on its face that the only right the complainant has is to pay off the defendant's mortgage, and become subrogated to his rights; (5) because the bill shows on its face that complainant comes too late, in seeking to have defendant resort to other property than complainant's real estate, it appearing from the bill that said other property has already been sold; (6) because there is no equity in the bill, no reason being shown for the interposition of a court of equity. Upon the submission of the cause upon the demurrers, the chancellor rendered a decree overruling them. From this decree the defendant appeals, and assigns the rendition thereof as error.

Lane & White, for appellant. Cabaniss & Weakley, for appellee.

TYSON, J. Unless the case made by the original and amended bills can be differentiated upon principle from the case of *Association v. Kent*, 117 Ala. 624, 23 South. 757, in which this court distinctly and clearly recognized the doctrine that where a mortgagor, after the execution of the mortgage, conveys different parcels of the mortgaged property to different persons at different times, by warranty deeds, which contain no reference to the existence of the mortgage, the portion of such premises retained by the mortgagor is primarily liable

for the whole of the mortgage debt, and must be first sold to satisfy the mortgage, and, if this portion proves insufficient, resort may be then had to the parcels conveyed, by selling them in the inverse order of their alienation, there was no error in the decree overruling the demurrers to the bill. The two facts relied upon by appellant to relieve this case from the influence of this doctrine are: First, that the complainant acquired title to a portion of the premises under a warranty deed from the mortgagor, who was her father, reciting a consideration of one dollar paid, and natural love and affection; second, that respondent acquired title to the remaining portion of the premises by mortgage from the original owner subsequent to the making of the deed to the complainant, which had been foreclosed before the filing of the bill. *Pomeroy* (3 Eq. Jur. § 1225), in speaking of this doctrine, says: "It is purely of equitable origin, and is not an absolute rule of law; and, if the peculiar equitable reasons on which it rests are wanting, it ceases to operate. Whether it does or does not apply to any particular case may be certainly determined by a careful consideration of the following principles: The doctrine, in its full scope and operation, primarily depends upon the relation subsisting between the mortgagor or other owner of the entire mortgaged premises and his grantee of a parcel of the land. This relation, in turn, results from the form of conveyance, which, being a warranty deed, or equivalent to a warranty, shows conclusively an intention between the two that the grantor is to assume the whole burden of the incumbrance, as a charge upon his own parcel, while the grantee is to take and hold his portion entirely free." Testing the deed under which the complainant claims by this principle, let us see if it is of such character as shows conclusively an intention of the grantor to assume the whole of the burden of the mortgage primarily executed by him as a charge upon his portion, and complainant to take and hold her portion free from the mortgage lien. The deed is one of bargain and sale, and covenants with the grantee that the grantor is seised in fee simple in the premises, and that they are free from all incumbrances, and that the grantor has a good right to sell and convey the same, and binds him, his heirs, executors, and administrators, to warrant and defend the title to the land conveyed to complainant, her heirs, etc., against the lawful claims of all persons. The consideration recited, as stated above, is for natural love and affection, and the sum of one dollar; and this is the infirmity pointed out by appellant's counsel, and insisted upon, which destroys the effect of the covenant and warranty clauses of said deed, and deprives it of the character which impresses conveyances under which this equitable doctrine can be invoked. It will be observed that the whole doctrine rests upon the intention of the parties, to be gathered from the entire instru-

ment or conveyance. That the consideration expressed in this deed will support it, inter sese and their privies, as a conveyance, can hardly be denied. In *Houston v. Blackman*, 66 Ala. 559, it is said: "In deeds of bargain and sale, the expression of any, the slightest, consideration,—for instance, a peppercorn, even,—will support them, as between the parties. The only use and operation of the expression of a consideration, or the introduction of a clause reciting a consideration, is to prevent a resulting trust to the grantor, and to estop him from denying the making and effect of the deed for the uses therein declared." And that the grantee could maintain an action for a breach of warranty against the grantor, in the event of a breach, is also indisputable. 8 Am. & Eng. Enc. Law (2d Ed.) 173; *Walker v. Crews*, 73 Ala. 412; 2 Devl. Deeds, § 810. The measure of her recovery for such a breach is not, in our opinion, the test by which the question under consideration is to be determined. It would seem that, from the plain words of the deed, complainant has the right to invoke this equity of exoneration, unless there is some impediment, arising out of the relations of the respondent to the transaction, rendering it inequitable for her to do so. Does the fact that the respondent became the owner of the first mortgage by transfer and assignment after complainant acquired the deed, and subsequent to the execution of the deed her grantor executed a mortgage upon the residue of the lands to the respondent, which he has foreclosed, in any manner impair her equity? It is against the holder of the first mortgage that this equity exists, and by what process of reasoning it may be said to be cut off by the second mortgagee of a portion of the premises acquiring the title of the first mortgagee, we are unable to perceive. She was in no sense a party to the assignment, or in any wise interested in it. It was a matter of indifference to her who was the owner of the first mortgage, and of no consequence to her who held it. As to the rights of the respondent under the mortgage made to him upon the residue of the property, he acquired no greater rights than he would have acquired under a deed from the mortgagor. By this mortgage the mortgagor conveyed his equity of redemption, subject to all equities between him and complainant of which respondent had notice, either actual or constructive. The complainant being at the time in the possession of the land conveyed to her, and the deed under which she held then being of record, the respondent had notice of her equity when he took the mortgage. 3 Pom. Eq. Jur. § 1225, and note; *Association v. Harris*, 114 Ala. 468, 21 South. 909; 2 Jones, Mortg. (5th Ed.) 1620; 2 White & T. Lead. Cas. Eq. 297. Having notice of complainant's equity when he took the mortgage, and when he purchased the property at the foreclosure sale under the power therein, the rights acquired by him were subject to the right of the complainant

to have the land sold in the inverse order of its alienation. *Association v. Kent*, supra; *Burton v. Henry*, 90 Ala. 281, 7 South. 925; *Aderholt v. Henry*, 87 Ala. 415, 6 South. 625; *Prickett v. Sibert*, 75 Ala. 315; *Insurance Co. v. Huder*, 35 Ala. 713; *Bank v. Dundas*, 10 Ala. 661; 2 Pom. Eq. Jur. § 1224; 2 Jones, Mortg. § 1620.

Complainant, in her bill, prays to redeem before foreclosure the lands conveyed by the first mortgage now owned by the respondent. This she has a right to do, having acquired a legal estate in a part of the mortgaged premises by deed from the mortgagor. *Butts v. Broughton*, 72 Ala. 294; 2 Jones, Mortg. (5th Ed.) § 1055; 3 Pom. Eq. Jur. § 1220; *Jones v. Matkin* (Ala.) 24 South. 242. The decree overruling the demurrer is affirmed. Affirmed.

(120 Ala. 390)

MARSHAL v. STATE.

(Supreme Court of Alabama. Feb. 9, 1899.)

ESCAPE—INDICTMENT.

Code, § 4712, fixes the punishment, where one intentionally assists, or attempts to assist, any prisoner to escape who is confined on conviction of misdemeanor. Sections 4896, 4898, provide that an indictment must state the facts constituting the offense concisely, and with such certainty as to enable the court to pronounce judgment. *Held*, that an indictment charging that defendant did intentionally assist a prisoner confined in the jail on a charge of misdemeanor to escape therefrom by drilling a hole through the walls is sufficient without averring that the drilling was done with intent to facilitate the escape.

Appeal from criminal court, Pike county; E. B. Wilkerson, Judge.

Sam Marshal was convicted of assisting a prisoner to escape, and appeals. Affirmed.

The following was the indictment: "The grand jury of said county charge that before the finding of this indictment Sam Marshal did intentionally assist Gus Raimer, a prisoner lawfully confined in the county jail of Pike county on a charge of a misdemeanor, to escape therefrom by drilling or prizing out a hole through the walls of said jail, against the peace and dignity of the state of Alabama." To this indictment the defendant demurred upon the following grounds: (1) "Said indictment fails to aver that the act of drilling or prizing out a hole through the walls of the jail was done with the intent to facilitate the escape of Gus Raimer from said jail." (2) "Said indictment fails to aver that the act of drilling or prizing out a hole through the walls of said jail was useful to aid or assist said Gus Raimer in escaping from said jail." The demurrer to the indictment was overruled, and the defendant duly excepted. This ruling of the trial court is the only one presented for review on the present appeal.

Chas. G. Brown, Atty. Gen., for the State.

HARALSON, J. The statutory offenses created by sections 4711 and 4712 of the Code are different, the one a felony and the other a misdemeanor; and from the terms of the two sections it is obvious, that an indictment under the first would necessarily contain averments not required in the latter. What averments are necessary in an indictment under section 4711, was very fully considered in *Hurst v. State*, 79 Ala. 55.

The indictment in this case was found under said section 4712, describing the offense created thereunder, in the language of the statute, or words conveying the same meaning, and alleges the fact in the doing of which the offense consists. Code, §§ 4896, 4898; *Grattan v. State*, 71 Ala. 344; *Wilson v. State*, 61 Ala. 151.

The ground of demurrer taken to the indictment,—that it “fails to aver that the act of drilling or prizing out a hole through the walls of the jail was done with the intent to facilitate the escape of Gus Baimer from said jail,” is not well taken, but if applicable in any case, it would be to an indictment under section 4711. The demurrer was properly overruled.

Affirmed.

(120 Ala. 309)

TEAGUE v. STATE.¹

(Supreme Court of Alabama. Feb. 7, 1899.)

MURDER—PROVOKING DIFFICULTY—RETREAT—INSTRUCTIONS—MANSLAUGHTER—EVIDENCE—PREPARATION FOR FLIGHT.

1. Where defendant provoked the difficulty which resulted in a homicide, and could have safely retreated while peril was imminent, evidence that deceased was of violent character is inadmissible.

2. In such a case it is proper to refuse a charge on self-defense.

3. An abusive and threatening letter received by defendant five minutes before killing the writer cannot be the basis of passion which may reduce the grade of the offense below murder.

4. A refusal to charge that the law does not require the jury to put an unreasonable construction on the testimony, nor to draw unjust inferences, is proper, where the evidence was not susceptible of any reasonable construction favorable to defendant's innocence.

5. A charge that is argumentative and confusing is properly refused.

6. Evidence that defendant, on the day of committing a homicide, and while he was nursing his wrath against deceased, tried to hire a horse and buggy, so as to leave the neighborhood early in the morning after the homicide, is admissible to show preparations for flight.

Appeal from circuit court, Marshall county; J. A. Bilbro, Judge.

Albert Teague was indicted and tried for the murder of Walter Clark by shooting him with a gun, was convicted of murder in the second degree, and sentenced to the penitentiary for 35 years, and he appeals. Affirmed.

The evidence for the state tended to show that the defendant had become aggrieved at

the deceased, who was the railroad agent and telegraph operator at Albertville, Ala., because he would not send a telegram which the defendant had delivered to him, without the prepayment of the charges, and that, as the outcome of this misunderstanding or trouble between them, the deceased had sent the defendant word to stay away from the depot; that the deceased's refusal to send the telegram as requested by the defendant was two or three days before the shooting; that upon the evening of the shooting the defendant was seen, with a gun, going to the station house, where the deceased was; that one of the witnesses for the state attempted to dissuade him from doing the deceased any harm, but the defendant refused to be dissuaded, and, passing around said witness, ran up the steps, and, reaching an open window, fired two shots at the deceased in quick succession; and that the deceased died from the gunshot wounds thus received. The defendant, as a witness in his own behalf, testified that the trouble between him and the deceased resulting from the deceased's refusal to send the telegram, unless the defendant paid him for it in advance, had been settled, and that he had told one of the witnesses who had testified for the state that he would not do anything wrong; that, about five minutes before the killing, one Street delivered to him a message from Clark, the deceased, in which there was contained a vile and opprobrious epithet, and in which Clark sent him word that, if he came on the depot platform again, he would kill him; that thereupon he remarked, “I will go and see him about it,” and started to the platform; that as he got to the top of the platform a certain named person holloed to the deceased, “Look out, Clark!” That he went directly to a window, which he found open, and as he got to the window Clark was reaching for his pistol, whereupon he (the defendant) fired, and, as Clark continued to reach for his pistol, he fired again. The defendant offered to prove by one of the witnesses that Clark's general character in the community was that of a man violent, dangerous, and quick tempered, and of an overbearing and vindictive nature. The state objected to the introduction of such testimony, the court sustained the objection, and to this ruling the defendant duly excepted. Upon the introduction of one Chambers as a witness, he testified that, on the day of the killing, the defendant told him that he wanted a horse and buggy the next morning to go to his uncle's. The defendant moved to exclude this testimony upon the ground that it was immaterial and irrelevant to any issue involved in this case. The court overruled the objection, and the defendant duly excepted. Upon the introduction of all the evidence, the defendant requested the court to give to the jury the following, among other, written charges, and separately excepted to the court's refusal to give each of them as

¹ Rehearing denied February 10, 1899.

asked: "(1) The court charges the jury, at the instance of the defendant, they must find from all the evidence the existence of each and every essential fact necessary to show or constitute the defendant's guilt. If, by excluding and not considering the presumption of the defendant's innocence, the jury should have no reasonable doubt, on all the other evidence, of the existence of such essential fact or facts, yet, if the jury should then take such presumption of defendant's innocence, and consider it in connection with all the other evidence in the case, and they should then have a reasonable doubt as to the existence of such essential fact or facts, the jury would then be authorized to find such essential fact or facts do not exist, although they might believe such fact or facts would exist, were it not for thus considering such presumption of defendant's innocence. (2) The court charges the jury that they are the sole judges of what construction shall be placed on the testimony, and what inferences shall be drawn from such constructions. But, notwithstanding such power, the law does not require the jury to put an unreasonable construction on the testimony, nor to draw unjust or unreasonable inferences from any construction the jury may put on the testimony." "(4) The court charges the jury that if the jury believe from the evidence in this case that the defendant was aroused by any opprobrious and insulting language used by the deceased to the defendant, and in five minutes the fatal shot was fired, and at the time the fatal shot was fired the appearances surrounding the defendant at the time were such as to produce a reasonable belief in the mind of the defendant that he was under peril of his life, or about to suffer some great bodily harm, at the hands of the deceased, then, under such circumstances, the law does not exact of the defendant that consideration and calmness of action or conduct that a man not so aroused and so circumstanced as the defendant was surrounded. The jury must judge of the defendant's conduct as he was thus surrounded or aroused, and not by what the calm view of one not so circumstanced might suggest he should have observed." "(6) Although the jury may believe from the evidence that the defendant had some feeling against the deceased because of what the defendant had heard the deceased had said about him, yet if the jury believe from the evidence that the defendant abandoned all idea of interfering with the deceased about this time, and had agreed with Mr. Coleman to let the matter pass, and after this the deceased sent a message to defendant, which defendant received five minutes before the killing, and upon receipt of the message the defendant went immediately to the depot to see the deceased about the message; and the jury believe that said message applied an insulting and opprobrious epithet to defendant, and informed defendant, if he came on the

platform of the depot any more, deceased would kill him, and at the time defendant got on the platform Coleman hollered, 'Look out, Clark!' and, when defendant reached the open window through which he shot Clark, Clark had his hand on his pistol for the purpose of using it against the defendant, and such appearances were such as impressed defendant with a reasonable belief his life was then in danger, or he was about to suffer some great bodily harm, at the hands of the deceased,—then the jury can take the opprobrious and insulting words sent in the message in connection with the appearance of danger surrounding defendant at the time, and in connection with all other evidence in the case, to determine whether the defendant is guilty alone of manslaughter, and not of murder, and if the jury, on the evidence, have a reasonable doubt whether the defendant is guilty of murder or manslaughter, then the jury should find the defendant only guilty of manslaughter." "(8) If the jury are satisfied beyond all reasonable doubt that the defendant is guilty of some degree of murder; and the jury further believe from the evidence that the deceased sent a message embracing an insulting and opprobrious epithet towards the defendant, and of which the defendant was informed five minutes before the killing; and the jury also believe from the evidence that the deceased had threatened to kill the defendant,—then the jury may consider such epithets and threats in determining of what degree of murder the jury will find the defendant guilty."

Denson & Tanner, for appellant. Charles G. Brown, Atty. Gen., and Lusk & Bell, for the State.

McCLELLAN, C. J. On the evidence in this record most favorable to the defendant, he is guilty of murder. He was palpably at fault, on his own testimony, in bringing on the difficulty which resulted in his killing his opponent, if there was any "difficulty," so far as any act of the deceased was necessary to constitute it; and, if at any time he was in imminent peril, it is clear, beyond adverse inference, that he could have retreated with the greatest ease and safety. The trial court was therefore not in error in excluding testimony of the violent and bloodthirsty character of the deceased,—there was no issue in the case upon which that fact could have shed any legitimate light,—and in refusing charges which submitted the inquiry of self-defense vel non to the jury.

Nor was there any room in the case for leaving to the jury the question whether the homicide was murder or manslaughter. The only provocation relied on to reduce the grade of the offense to manslaughter was the provocation of an abusive and threatening message from deceased to defendant,—received, as defendant claims, five minutes before the

killing. Such provocation, as has been many times decided by this court, cannot be the basis of passion, the existence of which may reduce the grade of the offense below murder.

The evidence in the case was patently not susceptible of any reasonable construction favorable to defendant's innocence, and hence charge 2 was properly refused to the defendant upon this as well as other grounds.

Charge 1 refused to defendant is argumentative and confusing.

The testimony that the defendant, on the day of the killing, and during the time he was nursing his wrath against the deceased, endeavored to hire a horse and buggy for the purpose of leaving the neighborhood early in the morning of the night in which the killing occurred, was properly allowed to go to the jury, as tending in some degree to show preparations for flight.

All the rulings of the court on charges requested by defendant are referable to one or another of the propositions stated above; and, moreover, they might all be justified on the broad proposition that on the whole evidence the court might well have instructed the jury on the hypothesis of its credibility that the defendant was guilty of murder in either the first or second degree. Affirmed.

(122 Ala. 573)

NELSON v. HOWISON.

(Supreme Court of Alabama. Feb. 7, 1899.)

DETINUE—COMPLAINT—DESCRIPTION OF PROPERTY—POSSESSION OF DEFENDANT—INSTRUCTIONS—FIXTURES—EVIDENCE—DECLARATIONS OF PREDECESSORS—TENANCY—CHATTEL MORTGAGES—ABANDONMENT OF PROPERTY BY MORTGAGOR.

1. A description of the property in a complaint in detinue as one engine and one boiler is sufficient.

2. In a chattel mortgage a description of the property as one wet pan, one engine, and one boiler, and the appurtenances belonging to them, is not too indefinite.

3. Where chattels are claimed by the grantee of lands as fixtures, as against one claiming them under a chattel mortgage from a third person, the death of the grantor does not disqualify the mortgagee from testifying to the declarations of the grantor of the lands in reference to her ownership of the chattels at the time the chattel mortgage was given, where her estate is not interested in the result of the suit.

4. Since the question whether machinery on lands is a fixture thereon depends largely on the intention with which it was erected, the declaration of the owner of the lands that she did not own such machinery is admissible as part of the *res gestæ*, on an issue whether such machinery is a fixture.

5. The owner of the lands being in possession, her declaration that she did not own the machinery was admissible on the question of ownership of the machinery, as against one claiming it under a conveyance of the lands from her.

6. On an issue whether a landowner and one claiming under her are estopped from claiming certain chattels thereon as fixtures, as against one claiming them under a mortgage from a third person, evidence that, prior to the execution of the mortgage, she told the parties to

it that she did not own the machinery, is admissible.

7. Whether defendant's possession of machinery is sufficient to authorize a suit in detinue is for the jury, where it is claimed by a firm of which he is the only male member, operated by a general manager employed by the firm, and where he is present on occasions, and gives orders in connection with its operations.

8. In detinue, the question whether defendant's possession of the property is for himself or on behalf of a firm of which he is a member, and which claims the property, is immaterial.

9. In detinue, where the property was claimed by a firm, and was in possession of one of the members, who alone was sued, a charge that if the jury believe that the partnership was in the possession at the commencement of the suit, and that defendant was not in possession, or that, since the action can only be brought against one in possession of the property because the gist of it is the unlawful detention, if the partnership and not defendant was in possession, or if it was in defendant's possession in behalf of the partnership, to find for defendant, is argumentative.

10. Such charge was erroneous as authorizing the jury to infer that possession by the partnership was inconsistent with possession by one of the members.

11. The abandonment of the chattels by the mortgagor does not prejudice the mortgagee's rights.

12. Evidence that a person resided on lands, and operated a brickyard thereon, under an agreement with, and by permission of, the owner, "as her tenant, and in subordination of her title and possession," does not show a tenancy, but a mere permissive user, subject to the owner's possession; and, where such person fails to remove fixtures while there, it does not make them the property of the owner of the land.

13. With the landowner's permission, and subject to her right of possession of the premises, a person erected an engine and boiler on lands which he used in manufacturing brick. Both were erected on foundations extending into the ground, and inclosed by a house, part of which would have to be taken away to permit their removal. *Held*, that the question whether they were removable fixtures was for the jury.

Appeal from circuit court, Bibb county: John Moore, Judge.

Detinue by Allen P. Howison against Frank Nelson. The complaint was in the following language: "The plaintiff claims of the defendant the following personal property, to wit: One wet pan, one engine, one boiler, and the appurtenances belonging to the said engine, boiler, and wet pan, with the value of the hire or use thereof during the detention, viz. since October 1, 1895." To this complaint the defendant demurred, upon the grounds (1) that there is contained therein no description or mark of identification of any of the property sued for; (2) that the description of said property is vague, uncertain, and indefinite, and that said property is incapable of identification from said description. This demurrer was overruled, to which ruling the defendant duly excepted. The cause was tried upon issue joined upon the plea of non detinet. Upon the trial of the cause the plaintiff offered in evidence a mortgage executed to him by one John Eharker, to secure the payment of an indebtedness by the mort-

gaged to the plaintiff, in which mortgage was included the property here sued for, and which is described therein as follows: "One wet pan, one engine, one boiler, and all appurtenances belonging to the engine, boiler, and wet pan, and all the tools used in making brick at said yard." This mortgage was duly executed and acknowledged, and recorded in the office of the probate judge of Bibb county. The defendant objected to the introduction in evidence of said mortgage, on the grounds that the description of the property conveyed therein was too indefinite. The court overruled this motion, allowed the mortgage to be introduced in evidence, and to this ruling the defendant duly excepted. It was shown by the evidence of the plaintiff that a portion of the mortgage debt still remained unpaid. The tendencies of the evidence, and the facts pertaining to the rulings of the court upon the evidence to which exceptions were reserved, are sufficiently stated in the opinion. Upon the introduction of all the evidence, the defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "If the jury believe from the evidence that the partnership was in possession of the property sued for at the commencement of this suit, then they will find for the defendant." (2) "If the jury believe from the evidence that John Eharker abandoned the possession of the property sued for, then he lost any right to remove the same, and that the plaintiff has no greater right than said Eharker had." (3) "The court instructs the jury that the partnership, the Nelson Firebrick Company, is not sued, and that the defendant is not sued as a member of said partnership, and that if the jury believes from the evidence that said Frank Nelson was not in possession of the property sued for on the 18th day of September, 1895, they will find for the defendant." (4) "If the jury believe the evidence, they must find for the defendant." (5) "The court charges the jury the original taking of property is not the gist of this action, but it is the unlawful detention, and that detinue can only be maintained against the party in possession at the time suit is brought; and if the jury believes from the evidence that the Nelson Firebrick Company, and not Frank Nelson, was in possession of the property at the time this suit was brought, then they must find for the defendant." (6) "If the jury believe from the evidence that the property sued for was, at the time the suit was brought, in the possession of E. B. Nelson, and that he was acting for the Nelson Firebrick Company in holding and controlling said property, and that said Nelson Firebrick Company was a partnership composed of the defendant and another, then they must find for the defendant." There were verdict and judgment for the plaintiff. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved. Affirmed.

W. S. Cary, for appellant. Logan & Van De Graaff, for appellee.

SHARPE, J. This action is in detinue, and the complaint describes the property recovered in the judgment appealed from as one engine and one boiler. Such description, tested by former adjudications of this court, was sufficiently definite, and the demurrer to the complaint was properly overruled. *Haynes v. Crutchfield*, 7 Ala. 189; *Thompson v. Pearce's Adm'r*, 49 Ala. 210.

The plaintiff claims through an unsatisfied chattel mortgage executed to him by John Eharker in 1884, to secure a note given for the purchase price of the boiler in suit, and the mortgage included both the boiler and the engine sued for. The description of the engine and boiler contained in the mortgage was sufficient for the purpose of the conveyance, and the objection to its admission in evidence was not well taken.

The evidence tended to show that, when the mortgage was given, Eharker had the engine at a brickyard he was operating on the land of his sister Mrs. Hoskins, with whom he resided. Subsequently, the possession of the land and of the brickmaking machinery erected on it passed from Mrs. Hoskins to one Nabors, and from Nabors to the Nelson Firebrick Company, a partnership composed of appellant and his sister-in-law. Mrs. Hoskins, Nabors, and John Eharker all died before the trial in the circuit court. The plaintiff testified, against appellant's objection, that, when the mortgage was about to be taken, a question arose as to whether Mrs. Hoskins had any interest in the machinery to be included in it; whereupon she was called upon by the parties to the transaction for information concerning her interest, and, in response, she stated that she owned the land, but not the machinery. The proof nowhere shows that Mrs. Hoskins' estate is interested in the result of this suit, and the objection to such statement based on that ground was without merit. *Butler v. Jones*, 80 Ala. 436, 2 South. 300; *Howle v. Edwards*, 97 Ala. 649, 11 South. 748. The rule which rejects parties as witnesses to statements of persons since deceased applies when the statements may contribute to a result of the suit which diminishes the estate left at the death of the decedent, whether it be in abeyance, or in the hands of an appointed representative or of one claiming such estate in legal succession. It does not apply for the protection of those who, though claiming title through the decedent, derive such claim from transactions *inter vivos*.

The main controversy is as to whether the engine and boiler are so attached to the realty as to become part of it, or are removable fixtures,—a question depending largely in such cases upon the intention with which they were erected upon the land. The statement of Mrs. Hoskins was competent as a part of the *res gestæ* upon the fact of such intention, and

also upon the fact of ownership of the machinery, in connection with the proof of her possession of the premises; and it could also be looked to by the jury to infer an understanding between her and the parties to the mortgage which might estop her from afterwards claiming the machinery as part of the realty. *Powers v. Harris*, 68 Ala. 409. Such estoppel could also extend to those holding subsequently, unless by relation equivalent to that of a bona fide purchaser.

The proof shows that, at the beginning of the suit, the brickyard, including the engine and boiler, was being operated by the Nelson Firebrick Company, through a manager employed by it; that defendant was the only male member of the firm, and that he, upon occasions, was present upon, and gave orders about, the premises. From such facts the jury could find that defendant had the immediately controlling power over the property, which would be such possession as would, if wrongful, authorize a suit in detinue. *Henderson v. Felts*, 58 Ala. 590; *Foster v. Chamberlain*, 41 Ala. 167; *Walker v. Fenner*, 20 Ala. 192. Whether such control was for his own purposes or in behalf of his firm was immaterial, if it was exercised in wrongfully detaining property to which the plaintiff was entitled. *Smith v. Wiggins*, 8 Stew. 221.

Charges 1, 3, 5, and 6 requested by defendant were properly refused, as being argumentative, and calculated to mislead the jury into the belief that the possession of the partnership was, as matter of law, inconsistent with the possession and control of one of its members, which is not true. Charge No. 2 requested was incorrect. Abandonment by the mortgagor of the mortgaged property ought not to, and does not, prejudice the rights of the mortgagee.

The rule applicable to landlord and tenant, that fixtures must be removed, if at all, during the tenant's term, is abstract here, since the proof fails to show what possessory interest, if any, in the land, was had by John Eharker. A witness stated that he resided with his sister on the land, and was operating a brickyard there, "under an agreement and by permission of said Amelia Hoskins, and as her tenant, and in subordination of her title and possession," which shows no more than a mere permissive user, subject to the continued possession of Mrs. Hoskins.

The boiler was set up for use upon a foundation of brick extending into the earth, the brick being built up from the outer edge of the foundation, so as to form a jacket reaching nearly to the top of the boiler. The engine was also erected upon and bolted to a brick foundation extending into the ground. Both were inclosed by a house so built that part of it would have to be taken away to allow the removal from it of the engine and boiler. In view of their situation, and of the circumstances under which they were so placed, the question as to whether they are removable

fixtures was one of mixed law and fact, falling within the class proper to be determined by the jury, as were the other questions in the case, including that of the title claimed by adverse possession. Finding no error in the record, the judgment appealed from must be affirmed.

(120 Ala. 376)

SWANSON v. STATE.

(Supreme Court of Alabama. Feb. 7, 1899.)

INDICTMENT—JOINDER—CRUELTY TO ANIMALS.

An indictment may properly join a count charging cruelty to animals (Code, § 5093) with one charging the unlawful killing of a horse (section 5091), though the punishment for one is a fine merely, while for the other it is fine, imprisonment, or hard labor, since both offenses are misdemeanors.

Appeal from city court of Montgomery; A. D. Sayre, Judge.

Ed Swanson was convicted of cruelty to animals and of unlawfully killing a horse, and he appeals. Affirmed.

The appellant was indicted and tried under the following indictment: "The grand jury charge that before the finding of this indictment Ed Swanson, alias Ed Swanson, did unlawfully overdrive or cruelly kill a certain domestic animal, to wit, one horse, the personal property of John W. Powell. The grand jury of said county further charge that before the finding of this indictment Ed Swanson, alias Ed Swanson, unlawfully or wantonly killed a certain domestic animal, to wit, one horse, the personal property of John W. Powell. The grand jury of said county further charge that before the finding of this indictment Ed Swanson, alias Ed Swanson, unlawfully or wantonly killed a gelding, the personal property of John W. Powell, of the value of one hundred and twenty-five dollars; against the peace and dignity of the state of Alabama." To this indictment the defendant demurred upon the following grounds: (1) The indictment contains a misjoinder of counts, in that in one count it charges defendant with unlawfully or wantonly killing a horse, and in another count it charges him with cruelty to animals; (2) because said indictment charges two separate and distinct offenses. This demurrer was overruled, and to this ruling the defendant duly excepted. The ruling on the demurrer is the only question presented for review on the present appeal.

Charles G. Brown, Atty. Gen., for the State.

SHARPE, J. The first count in the indictment charges an offense under section 5093 of the Code, the punishment for which is by fine. The second and third each charge an offense under section 5091 of the Code, which is punishable by fine, and may also be punished by imprisonment in the county jail, or hard labor for the county. The offenses each belong to the same family of crimes embraced in chapter 172 of the Code, entitled

"Malicious Mischief: Injury and Cruelty to Animals," and each is a misdemeanor. The rule against the joinder of offenses in different counts in the same indictment, when the punishment is not of the same nature, does not apply to misdemeanors. *Wooster v. State*, 55 Ala. 217. The demurrer to the indictment was, therefore, properly overruled. No question was reserved on the trial by bill of exceptions. Finding no error in the record, the judgment of the city court is affirmed.

(120 Ala. 359)

MCRAE v. STATE.

(Supreme Court of Alabama. Feb. 8, 1899.)

HOMICIDE—ASSAULT WITH INTENT TO KILL—EVIDENCE.

In a quarrel between defendant and B. with reference to a fight between their wives, defendant accused B. of striking defendant's wife, which B. denied, whereupon defendant cut him. The only evidence of what occurred at the fight between the women was brought out by defendant on B.'s cross-examination. *Held*, that defendant was not entitled to testify that in that difficulty B. had assaulted defendant's wife; such evidence not being *res gestæ* of the trouble between B. and defendant, nor admissible in justification or mitigation of the assault.

Appeal from city court of Montgomery; A. D. Sayre, Judge.

Lymus McRae was convicted of assault with intent to murder, and appeals. Affirmed.

Charles G. Brown, Atty. Gen., for the State.

SHARPE, J. The defendant, being indicted for an assault with intent to murder one Benbow, was convicted of an assault and battery. The only question reserved by the bill of exceptions is upon the refusal of the court to permit the defendant to testify, upon his offer to do so, that Benbow "had, on the morning of the same day, previous to the difficulty in the afternoon which was the basis of this prosecution, assaulted the wife of the defendant." The state had introduced testimony as to a quarrel between defendant and Benbow, at the time of their difficulty, about a fight which had occurred between their wives, in which defendant accused Benbow of having struck the wife of defendant, which Benbow then denied and denounced, whereupon the defendant cut him with a knife. The only evidence, however, as to what in fact occurred at the fight between the women, was drawn out by the defendant on cross-examination of Benbow, who, in answer to defendant's question, denied having struck defendant's wife, but said he had only pushed the women apart. The occurrences at the fight between the women were no part of the *res gestæ* of the difficulty between defendant and Benbow, and the conduct of Benbow thereat was not admissible either in justification or mitigation of the assault upon him by defendant. *Reese v. State*, 90 Ala.

624, 3 South. 818. Finding no error in the record, the judgment of the city court will be affirmed.

(122 Ala. 243)

RICE et al. v. EISEMAN et al.

(Supreme Court of Alabama. Feb. 8, 1899.)

FRAUDULENT CONVEYANCES—EQUITY—PLEADING—DISCOVERY—PRAYER.

1. Under Code, § 818 (3544), authorizing equity courts to entertain a bill to subject to a creditor's claim any property fraudulently conveyed by a debtor, the bill need not aver the debtor's insolvency.

2. A bill to subject property fraudulently conveyed, and attempted thereby to be placed beyond a creditor's reach, to his debt, is not a bill for discovery.

3. A bill averring that at an assignee's sale the assignor's clerk bought the goods ostensibly in his own name, with his own money, when in fact he had no money, but that the assignor was the real purchaser, and seeking to subject the goods to complainant's debts, need not allege that the goods were bought with the assignor's money.

4. Under a general prayer for relief, with or without a special prayer, equity will award such relief as is consistent with the case.

Appeal from city court of Montgomery; A. D. Sayre, Judge.

Bill by Eiseman Bros. & Co. and others against Sam Rice and Sam Trum. There was a judgment for complainants, and defendants appeal. Affirmed.

It was averred in the bill that the complainants Eiseman Bros. & Co., on June 6, 1895, obtained a judgment at law against the respondent Rice for an amount due on account for goods sold and delivered by them to said Rice; that on this judgment execution had been issued and returned "no property found." It was then averred that the respondent Rice was indebted to the complainant the Wertheimer-Swartz-Shoe Company for goods sold and delivered by it to said respondent, which sum was due and unpaid. The fourth and fifth paragraphs of said bill were as follows: "(4) That said respondent Rice was engaged in a general mercantile business in the city of Montgomery, Alabama, up to about December 24, 1894; that while he was engaged in said business he became indebted to orators for goods sold and delivered him for the amounts and in the manner set forth in paragraphs 2 and 3 above; that on, to wit, December 24, 1894, said respondent Rice made a general assignment for the benefit of his creditors to one Nathan Gerson, as trustee; that said assigned business yielded, upon administration, 14 per cent. net dividend, which was paid to creditors; that said Gerson as trustee disposed of the stock and other assets so assigned to him in bulk at auction to the highest cash bidder; that at said sale one Sam Trum became the ostensible purchaser thereof for an amount to your orators unknown.

"(5) That the said Trum was a clerk in the employ of said Rice before and up to the time of said assignment; that said Trum is a

brother-in-law of said Rice; and orators are informed and believe, and upon such information and belief charge and aver that the said Sam Trum was without visible means and that he bought said stock at said assignment sale in his own name and ostensibly with his own money and for his own benefit, but that in fact said Rice was the real purchaser of said assigned stock and the sole beneficiary of said purchase operating in the name of said Sam Trum; that under the name of Sam Trum the said Rice has been and still is, in fact, operating said purchased business for his own benefit; that said Rice is apparently and ostensibly a clerk or employé of said Trum but is in reality the true and bona fide owner of said business."

The bill then avers, "that in the manner and by the means above set forth and described, the said Sam Rice is withholding from the satisfaction of orators' claims assets that ought in good conscience be subjected to the payment of said debts, but that orators are unable to legally condemn said assets and property to their claims."

The prayer of the bill was as follows: "Orators further pray that your honor will decree that said stock and business operated and managed in the name of Sam Trum, as aforesaid, be declared equitably liable to the satisfaction of orators' claims against said Sam Rice; orators further pray for such other and different relief as may to your honor seem just and equitable."

The respondents moved to dismiss the bill for the want of equity, and also demurred to the bill upon the following grounds: (1) Said bill does not aver, or otherwise show, that said Sam Rice has no other property than that which, it avers, is in the name of said Sam Trum. (2) Said bill shows that the complainants have a complete and adequate remedy at law. (3) That the said bill is in the nature of a bill for discovery, and is not sworn to. (4) Said bill fails to aver that said goods were bought with money belonging to said Rice. (5) That the prayer of said bill fails to ask for any definite or certain relief. (6) That the prayer of said bill fails to ask for any definite or certain relief against any specific property. (7) That the said prayer fails to ask for a receiver, or request the court to condemn said goods in any manner known to equity. (8) There is no equity in the bill.

On the submission of the cause on the motions and the demurrers, there was a decree rendered overruling each of them, and from this decree the defendants appeal and assign the rendition thereof as error.

Graham & Steiner, for appellants. C. P. De Yampert, for appellees.

HARALSON, J. 1. Section 818 (3544) of the Code enlarges the original jurisdiction of courts of equity, so that a creditor at large without a lien, may file a bill in chancery to discover or to subject to the payment of his

debt any property which has been fraudulently transferred or conveyed by his debtor. It extends the jurisdiction, as we have held, to all classes of transfers or conveyances which offend the rights of creditors, whether with or without a lien, or with or without a judgment, notwithstanding there may exist legal remedies to recover the debt, and though the debtor may own other property sufficient to pay his debts. It is unnecessary, therefore, in such a bill to aver that the debtor is insolvent. *Carter v. Coleman*, 82 Ala. 177, 2 South. 354; *Dickson v. McLarny*, 97 Ala. 383, 389, 12 South. 398; *Lehman v. Meyer*, 67 Ala. 396; *Wooten v. Steele*, 109 Ala. 563, 19 South. 972.

2. The bill in this case, filed under said section 818 (3544) of the Code, has none of the features of a bill of discovery, such as defendants attribute to it, but protesting it to be insufficient as such. It proceeds upon the other provision of the statute, to subject to the payment of the demands of complainants, property that has been fraudulently conveyed and attempted to be placed and covered by such transfer, beyond the reach of complainants. They are alleged to be, each, creditors of defendant, Rice, for goods sold and delivered to him, one of them having reduced his claim against said defendant to judgment in the circuit court, the date and amount of which is stated, and the claim of the other is alleged to be by open account, also for goods and merchandise sold, and in a sum stated, due and payable on the 1st of March, 1895, which claims are alleged to remain due and unpaid.

If the facts averred in the fourth and fifth paragraphs of the bill are true, the goods and merchandise sought to be condemned for the payment of complainants' demands belong to the defendant, Rice, although the legal title to them is in the name of defendant, Trum, who holds them for the use and benefit of defendant, Rice. These averments make Trum, a fraudulent assignee of the goods from Gerson,—the trustee in the deed of assignment to him from Rice,—the money with which the goods were purchased by Trum from Gerson having been furnished by the debtor, Rice. It is not permissible for him, through the instrumentality of Trum, to hold these goods, for which he paid the money, and thus cover them from the reach of his creditors. The purchase and transfer, if true as alleged, is a mere device to defraud Rice's creditors. Equity looks through and unveils such an alleged device and manipulation of them for Rice's benefit, and will pursue them for the payment of his creditors. *Moog v. Farley*, 79 Ala. 246; *Bank v. Kennedy*, 91 Ala. 470, 8 South. 652.

3. The prayer is altogether sufficient for the purposes in hand. It is especially for a decree, "that said stock and business operated and managed in the name of Sam Trum, as aforesaid, be declared equitably liable to the satisfaction of orators' claims against

said Sam Rice," followed by a prayer for general relief.

When there is a prayer for specific relief, chancery will not go further than its general terms require; but under a general prayer for relief, with or without a special prayer, the court will award such relief as may be made out or is consistent with the case. *Driver v. Fortner*, 5 Port. (Ala.) 10; *Story*, Eq. Pl. §§ 40-42.

There was no error in overruling the motion to dismiss for want of equity, nor in overruling the demurrer to the bill.

Affirmed.

(122 Ala. 297)

TREADWELL v. TORBERT.

(Supreme Court of Alabama. Feb. 9, 1899.)

EQUITY—DISMISSAL—LACHES—APPEAL—CANCELLATION OF DEEDS—GROUNDS—COMPOUNDING FELONY.

1. On a motion to dismiss a bill for want of equity, every averment, though defective, if capable of being cured by amendment, must be taken as true.

2. Where one commences a criminal prosecution against another on a false charge, with the purpose of inducing the latter's wife to execute a deed, and the wife, on representations that the husband committed the offense, executes the deed to secure his release, she may have the deed canceled.

3. Where one prosecutes another criminally on a known false charge, an agreement by him, for a consideration, to desist from the prosecution, does not constitute the offense of compounding a felony.

4. Where a bill is dismissed for want of equity, but on appeal it is held to show equity, and defendant seeks an affirmance on the ground of laches, the bill will be treated as amended, so as to relieve complainant from the imputation of laches.

5. Where a bill by a grantor to cancel deed avers that he is in possession, and avers nothing to show that he ever surrendered possession under the deed, or recognized the grantee's title, he cannot be charged with laches.

Appeal from chancery court, Geneva county; Jere N. Williams, Chancellor.

Bill by F. O. Treadwell against C. O. Torbert for cancellation of a deed. From a decree dismissing the bill for want of equity, complainant appeals. Reversed.

W. O. Mulkey, for appellant. Geo. P. Harrison and Morris & Carmichael, for appellee.

TYSON, J. The bill in this case was filed by appellant to cancel a deed executed by her to the appellee on the 27th day of June, 1895, as a cloud upon her title to certain lands of which, it is averred, she is in the possession. The chancellor dismissed the bill for want of equity, and it is from this decree that this appeal is prosecuted. The facts averred may be fairly collated, notwithstanding they are not tersely and concisely stated, as follows: That the defendant, on May 1, 1895, commenced a criminal prosecution against the husband of complainant for obtaining from him \$800 under false pretenses, which was wholly unfounded and

fraudulent, and for the purpose of procuring the execution of this deed; that, before and after her husband's arrest, the defendant represented to her that her husband had committed the said offense, and that he was liable to be imprisoned therefor in the penitentiary; and that it would be necessary for complainant, in order to secure his release and avoid his conviction and sentence, to execute the deed which she here seeks to have canceled; that the charge brought by defendant against her husband was false, malicious, and "trumped up"; and that defendant knew it to be false, but resorted to it for the purpose of inducing complainant to execute the said deed; and that there was no other consideration for said deed. These facts must be taken as true on the motion to dismiss the bill for want of equity, and, indeed, every averment of the bill, though defective, but capable of being cured by amendment, must be so taken and treated. They constitute a fraud upon complainant, against which a court of equity will grant relief. It would be unconscionable, and would encourage a resort to dishonest artifices and practices to acquire property, to allow the defendant to retain the fruits of this transaction, obtained under the circumstances alleged in this bill.

The record contains no opinion of the chancellor, and we are without data, by which we could be informed as to the considerations that influenced him in reaching the conclusion that the bill contained no equity. Doubtless, the contention was insisted upon before him by the defendant that is here relied upon. It is that the facts averred show that the real consideration of the deed was the compounding of a felony. How defendant could be guilty of compounding a felony by taking or receiving the property conveyed by the deed to compound or conceal such felony, or to abstain from any prosecution therefor, if complainant's husband had committed no offense, we are unable to perceive. Had he been indicted for the compounding of a felony by receiving the deed from complainant, in consideration of his promise to conceal or to abstain from a prosecution of her husband, it would have been a perfect defense to have shown that complainant's husband was not guilty of obtaining the money by false pretenses, that the charge and prosecution was unfounded, and could not have been successfully maintained. It would be a non sequitur to hold that defendant would not be guilty of compounding a felony under the facts alleged in that bill, but that complainant should be denied the right to prosecute this suit because she shared in the guilt of an illegal and immoral transaction. It follows that the case as now made by this bill is clearly distinguishable from *Treadwell v. Torbert* (Ala.) 24 South. 54, and not within the influence of the principles there declared.

The contention of appellee that the decree

dismissing the bill should be affirmed, because it appears that more than three years have elapsed since the matters complained of arose and the filing of the bill, is untenable. Even if this doctrine had any application to this case, we would treat the bill as amended, so as to relieve the complainant of the imputation of laches. But it is distinctly averred that she is in the possession of the lands, and, for aught that appears, has never surrendered the possession to defendant under the deed, or recognized his claim or title to them. Staleness or laches is founded upon acquiescence in the assertion of adverse rights, and unreasonable delay on complainant's part in not asserting her own, to the prejudice of the adverse party. Pom. Eq. Jur. § 419; 12 Am. & Eng. Enc. Law, 533; 3 Brick. Dig. p. 366, § 463.

There are some amendable defects in the bill, which can be cured, but they furnished no ground for its dismissal on the motion. The decree must be reversed, and the cause remanded. Reversed and remanded.

(122 Ala. 611)

BATES v. CROWELL.

(Supreme Court of Alabama. Jan. 31, 1899.)

DETINUE—JUDGMENT—RES JUDICATA—CONDITIONAL SALE—PAROL EVIDENCE—MORTGAGES—USURY—DEFENSE—EQUITY—REMEDY AT LAW—CANCELLATION OF INSTRUMENTS—EVIDENCE.

1. Plaintiff, desiring to purchase a horse, applied to defendant for a loan, which he declined to make, but himself purchased the horse, and delivered him to plaintiff under a conditional contract of sale at a greatly advanced price, which agreement plaintiff alleged was a mere cover for usury, and in fact intended as a mortgage. Plaintiff having broken the conditions of the contract, defendant recovered the horse from him in detinue. *Held*, that the judgment in that action was not res judicata of plaintiff's suit in equity to cancel the contract, etc., since the facts alleged by plaintiff could not have been proved as a defense at law to the action of detinue.

2. Parol evidence cannot be introduced in a court of law to show that an instrument on its face a conditional sale of personal property was in fact intended as a mortgage.

3. The defense of usury cannot be pleaded at law to an action of detinue based on a contract which, on its face, is a conditional sale.

4. Where property was transferred by a contract on its face a conditional sale, which plaintiff alleged was in fact a mortgage, made as a cover for usury, and the creditor, who had retaken the property for breach of condition, refused to deliver it after payment of the loan with legal interest, plaintiff's only remedy is in equity to cancel the contract and recover the property.

5. Plaintiff alleged that, desiring to purchase a horse from a third person, the price of which was \$50, he applied to defendant for a loan of that amount, which he refused, but himself purchased the horse, and sold it to plaintiff by a contract on its face a conditional sale for \$125; that such transaction was in fact but a usurious loan, and that the conditional contract of sale was in fact a mortgage. Defendant admitted that he sold the horse to plaintiff for \$125, to be paid in weekly installments. The contract also included other personal property which belonged to plaintiff, and his witnesses testified that the transaction was

a loan. *Held*, that a decree for plaintiff canceling the contract and ordering delivery of the horse to him, he having paid defendant \$50, with legal interest thereon, was supported by the evidence.

Appeal from city court of Birmingham; William W. Wilkerson, Judge.

Bill by Allen Crowell against George B. Bates to cancel a contract and recover possession of property. From a decree for complainant, defendant appeals. Affirmed.

The averments of the bill substantially are that complainant, desiring to purchase a horse belonging to the Heldt-Nelson Coal & Lumber Company, and it having agreed to sell him to complainant for the sum of \$50, which was a reasonable value, and complainant being very indigent, and without means to obtain the money for that purpose, applied to the defendant, Bates, and informed him of the above facts, and asked him for a loan of the money to buy said horse; that said Bates, in reply to said request, and for the purpose of evading the statutes against usury, stated to complainant that he (Bates) would buy the horse for said sum of \$50, and sell him to complainant for \$120; that complainant, being unable to raise the money otherwise, agreed to and did accept said proposition; that said Bates thereupon purchased said horse from the said Heldt-Nelson Coal & Lumber Company at and for the sum of \$50, and complainant, pursuant to his agreement with Bates, executed and delivered to Bates a contract, a copy of which is attached to the bill as Exhibit A, and received the horse from Bates. The bill further avers that at the time of making said original agreement said Bates was well aware of the indigent condition of complainant, and knew that said horse was not worth more than the sum of \$50, and it was the intention of both parties to said transaction to violate the laws against usury, and that said contract is in fact usurious, and said Bates is not, and never was, entitled to receive upon the contract more than the said sum of \$50 and the lawful interest thereon. The bill also states that, pursuant to said agreement, complainant paid to said Bates, on said contract, the said sum of \$50, and the lawful interest thereon. The bill further avers that Bates afterwards took possession of said horse, claiming him under said contract, is still in the possession of him, and has refused, on the demand of complainant, to surrender said horse to complainant. The bill further avers that said transaction was in fact a loan by Bates to complainant of the sum of \$50; and the additional \$70, which complainant, by said contract, promised to pay to Bates, was so much usury for the loan and forbearance of the \$50, and both were so intended by complainant and Bates at the time of the transaction; and that said agreement was intended by both the parties thereto only as a security for the payment of the said \$120, and was put in its existing form for the purpose and with the intent to evade the statute against usury. The

complainant submits himself to the jurisdiction of the court, and formally offers to do equity. The prayer of the bill is for the cancellation of the contract, and that the horse be delivered to complainant.

The contract, which is made a part of the bill as Exhibit A, is as follows: "Geo. B. Bates, of the first part, and Allen Crowell, of the second part, agree as follows: Said Geo. B. Bates agrees to furnish said party of the second part one black horse (two white hind feet) named Pat, one single-horse dray, and one set of harness, of the agreed value of one hundred and twenty dollars and — cents, upon the following conditions, which are to be strictly complied with by the party of the second part: (1) Said property so furnished to be used and kept at the residence of the party of the second part, and it is not to be removed therefrom without the written consent of the said Geo. B. Bates. (2) The title to said property is to remain and continue in the said Geo. B. Bates until he makes said party of the second part a written title to the same; and, until said title is made, said party of the second part holds possession of said property in trust for said Geo. B. Bates. (3) Said party of the second part is to pay the sum of six dollars and — cents on Saturday of each week for twenty weeks, as rent for said property, to said Geo. B. Bates, at his place of business at —. And if said party of the second part fails in any way to pay said rent when the same becomes due as aforesaid, then said Geo. B. Bates or his assigns may take possession of said property by entering any premises of mine, or to which I may have access, and the said Geo. B. Bates is to retain the amounts so paid for rent for and during the time said property has been in his possession. (4) If said party of the second part pays the sum agreed upon for each and every week as agreed above, then said Geo. B. Bates obligates and binds himself to make said party of the second part a written title to said property. But said Geo. B. Bates is not to make any title or lose or waive any right to said property, unless said payments are made as above stipulated; time being here made the essence of this contract. And said party of the second part hereby acknowledges the receipt of said property above described, and agrees to hold the same upon the terms above stated. Said party of the second part further agrees and binds himself to keep said property in good order and repair, and not to abuse same, and to comply with each and every one of the stipulations above named, or, in default thereof, to deliver said property upon demand without any trouble, expense, or delay being given to said Geo. B. Bates or his assigns. Any violation of this agreement shall be considered as a conversion of said property. Said party of the second part further agrees that he will not attempt to mortgage, incumber, or in any way convey said property until he gets a title to the same, as he does not own the same until that time.

And the said party of the second part further agrees to pay all attorney's fees or expenses of collection in default of payment of any of the above amounts; and to secure the payments above promised to be paid as rent, the said party of the second part hereby waives all his right to claim any exemption under the constitution and laws of the state of Alabama or any other state in the United States."

The respondent moved to dismiss the bill for the want of equity, and also demurred to it upon the ground that the averments did not state a ground for equitable relief. This demurrer was overruled. Thereupon the defendant filed his answer to the bill, in which he set up that the horse was purchased by him from the Heldt-Nelson Coal & Lumber Company for the sum of \$50, and that he sold the horse to the complainant as evidenced by the contract made an exhibit to the bill, and copied above; that this transaction with the complainant was an absolute sale, and was not intended as a mortgage, and that he refused to lend the complainant the money necessary to purchase the horse, but, that after having purchased it himself, he entered into a separate transaction for the absolute sale to complainant as evidenced by said contract. There was also included in this answer a special plea, the substance of which is stated in the opinion. The complainant interposed a demurrer to this plea upon the ground that the facts set forth therein constituted no answer to the complainant's bill, and, without any objection being made to this mode of contesting the sufficiency of the plea, the demurrer was sustained. The cause was submitted in behalf of the complainant upon the bill and exhibits thereof, and the depositions of A. C. Howze, one of the attorneys for complainant, C. C. Heldt and A. W. Nelson, of Heldt-Nelson Coal & Lumber Company, together with the exhibits thereto; all of which testimony substantiated the averments of the bill. In behalf of the defendant the cause was submitted upon the answer and the depositions of the defendant and one Grimsley, and the exhibits thereto, and the testimony of these two witnesses tended to show that the transaction between the defendant and the complainant was an absolute sale. On the final submission of the cause a decree was rendered granting the complainant the relief prayed for. From this decree the defendant appeals, and assigns the rendition thereof as error.

John H. Miller, for appellant. White & Howze, for appellee.

DOWDELL, J. A motion to dismiss the bill for want of equity, as also a demurrer going to the equity of the bill, was overruled by the court below. The defendant then answered the bill, and also filed a plea thereto, setting up in said plea, as res adjudicata of the matters complained of in complainant's bill, a judgment in a detinue action in the circuit

court, wherein the defendant had recovered of the complainant the horse in question under the contract Exhibit A. A demurrer was sustained by the court to this plea, no objection being made as to this mode of testing the sufficiency of the plea. The plea failed to show that complainant here, who was defendant in the detinue suit, had or could have had the benefit of the matters set up in his bill as a defense in said suit, and for that reason the plea was insufficient, if for no other. It is plain from the averments of the plea that the defendant here, and plaintiff in the detinue action, recovered judgment for the horse in that action on the strength of his title under the contract, which is here set out as Exhibit A in complainant's bill. This contract, as apparent on its face, was a conditional sale, and, standing alone, was bound to be so held and construed in a court of law. *Warren v. Liddell*, 110 Ala. 232, 20 South. 89; *Iron Works v. Smith*, 98 Ala. 614, 13 South. 525; *Sumner v. Woods*, 67 Ala. 139; *Turner v. Wilkinson*, 72 Ala. 361. Nor was it competent in a court of law to show by parol evidence that it was intended by the parties to be a mortgage. It is not permissible, in a court of law, to vary the terms of a written contract by parol evidence. 1 Brick. Dig. p. 865, § 866; *Bragg v. Massie's Adm'r*, 38 Ala. 89; *Jones v. Tra- wick's Adm'r*, 31 Ala. 253. It is only by reason of the statute that the defense of usury can be set up in an action of detinue under a mortgage. The provisions of the statute do not extend to cases where the action in detinue is based upon a title under a conditional sale. If the contract, which on its face was a conditional sale, was in fact, as averred in complainant's bill, a mortgage or security for a loan, and the transaction was usurious, the complainant's only means of relief against the usury was by bill in equity to redeem, offering to pay principal and legal interest; or if, as in the present case, the loan and legal interest thereon had been paid to the creditor, then by bill for cancellation of the contract and recovery of the mortgaged property. The jurisdiction of chancery for the cancellation of contracts is an old and well-established doctrine. 3 Pom. Eq. Jur. (2d Ed.) § 1377, and authorities cited in note.

The defendant, in his answer, admits that he sold the horse to the complainant at and for the price of \$120, to be paid in weekly installments of \$6 a week. The contract Exhibit A embraces a wagon and set of harness. The only reference in the testimony to this property is to it as being the property of the complainant, Crowell, and this circumstance tends to show that the contract was something more than a conditional sale of the horse. The testimony of the witnesses for the complainant is to the effect that the transaction was a loan, and, when taken in connection with the circumstances attending the transaction, the weight of the evidence sustains the decree of the city court on the

facts. We find no error in the record, and the decree of the court below must be affirmed.

(123 Ala. 529)

LUCAS v. SOUTHERN RY. CO.

(Supreme Court of Alabama. Feb. 8, 1899.)

RAILROADS—CONTRACTS—AGENCY—EVIDENCE—HARMLESS ERROR.

1. An averment that plaintiff contracted with a railway company for the transportation of the corpse of his infant is not supported by proof that he furnished the money to another, who acted as his agent in purchasing the tickets, where neither the agency nor the fact that the agent was using plaintiff's money is disclosed to the company.

2. The refusal of the filing of an amended count is harmless error where, from the evidence, plaintiff is not entitled to recovery under its allegations.

Appeal from circuit court, Bibb county; John Moore, Judge.

Action by James Lucas against the Southern Railway Company. Upon the introduction of all the evidence, the court, at the request of the defendant, gave the general affirmative charge in its behalf, and to the giving of this charge the plaintiff duly excepted. There were verdict and judgment for the defendant. The plaintiff appeals, and assigns as error the rulings of the trial court to which exceptions were reserved. Affirmed.

J. M. McMaster and W. S. Cary, for appellant. Smith & Weatherly and Edward S. Lyman, for appellee.

TYSON, J. The complaint in this case avers that plaintiff contracted with defendant to transport and deliver the corpse of his infant child from Blocton, Ala., to Aldridge, Ala., both being stations on the defendant's line of road; that he paid the price of transportation charged, and defendant accepted said corpse for transportation; that the contract of affreightment was effectuated by the purchase of a passenger ticket for said corpse; that defendant negligently and carelessly failed to carry the said body to Aldridge, but left it at a station some six miles distant from Aldridge. The complaint further avers that, in consequence of this negligence, the funeral of said infant was delayed, and plaintiff was "sorely vexed and harassed, and suffered great mental pain and anguish, and was compelled to prolong his stay from his business, to wit, two days, to his special damage," etc. The undisputed evidence, as shown by the record, is that one G. B. Lucas, a kinsman of the plaintiff, was in charge of the corpse, and purchased the tickets for its transportation and the transportation of three other persons, the plaintiff being one of them, who were accompanying the remains. The record affirmatively discloses that plaintiff was not present when the tickets were purchased, and never had them in his possession; that G. B. Lucas delivered all the tickets to the conductor of the train, tell-

ing him that one was for the corpse, which was put in the caboose of the mixed train, and transferred at Gurnee Junction to the baggage car of the regular passenger train; and, further, that the only information imparted by G. B. Lucas to defendant's agent when he purchased the tickets was that one of them was for a "corpse," which ticket the agent identified by writing the word "corpse" upon it. The evidence further shows that plaintiff gave the money to G. B. Lucas to pay for all the tickets purchased by him, and G. B. Lucas testified that he was acting for the plaintiff in the purchase of the tickets; but it is nowhere shown that this was disclosed or known to the agent when he sold the tickets. On the contrary, the agent testified that he did not know that the "corpse" was the body of plaintiff's child; that there were three families by the name of Lucas living in Blocton, and that he knew that an infant in one of these families had died, but did not know which one; that he was not told it was a child of plaintiff, and he only knew the plaintiff by sight.

We have only stated the evidence bearing upon the point as to whether or not it supports the allegations of the complaint that there was a contract between the plaintiff and defendant, as alleged, for the transportation of the "corpse." It will be observed that the contract was made by G. B. Lucas with defendant's agent, who says that plaintiff gave him the money to purchase the tickets, and that he was acting for the plaintiff in the transaction, but that he did not disclose his agency, or the fact that he was using plaintiff's money in paying for it. The case of *Kennon v. Telegraph Co.*, 92 Ala. 399, 9 South. 200, was a suit by the sendee of a telegraphic message against the telegraph company for the failure to deliver a telegram within a reasonable time from its sending. The contention of the telegraph company was that it made no contract with the sendee, and therefore it was not liable. Justice McClellan, in delivering the opinion of the court, said: "As we construe the amended counts of the complaint, they each sufficiently aver that the plaintiffs, through their agents in New York, made a contract with the defendant to transmit a message from the agents to their principals at Salem, Alabama, with diligence and dispatch, for a reward then and there paid by the agents for the principals, and subsequently repaid by the latter to the former; and that the defendant violated said contract, in that it misst the message, and failed to transmit and deliver it to plaintiffs for several days after it received the same for transmission, and should have transmitted and delivered it. On the contract thus alleged, these plaintiffs may sue, and, if the evidence develops that they were disclosed to the telegraph company as the principals in the contract, they may recover against the defendant." To the same effect is the cases of *Daughtery v. Telegraph Co.*, 75 Ala. 168; *Telegraph Co. v. Wilson*, 93 Ala. 82, 9 South. 414; *Wells, Fargo & Co.'s Express v. Fuller* (Tex. Civ. App.) 23 S. W.

412; *Railway Co. v. Denny* (Tex. Civ. App.) 24 S. W. 317. It is true that none of these cases decide the converse of the proposition above quoted and italicized, but it necessarily follows that it is bound to be correct. So, then, we feel constrained to hold that plaintiff has failed to prove this averment of his complaint, and cannot recover.

The second count offered by way of amendment contains the same averment as to the making of the contract for transportation, and, if there was error in the action of the court in not permitting it to be filed, it was without injury to the plaintiff.

The other assignments of error relate to the exclusion of testimony, which in no way affect the question decided by us, and it is unnecessary to consider them. The affirmative charge was properly given for the defendant. Judgment affirmed.

(122 Ala. 249)

MOBILE & O. R. CO. v. HESTER.¹

(Supreme Court of Alabama. Jan. 18, 1899.)

RAILROADS—CONDEMNATION OF LAND—DAMAGES—INSTRUCTIONS—JUDGMENT.

1. An instruction in a condemnation of land by a railway company that the possibility of the destruction by fire of houses on the land cannot be made the basis for damages is properly refused, since it impresses the jury that the liability of the improvements to fire in the future from the operation of the railroad cannot be considered in determining the present value of the remaining property.

2. The court's reference in its general charge, in a condemnation proceeding, to decisions of another state illustrative of the general principles of law governing juries in the ascertainment of compensation in such cases, is not reversible error, where the jury is not misled to appellant's prejudice.

3. Under Code, § 1719 (3212), providing that, on the rendition of a verdict in a condemnation proceeding, the court must order a condemnation in pursuance thereof, on payment of the compensation assessed, it is improper to render a moneyed judgment, and order execution thereon.

Appeal from circuit court, Tuscaloosa county; S. H. Sprott, Judge.

The proceedings in this case were instituted by the appellant, the Mobile & Ohio Railroad Company, filing a petition addressed to the probate judge of Tuscaloosa county asking for the condemnation of a right of way through the lands of the appellee, William Hester.

On the hearing of the application, there was a decree of condemnation and commissioners appointed to assess the damages. Upon the report of the commissioners, the probate court rendered a final decree assessing the damages of the respondent at \$750. From this decree the petitioner appealed to the circuit court. In the circuit court the question at issue was the amount of damages that should be allowed the respondent for the right of way sought to be condemned, and the facts in reference thereto, so far as are necessary to an under-

¹ Rehearing denied February 3, 1899.

standing of the decision on the present appeal, are sufficiently stated in the opinion.

The bill of exceptions recites that: "As a part of his oral and general charge to the jury, the court adopted as a part of such charge and read to the jury extracts from the opinion rendered by the supreme court of New Hampshire in the case of *Adden v. Railroad Co.*, 55 N. H. 413," and that to the reading of each of such extracts the Mobile & Ohio Railroad Company separately objected and excepted.

The petitioner requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (3) "The compensation allowed for right of way should be direct and proximate and not remote and contingent, upon circumstances which may or may not transpire. The possibility of the future destruction of buildings or like improvements by fires is a field of inquiry so remote and contingent as to be without and beyond any range of damages known to the law in this case." (4) "Mere prospective damages from fires which may occur during the future operation of the railroad are not proper elements of damages for consideration by the jury in this case." (5) "The court charges the jury that in estimating damages in this case they have only to determine the difference in value of the defendant's plantation before and since the appropriation of the right of way by the plaintiff, and they may not consider any remote damages for fires that may be hereafter occasioned by the operation of plaintiff's railroad."

The verdict of the jury was as follows: "We the jury find the issue for the defendant for damages to plantation and assess the damages at one thousand dollars." Upon this verdict the court entered the following judgment, after setting out said verdict: "It is therefore considered by the court, and it is the judgment of the court, that the defendant have, and recover of the plaintiff in the sum of one thousand dollars, the damages assessed by the jury, together with the costs in this behalf expended, for which let execution issue," etc.

The petitioner appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved. Reversed.

E. L. Russell and Fitts & Fitts, for appellant. Henry B. Foster, for appellee.

HARALSON, J. The measure of damages in cases of this character, as established in this court, sustained by many decisions elsewhere and text writers is, the value of the land when taken by the railroad company before any injury thereto resulting from the construction of the road, and the injury or diminution in the value thereby caused to the remaining and contiguous lands, with interest on the sum thus ascertained. *Jones v. Association*, 70 Ala. 227; *Bank v. Thompson* (Ala.) 22 South. 668; *Lyon v. Railway Co.*, 42 Wis. 553; *Mobile & O. R. Co. v. Postal Tel. Cable*

Co. (Ala.) 24 South. 408; 3 Elliott, R. R. § 995; 6 Am. & Eng. Enc. Law, 567.

In arriving at this difference in value of the land before and after the taking, when a part only is taken, various elements of damage are to be considered, such as the difficulty of access and of communication between the different parts; the expense of constructing crossings; the interference with the drainage of the land, or the flow of surface water, or with the water supply; the injury to grass and crops; cost of fencing rendered necessary for the reasonable use and enjoyment of the remainder; danger of fire from passing engines and the like. For illustrative instances of matters to be considered in estimating these damages, see *Mills*, Em. Dom. § 163; *Lewis*, Em. Dom. §§ 496-499; 3 Elliott, R. R. §§ 995, 996, 1127. As for damage from fire, Mr. Lewis lays down the rule, consonant with reason and authority to be, that "when a part of a tract is taken for railroad purposes, danger from fire to buildings, fences, timber or crops upon the remainder, in so far as it depreciates the value of the property, may properly be considered. It is immaterial that the railroad company is made absolutely liable for all losses by fire which originated from the operation of the road, whether they result from negligence or otherwise. Such a liability would doubtless render the depreciation in value less than in cases where the company was liable only for fires resulting from negligence. It is to be borne in mind that compensation is not to be given for increased exposure to fire, nor for increased insurance rates, nor from probable losses by fire in the future for which no recovery can be had, but simply from depreciation in the value of the property by reason of the danger from fire. The evidence should, therefore, be limited to showing all the facts in regard to the situation of the property and improvements relatively to the railroad and perhaps to showing the distance from the road to which the danger extends. Evidence of actual damages by fire before the assessment of damages should be excluded." *Lewis*, Em. Dom. § 497. The present value of buildings for residence or other farm purposes, common experience teaches is diminished by the effect of constant liability to fire on account of their proximity to a railroad, and as to such matters, the jury may consult their own knowledge and experience in arriving at a correct verdict, as to the deterioration in value of the portion of the land not taken. *Rosenbaum v. State*, 38 Ala. 355; *Weaver v. Shropshire*, 42 Ala. 230, 233; *Mills*, Em. Dom. § 154.

In some cases, it has been held, that it is incumbent on one who claims damage on this ground, to show that the company's track ran so near the buildings "as to cause imminent and appreciable danger by fire." 1 Redf. R. R. (5th Ed.) § 74, note 11; 6 Am. & Eng. Enc. Law, 550. "A broader view," says Mr. Randolph, "is taken in decisions which do not insist upon the imminence of the risk, but sim-

ply require evidence of the depreciation on account of it." *Rand. Em. Dom.* § 259. He collates the decisions pro and con.

In the case before us, witnesses were examined as to the damages the owner sustained to the remainder of his lands in consequence of the running of the railroad through them. It ran through his settlement on the farm, dividing the buildings, leaving some of them on one and some on the other side of the track. The witnesses examined on the subject gave different estimates of the damages, and those who testified on the subject also differed as to the proximity of the buildings to the railroad track. One of them testified that the road ran between the dwelling and the barn, about 200 feet from the barn, and about 200 or 300 feet from the house. Another, that the track ran about 250 feet from the dwelling, and the barn was about 50 feet from the right of way. Another, that there were some cabins on or near the right of way. Another still deposed, that it ran in the neighborhood of 150 feet from the house, and yet another that the barn was about 70 or 80 feet from the right of way, and that there was a double cabin between the house and right of way. The owner, William Hester, testified that the right of way ran about 125 feet from the dwelling and 18 feet from the barn; that he had measured the distance of the barn from the right of way, but had not measured the distance therefrom to the dwelling, and that the barn was a very fine one, and to build one like it would cost about \$1,500.

The court at the request of the owner of the land, the appellee here, charged the jury in substance, that in measuring the damages it was proper to take into consideration the matters affecting the market value of the property appropriated; that matters of mere fancy, conjecture or the like, should be strictly excluded from consideration; that the rule for measuring damages in the case was, that the owner was entitled to the difference between the market value of the whole of the plantation bisected, before the taking, and the market value of all that remained to him after the taking, uninfluenced by any general rise in value due to the erection of the improvement, and likewise uninfluenced by any prospective accidents which might in the future befall his premises, by reason of the operation of the improvement thereon; that fires, such as might be hereafter occasioned by the operation of the railroad, should not be considered by the jury, further than the possibility of such fires affected the present value of the property of the owner. These charges appear not to have been excepted to by the railroad company. They certainly contain no error of which it can complain. We have referred to them in elucidation of other charges to which it did except, and assigns as error.

The charges numbered 3, 4 and 5 requested by defendant, assert about the same prop-

osition in different forms,—that the possibility of the destruction of the houses on the owner's land in the future, could not be made the basis for allowing damages therefor, in this condemnation proceeding. The court had just charged the jury very correctly, that the possibility of fires might be considered as affecting the present value of the property, and not in themselves to be considered as damages to be now allowed. These charges were calculated to mislead the jury and impress them, that the liability of the improvements to fire in the future, from the operation of the defendant's railroad, could not be considered, even in determining the present value of the property remaining after that taken by the railroad, and were in contravention of the charge just given the jury by the court on that subject.

The extracts from the decision of the New Hampshire court read by the court to the jury in its general charge, were designed as merely illustrative of the general principles of law governing juries in the ascertainment of compensation in such cases. If they referred to elements of compensation not in this case, and were to that extent abstract, or calculated to mislead, we would not reverse on that account. It is apparent that the jury were not misled by them to the prejudice of the appellant. 3 *Brick. Dig.* p. 113, §§ 106, 107.

The judgment rendered was not such a one as is authorized in proceedings of this character. It was never within the contemplation of the statute that a moneyed judgment should be rendered, as in debt or assumpsit, as was here done, on which an execution should issue. The verdict of the jury should be recorded, and an order of condemnation entered in pursuance thereof upon the payment of the sum ascertained and assessed by the verdict, or the deposit thereof in court for the defendant, which shall vest in the applicant the easement proposed to be acquired for the uses and purposes stated in the application, and for no other uses or purposes. Code, §§ 1719, 1721 (3212, 3216). The applicant has the option to pay the assessment at any time within six months thereafter, or in case an appeal is taken, within six months after the appeal is determined; but if he fails to pay the same within such time, the assessment no longer binds the owner, and the rights of the applicant thereunder shall determine. Code, § 1722 (3218); *Commissioners' Court v. Street*, 116 Ala. 28, 22 South. 629.

The verdict of the jury was in proper form, and authorized a judgment to be rendered thereon in accordance with the statute. The court having rendered an erroneous judgment on this verdict, the same will be reversed and set aside; and a proper judgment will be here rendered on the verdict,—such a judgment as the court below should have rendered thereon.

Reversed and rendered.

(122 Ala. 159)

BROWNE v. CITY OF MOBILE.

(Supreme Court of Alabama. Feb. 1, 1899.)

PLEADING — DEMURRER — ABANDONMENT — CITY CHARTER — CONSTRUCTION — UNCONSTITUTIONAL CLAUSE — EFFECT — ORDINANCE — LICENSES OF VEHICLES — VIOLATION — VALIDITY.

1. Demurrer to the original complaint is abandoned unless reinterposed to the amended complaint.

2. Under a city charter providing that "a vehicle license may be imposed in addition to a business license, provided that such license shall only apply to vehicles used in the transportation of goods, wares, and merchandise, and vehicles used for hire at the public stands," an ordinance was authorized imposing a license on "drays, wagons, and vehicles used in the transportation of goods and merchandise, and vehicles used for hire at the public stands."

3. Under an ordinance requiring a license for vehicles used in the transportation of goods and merchandise, an averment that defendant violated the same by using a vehicle on the streets of the city for the transportation of goods and merchandise, and which was kept and used by him for the business of transportation of goods and merchandise without procuring a license therefor, as required by such ordinance, which was also set out, is sufficient.

4. An ordinance requiring a license of \$7.50 for all vehicles used in transporting goods and merchandise in a city, whether used for hire or not, is not unreasonable.

5. A city charter provided that every third year after the first Monday in March a mayor, a recorder, etc., should be elected for three years; said recorder to be learned in the law, and a practicing attorney at the time of his election. *Held* that, while the latter clause was unconstitutional, as a violation of Const. art. 1, § 2, investing all citizens of the state with equal civil and political rights, yet, since such clause might be stricken out without impairing the remaining valid provisions, the entire section was not thereby invalidated.

Appeal from city court of Mobile; O. J. Semmes, Judge.

Action by the city of Mobile against W. F. Browne. From a judgment for plaintiff, defendant appeals. Affirmed.

In the complaint the plaintiff claimed of the defendant the sum of \$10 as a penalty for the violation of an ordinance of the city of Mobile. The ordinance which was alleged to have been filed was set out in the complaint, and was an ordinance to fix the rate of licenses for the year commencing March 15, 1897. Section 1 required each person, firm, association, or corporation trading or carrying on any business, trade, or profession, by agents or otherwise, within the limits of the city of Mobile, to pay a license as in said ordinance fixed. Sections 2 and 7, applicable to the business of the defendant, and which were also set out in the complaint, were as follows: "Sec. 2. Drays, wagons, and vehicles used in the transportation of goods and merchandise, and vehicles used for hire at the public stands,—\$7.50." "Sec. 7. Be it further ordained, that each and every license in this ordinance declared is due and payable on the seventeenth day of March, 1897, and the tax collector will proceed to

collect the same. Whenever any person shall fail or refuse, after publication of this ordinance, to obtain a license under the provisions of the same, he shall be fined in such sum as the recorder may impose, not exceeding fifty dollars, nor less than five dollars, for each day's failure to obtain such license." After setting out these sections of the ordinance, the complaint alleges that said ordinance was published in the Mobile Daily Register, a newspaper of the city of Mobile, on March 18, 1897. The complaint further alleges that on the 3d day of May, 1897, and also within 30 days of said May 3, 1897, said defendant, W. F. Browne, violated said ordinance by using a vehicle upon the streets of the city of Mobile for the transportation of goods and merchandise, without procuring a license therefor, as required by said ordinance. Complaint also alleges that for the violation of said ordinance by said defendant the recorder of said city, on the 5th day of May, 1897, duly and lawfully imposed on said defendant a fine of \$10, whereby the defendant became and is liable to pay the said sum of \$10. To this complaint the defendant demurred upon the following grounds: "First. The act of the General Assembly creating the office of recorder of the city of Mobile is unconstitutional, illegal, and void, because (1) said act, by its terms, disqualifies and excludes from eligibility to said office of recorder all citizens and qualified electors of the state of Alabama residing in the city of Mobile, except practicing attorneys; (2) said act denies to the citizens and qualified electors of the state of Alabama residing in the city of Mobile equal civil and political rights; and (3) said act prescribes and makes an educational qualification for said office of recorder of the city of Mobile. Second. For further cause of demurrer defendant says that the ordinance of the city of Mobile set out in said complaint is illegal, unauthorized, and void. Third. For further cause of demurrer defendant says: (1) Said complaint fails to allege that the defendant was engaged in carrying on the business of using a vehicle upon the streets of the city of Mobile for the transportation of goods, wares, and merchandise without procuring a license therefor, as required by said ordinance. (2) Said complaint fails to allege that defendant was engaged in using said vehicle in the transportation of goods, wares, and merchandise for profit, or with the purpose to derive a profit therefrom." Upon consideration of the demurrers to the complaint, the court overruled the first and second causes of demurrer, and sustained the third. Thereupon the plaintiff filed an amended complaint which was substantially the same as the original complaint, except that it alleged more fully that the defendant, Browne, violated the ordinance in question "by using a vehicle upon the streets of the city of Mobile for the transportation of goods and merchandise, and which said vehicle was kept and used by said W. F. Browne in the

business of transporting goods and merchandise, without procuring a license therefor as required by said ordinance." To the amended complaint the defendant demurred upon the following ground: "First. Said amended complaint fails to allege that defendant was engaged in carrying on the business of using a vehicle upon the streets of the city of Mobile in the transportation of goods, wares, and merchandise, without procuring a license therefor, as required by said ordinance." This demurrer was overruled.

The cause was tried upon the following facts, which were agreed to by the parties: "The defendant is engaged in the business of selling butter in the city of Mobile, and has paid to said city a license tax of \$15 for the privilege of doing said business in said city; said license being paid under the license ordinance of said city adopted by the general council, and approved by the mayor on the 17th day of March, 1897. The defendant uses a small wagon to deliver butter to such persons as may purchase the same of him. The wagon is used exclusively in carrying the butter from his place of business to the residence or places of business of the customers, and said wagon used the public streets of the city of Mobile for that purpose, after the 18th day of March, 1897, and was so using the streets on May 3, 1897. Defendant makes no charge against the customer for the use of the wagon, and derives no profit from its use. Defendant sells butter to those who receive it at his place of business at the same price at which he sells it to those to whom he delivers it with said wagon. It is the custom of the merchants of the city of Mobile to deliver goods, wares, and merchandise purchased of them to the customer at his residence, or such other place as he may designate, without additional charge. Other persons engaged in the business of selling butter in said city, and competing with defendant for such trade and patronage, use wagons to deliver the butter sold, and make no charge for the same; the city of Mobile, however, demanding the same vehicle license of them. The use of said wagon is an item of expense to defendant in the conduct of his business. The license ordinance hereto attached is a true copy of the ordinance now of force in said city, and is the ordinance under which said city proceeds in this case against defendant, and said ordinance was published in the Mobile Daily Register, a newspaper published in the city of Mobile, on March 18, 1897, and is hereby made a part of this agreed statement of facts. The value of the wagon is \$30. The amount of the license, including the brass tag to be placed on the wagon, demanded of the defendant, is \$7.75. The cost of issuing the license does not exceed 25 cents. The license demanded of the defendant is, when collected, not applied to any particular purpose, but is paid into the general city fund, and is applied, together with collections from other sources, to gen-

eral municipal purposes." The ordinance referred to in the agreed statement of facts was set out at length, but the only three sections applicable to the facts of this case are those contained in the complaint as above set out.

The court charged the jury, at the request of the plaintiff, "That under the agreed state of facts they would find for the plaintiff." To the giving of this charge the defendant duly excepted, and also excepted to the court's refusal to give the general affirmative charge in his behalf. There were verdict and judgment for the plaintiff. On this appeal by the defendant he makes five assignments of error. The first and second are based, respectively, upon the overruling of the first and second demurrers to the original complaint. The third assignment of error was based upon the overruling of the demurrer to the amended complaint. The fourth and fifth are based, respectively, on the giving of the affirmative charge requested by the plaintiff, and the refusal to give the affirmative charge requested by the defendant.

McIntosh & Rich, for appellant. B. B. Boone, for appellee.

SHARPE, J. After the demurrer to the original complaint filed in the city court was sustained, there was filed what purported to be an amended complaint, setting out the cause of action in full, which was apparently intended as, and which was treated in the subsequent proceedings as, a substitute for the original complaint. This was demurred to as the amended complaint upon the single ground that "said amended complaint fails to allege that defendant was engaged in carrying on the business of using a vehicle upon the streets of the city of Mobile in the transportation of goods, wares, and merchandise without procuring a license therefor, as required by said ordinance." The filing of the amended complaint was an abandonment of the original, and the failure to reinterpose to the new complaint the demurrer which was filed to the original was an abandonment of such demurrer. This disposes of the first and second assignments of error.

The charter of the city of Mobile provides that "a vehicle license may be imposed in addition to a business license, provided that such license shall only apply to vehicles used in the transportation of goods, wares and merchandise and vehicles used for hire at the public stands." Acts 1896-97, p. 574. The ordinance averred in the complaint is an exercise of the power so conferred by the charter to impose a tax for the privilege of using the class of vehicles named, whether the use constitutes the principal business of the persons so using them, or is only an adjunct to such business. The averments of the complaint were sufficient to bring the ordinance within the authority of the charter, and also sufficient to bring the vehicle, and its use by the defendant, within the class required by the ordinance to be licensed, and the demurrer to the

amended complaint was, therefore, properly overruled.

It is insisted under the last assignment of error that the ordinance is unreasonable, and also that it provides double and unequal taxation. The tax imposed is upon the person, and not upon the vehicle itself. In that respect the provision in question, if it stood alone as it appears in the schedule, might be ambiguous; but, considered in connection with the body of the ordinance, and with the grant of power in the charter, it plainly appears as a tax for the exercise of a privilege. The city is required to maintain its streets. The use of vehicles upon them tends to their detriment, and is a use not common to all the citizens. Therefore the municipal government may reasonably require those so deriving a special benefit from the streets to pay reasonably for the privilege. *Kentz v. City of Mobile* (Ala.) 24 South. 952; *Gartside v. City of East St. Louis*, 43 Ill. 47; *Davis v. Petrinovich*, 112 Ala. 680, 21 South. 344. While the tax would seem more equitable if it were graduated with respect to the character of the vehicle, yet we cannot say that it is unreasonable in amount or otherwise, and with the policy of the enactment we have nothing to do.

The question argued in the briefs, and which also was apparently intended to be raised by the last assignment of error, as to the validity of that part of the charter act creating the office of recorder, was recently considered in the case of *Kentz v. City of Mobile*, supra. We hold to the opinion there rendered, which was to the effect that, eligibility to the office of recorder being not restricted by the constitution to persons learned in the law, and in view of the constitutional guaranty of equal civil and political rights to citizens of the state, the legislature was without power to enact that "said recorder shall be learned in the law, and a practicing attorney, at the time of his election," but that the invalid clause can and must be alone rejected, leaving the remainder of the act unimpaired. Finding no error in the record, the judgment of the city court will be affirmed.

(122 Ala. 630)

WILSON et al. v. ALSTON.

(Supreme Court of Alabama. Feb. 11, 1899.)

DEEDS—HEIRS—PURCHASE—DESCENT—RULE IN SHELLEY'S CASE—ESTOPPEL—REVIEW—ASSIGNMENTS OF ERROR.

1. In the absence of other words in a conveyance showing that grantees were to take by purchase under a grant to one and the heirs of his body, such heirs do not take jointly with the ancestor, but by descent.

2. A deed to one, "and to the heirs of her body after her death" (these words not being controlled by other words in the deed), is such a grant as would, at common law, have fallen within the rule in *Shelley's Case*, and, being made subsequent to the statute abolishing that rule (Code, § 1025), is governed by that statute; and therefore such deed operates to convey to the first taker only a life estate, at the termination of which those who are heirs of the body of the life tenant take the remainder by purchase in fee simple.

25 So.—15

3. One attempting to convey an estate in land is estopped to set up a prior outstanding title in another.

4. Where there is no severance in an assignment of error, it must be prejudicial to all who join therein, in order to be available to reverse the decree.

Appeal from circuit court, Bibb county; John Moore, Judge.

Ejectment by Samuel F. Alston against W. J. Wilson and others. From a judgment for plaintiff, defendants appeal. Affirmed.

The record shows that all the defendants except W. J. Wilson filed the plea of not guilty, and it does not appear that there was any plea filed by said W. J. Wilson. The material facts in the case are as follows: On the 5th of March, 1874, James Hill and Nancy Hill, his wife, executed a deed of conveyance of certain lands in Bibb county to their daughter, Grace E. Wilson, "and to the heirs of her body after her death." This deed was filed in the probate office of Bibb county, for record, on the 5th day of April, 1874. At the time of the execution of this deed, Grace E. Wilson, the grantee named, was the wife of W. J. Wilson, and the mother of two or three children, and several children were born to her afterwards. In 1885, Grace E. Wilson died, leaving surviving her five children, who are defendants in this suit. At the time of said conveyance, the grantee, Grace E. Wilson, went into possession, and with her family occupied and resided on said land until her death; and her husband and her children, defendants, have ever since resided on and occupied said lands. After the death of Grace E. Wilson, to wit, on the 27th day of April, 1894, her husband, W. J. Wilson, executed a mortgage to Samuel F. Alston to secure a personal debt of his at that time created for purchase of mules, conveying therein said lands in this action sued for; being a part of the lands conveyed by Grace E. Wilson's father to her by deed, as above recited. In default of payment, Alston foreclosed said mortgage, sold and executed a deed to said land to one A. D. Mellin on the 14th day of February, 1895, for consideration of \$10, signing the said deed of conveyance, "W. J. Wilson, by S. F. Alston, Atty. in Fact," and "Samuel F. Alston, Mortgagee," and on the same day, and for the same consideration, said A. D. Mellin conveyed said land so bought by him to said Samuel F. Alston. Samuel F. Alston institutes this suit against W. J. Wilson and the children of W. J. Wilson and Grace E. Wilson to recover said lands, and damages for the detention of them. On the trial, as appears from the bill of exceptions, the plaintiff introduced in evidence the mortgage executed by W. J. Wilson to him, the deed which was executed by him to Mellin at the time of the foreclosure, and the deed from Mellin back to him. He also introduced in evidence a deed from James and Nancy Hill to W. J. Wilson, dated July 31, 1874, the only recital in the bill of exceptions as to this deed being as follows: "The plaintiff then introduced a deed from James Hill and wife, Nancy Hill, to W. J. Wilson, dated

the 31st July, 1874, to wit, containing the same description as in the deed to Grace E. Wilson, of date March 5, 1874." The defendant offered to introduce in evidence the deed from James and Nancy Hill to Grace E. Wilson, which was dated March 5, 1874. To the introduction of this deed in evidence the plaintiff objected upon the following grounds: "(1) That it shows it has been altered; (2) because it does not sufficiently describe the land in this suit; (3) because this deed is void as to plaintiff, because it is not shown it was recorded in thirty days after its execution; (4) because deed shows that Grace E. Wilson took a fee simple; (5) that she died before the mortgage, and her husband was her heir; (6) that deed does not show title, except as to W. J. Wilson, plaintiff, having acquired his title." The court sustained the objection, refused to allow the deed to be introduced in evidence, and to this ruling the defendants duly excepted. The other material facts of the case are sufficiently stated in the opinion. Upon the introduction of all the evidence, the court, at the request of the plaintiff, gave the general affirmative charge in his behalf, and to the giving of this charge the defendants duly excepted. There were verdict and judgment for the plaintiff. The defendants appeal, and assign as error the court's refusal to allow the defendants to introduce in evidence the deed from James and Nancy Hill to Grace E. Wilson, and the giving of the general affirmative charge in favor of the plaintiff.

W. W. Lavender and J. M. McMaster, for appellants. Ellison & Thompson and Jones & Brown, for appellee.

SHARPE, J. Upon the trial in the circuit court the plaintiff claimed the land in suit through a mortgage to him made by the defendant W. J. Wilson on April 27, 1894, and afterwards foreclosed under the power it contained. To show the mortgagor had title when he conveyed, he introduced evidence of the mortgagor's possession at that time, and also a deed to the mortgagor from James and Nancy Hill, dated July 31, 1874. The defendants sought to claim through and defend under deed from James and Nancy Hill, who were the common source of title, to their daughter, Grace E. Wilson, the deceased wife of W. J. Wilson, and the mother of the other defendants. The deed purports to have been executed and duly acknowledged on the 5th day of March, 1874, and was filed for record April 5, 1874, and it was, therefore, *prima facie* self-proving. The original deed is bent here for inspection, and upon examination it appears to have been interlined in two places, but that feature is explained by the testimony of the justice who took the acknowledgment of the grantors, to the effect that the interlineations were made before the deed was executed, and such fact is recited at the end of the deed. The only ground insisted upon to justify the exclusion of this deed is that which embodies the controlling question in the case,

and which is stated in appellee's brief as follows: "There are several assignments of error, but all amount to one only, and all raise and involve one question only. That question is, the effect of the deed from James Hill and Nancy Hill to Grace E. Wilson. The plaintiff (appellee) insists that the said deed created in the said Grace E. Wilson an estate in fee tail; that under our statute this became an estate in fee simple; that upon the death of the said Grace E. Wilson, her husband, the defendant W. J. Wilson, became entitled to the use of her realty during his life, and that he conveyed to the plaintiff, S. F. Alston, appellee, his life estate in the lands sued for by the mortgage which he executed to him on the 27th day of April, 1894." The defendants contend that either the grant is to Mrs. Wilson and her children jointly, or, if not so, then the terms of the conveyance are such as would at common law have brought the grant within the influence of the rule in *Shelley's Case*, and that by that statute abolishing that rule the whole estate vested in the children at their mother's death. The granting clause of the deed is as follows: "We do grant, bargain, sell, and convey to the said Grace E. Wilson of the second part and to the heirs of her body after her death, the following described real estate, to wit." Next following the description is the habendum clause, "to have and to hold to the said Grace E. Wilson of the first part and to the heirs of her body after her death." The words "heirs of the body," by a long course of legal interpretation, acquired a settled meaning, whereby they impute to the grantor the intention to create an estate of inheritance restricted in the course of descent to the lineal heirs of the ancestor named. *May v. Ritchie*, 65 Ala. 602; 4 Kent, Comm. 214; 1 Washb. Real Prop. (5th Ed.) 110. From other parts of the conveyance it may appear that such words were not used in their strict legal sense, and that they were employed merely to designate certain persons whom the grantor intended should take by purchase, instead of by descent, as when an indiscriminate use is made of the word "heirs" along with the word "children" or other qualifying words; and in such cases, even when the meaning of the conveyance is doubtful, that construction is favored which carries the estate to persons so designated to be held by purchase. We find nothing in this deed, however, to control or qualify the meaning usually attaching to such words, and therefore nothing to sustain the position that the children of Mrs. Wilson could take as purchasers jointly with her by force of the terms employed in this deed.

The remaining consideration is whether the operation of the deed is controlled by section 1021 or by section 1025 of the Code of 1896. Section 1021 is the older enactment, dating from 1812; and until the passage of the later statute, affecting conveyances by their terms falling within the rule in *Shelley's Case*, it had effect to convert into absolute fees all estates

in fee tail. The statute now section 1025 first appeared as section 1304 of the Code of 1852. The later statute operates, as imported by its title, to abolish the rule in *Shelley's Case*, the abolition being, not in express terms, but by altering the effect of conveyances falling within that rule, so that estates granted by them should vest by purchase in the persons who, on the termination of the life estate, answer the description of the descendants named in the conveyance. It is not retroactive, and has no application to conveyances made before its enactment. A test by which to determine whether a grant made since this statute has been in force is of the class mentioned and controlled by it is whether, in the absence of the statute, it would have fallen within the rule which the statute abolished. Where the grant is such as to import merely an estate tail in the first taker, as "to A. and the heirs of his body," the rule had no application. *Mason v. Pate's Ex'r*, 34 Ala. 379; *Pierson v. Lane*, 60 Iowa, 60, 14 N. W. 90; 4 Kent, Comm. *216. In such case, by section 1021 the fee-tail estate so imported is converted into an estate in fee simple. An examination will show that many of the decisions of this court relied on by appellee involved grants of such character, and were determined upon such principle; and therefore are not applicable to conveyances governed by the rule in *Shelley's Case*. Among the more recent of those cases are *Smith v. Greer*, 88 Ala. 414, 6 South. 911, and *Slayton v. Blount*, 93 Ala. 575, 9 South. 241. The decisions in *Holt v. Pickett*, 111 Ala. 862, 20 South. 432, *Campbell v. Noble*, 110 Ala. 383, 19 South. 28, and *McQueen v. Logan*, 80 Ala. 304, also relied on by appellee, were each based upon instruments antedating the Code of 1852, and that fact is referred to in the opinions. The cases of *May v. Ritchie*, 65 Ala. 602, *Campbell v. Noble*, supra, and *Wikle v. McGraw*, 91 Ala. 631, 8 South. 341, were determined upon the consideration that the class of persons named in the grants took as purchasers by force of the terms employed in the grants. In the last-named case the date of the conveyance does not appear from the report. To bring a conveyance within the class which was governed by the rule in *Shelley's Case*, and within the class mentioned in section 2125, a life estate and a remainder must be imported by the terms of the grant. It is not necessary, however, that such interests be expressly named. They may sufficiently appear by implication as the legal result of the terms employed. In *Mason v. Pate's Ex'r*, supra, this court had under consideration a will containing this clause: "I will and desire that the property which my daughter obtains from this, my will, at her death to descend to her bodily heirs," and in determining whether the grant would have been within the rule in *Shelley's Case* it was said: "An examination of the authorities will show that no particular or technical import was attached to the words 'remainder after his or her death,' etc., or to the language by which the estate in the first taker

was created. The rule was applied to all cases where an estate for life was given to the first taker, and an attempt made, after its termination, without more specific words, to vest an estate by purchase in the heirs, or heirs of the body of the first taker." And again, in determining the effect of the grant under section 1304 of the Code of 1852, now 1025 of the present Code, it was said: "We hold, then, that section 1304 of the Code applies to all cases where an estate is given to A. expressly for life, with remainder, or at the death of A., the first taker, to the heirs, issue, or heirs of the body of such grantee or devisee. It also embraces all cases where an estate is given generally to A., followed by the words, 'with remainder,' or 'at the death of A.,' or other equivalent expression, to the heirs, issue, or heirs of the body of A. In each of these cases, before our statute, a fee or absolute title would vest in A., the first taker; while in each it is morally certain that a life estate only was intended, but which life estate was enlarged into a fee, or absolute title, by force of the rule in *Shelley's Case*." We think it sufficient to rest the construction of the deed here in question upon the authority of that case, which was well considered, and has long stood as a rule of property. This grant being to Mrs. Wilson, and to the heirs of her body after her death, naturally imports that her interest is for life, and that the class named to succeed to the estate are to take an estate tail in remainder. It results from such construction that the deed offered in evidence by defendants took effect under the provision of section 1025 of the Code, and at the death of Grace E. Wilson vested in her children the fee-simple title to the land it conveyed, and that W. J. Wilson had no estate by the curtesy therein which could pass by his mortgage. But the excision of the deed by the trial court is not a matter of which the appellant W. J. Wilson can complain. It appears from the judgment entry in this case that upon the trial issue was joined upon the plea of not guilty alone. The plea of not guilty appearing of record was not joined in by W. J. Wilson. But whether or not we shall presume that the case was tried upon the plea of not guilty as to him, still he is not in a situation to complain of the exclusion of the deed. Being the mortgagor, he is estopped to deny the title he assumed to convey, or to defeat the same by setting up a prior outstanding title in another. 3 Walt. Act. & Def. pp. 17, 98, 112, and cases there cited; 6 Am. & Eng. Enc. Law, 245a, notes, and cases there cited; *Pollock v. Malson*, 41 Ill. 516; *Mathews v. Lecompte*, 24 Mo. 545; *Harrison v. Taylor*, 33 Mo. 211.

There was no severance in the assignment of error, and the established rule in such case is that, to be available to reverse a judgment or decree, the error must be prejudicial to all who join in the assignment. *Rudolph v. Brewer*, 96 Ala. 189, 11 South. 314. As the result of a single action of this character is not conclusive upon the rights of either of the parties,

we have thought best to define those rights as they appear from the record; though, finding no error of which appellants can jointly complain, the judgment appealed from must be affirmed.

(122 Ala. 169)

INGE et al. v. DEMOUY et al.

(Supreme Court of Alabama. Feb. 9, 1899.)

BILL TO QUIET TITLE—PLEADING—DESCRIPTION—SUFFICIENCY.

1. A bill under Code, §§ 809, 810, to determine claims to land and to quiet title, brought by one in peaceable possession thereof, need not offer to satisfy any claim or incumbrance which may be decreed to be valid and subsisting, though it alleges defendant's claim thereto.

2. Under Code, §§ 809, 810, providing that a bill to quiet title by one in peaceable possession must describe the land with certainty, the description of a lot as on the south side of a certain street, between two other streets named, giving the dimensions of its front and its depth, and as being next east of S.'s lot, is insufficient, because, though S.'s lot might now be ascertained by parol, and the lot in question located, S.'s possession and ownership will not necessarily continue, and the description should be certain enough to always identify the property.

3. A description of property in M. as "that certain house and lot on the south side of St. M. street, between St. J. and C. streets, having a front of 64 feet on St. M. street, and extending back with the same width 83 feet," and "also that certain house and lot on the west side of R. street, second south of E. street, having a front on R. street of 62 feet, and a depth of 160 feet," describes the property with sufficient certainty.

4. A demurrer for insufficiency of the description in a bill to quiet title to three lots was properly overruled where one only was not well described.

Appeal from chancery court, Mobile county; William H. Tayloe, Chancellor.

Bill by William Demouy and others against Z. M. P. Inge, trustee, and others. Defendants demurred. The demurrer was overruled, and they appeal. Affirmed.

The bill in this case was filed against Z. M. P. Inge, individually and as trustee for the bondholders of the city of Mobile, and L. H. Kennerly, individually and as tax collector. The purpose of the bill was to compel the determination of claims and to quiet title to certain lands, which are described in the bill as follows: "That certain house and lot on the south side of Dauphin street, between Conception and Joachim streets, having a front of twenty-eight (28) feet and seven (7) inches on Dauphin street, by a depth of one hundred and ten (110) feet, more or less, being next east of Sangrouber. Also that certain house and lot on the south side of St. Michael street, between St. Joseph and Conception streets, fourth west of St. Joseph street, having a front of sixty-four (64) feet on St. Michael street, and extending back with the same width eighty-three (83) feet. Also that certain house and lot on the west side of Royal street, second south of Eslava street, having a front on Royal street of sixty-two (62) feet,

and a depth of one hundred and sixty (160) feet." The defendants demurred to the bill upon several grounds. The only two grounds of demurrer which are insisted upon on this appeal are copied in the opinion. Upon the submission of the cause upon the demurrers, the chancellor rendered a decree overruling them. From this decree the defendants appeal, and assign the rendition thereof as error.

Gregory L. & H. T. Smith, for appellants.
Fielding & Vaughan, for appellees.

DOWDELL, J. The bill in this case was filed under sections 809 and 810 of the Code, "To compel the determination of claims to lands and to quiet title."

1. We notice that the bill, in its averments, closely follows the statute, and contains all that is required to be averred. *Adler v. Sullivan*, 115 Ala. 582, 22 South. 87; *Cheney v. Nathan*, 110 Ala. 254, 20 South. 99; *Loeb v. Wolff*, 116 Ala. 273, 22 South. 513; *Parker v. Boutwell* (Ala.) 24 South. 860. The only two assignments of error insisted on by appellants in their brief and argument are the overruling the two grounds of demurrer to the bill, viz.: "Because it [the bill] alleges that the defendants claim an interest or incumbrance upon said lands, but fail to offer to do equity by paying and satisfying any claim or incumbrance which may be decreed to be a valid and subsisting claim;" and "because the bill of complaint fails to describe the lands with certainty." The statute does not require, nor was it necessary for, the complainant in his bill to offer to do equity by satisfying any claim or incumbrance which defendants may have had on the lands. This alleged requirement was outside the purview of the statute, the purpose of which is—without denying the authority of the court taking jurisdiction under such a statutory bill to go on and settle the claims of the parties in respect to the land—"simply to fix the status of the land in respect to ownership, [and] to re-establish by the decree muniments of title to it." *Cheney v. Nathan*, supra; *Friedman v. Shamblin* (Ala.) 23 South. 821.

2. The ground of demurrer in respect to the description of the land, as given in the bill, was general as to the three separate lots therein referred to and described. The description of the first lot mentioned is: "That certain lot on the south side of Dauphin street, between Conception and Joachim streets, having a front twenty-eight feet and seven inches on Dauphin street, by a depth of one hundred and ten feet, more or less, being next east of Sangrouber." The decree in a case of this kind, as we have heretofore said, is not intended to be presently executed, but is to stand for all time as a muniment of title. This description is not void for uncertainty, in a bill where the decree is to be presently executed. It is one of those uncertain descriptions, in a case of this character, which may be aided by parol, and comes within the maxim, "Id certum est quod certum reddi potest."

Where Sangrouber's lot is, could now be easily ascertained by parol; and the description given would enable a surveyor, at the present time, to locate it, and thereby locate the lot referred to in the bill. *Homan v. Stewart*, 108 Ala. 650, 16 South. 35; *Griffin v. Hall*, 115 Ala. 482, 22 South. 162. But Sangrouber's possession and ownership of his lot are not necessarily continuous, and such a description as the one given is, therefore, necessarily ephemeral. The description, in order to meet the requirements of the statute, should have been of a character sufficiently certain to identify the lot always hereafter, in its muniments of title. The landmarks employed, we apprehend, fall short of that certain, continuous identification of the property which is necessary. The descriptions of the other two lots seem to be sufficiently certain. They are enduring. *Ward v. Janney*, 104 Ala. 122, 16 South. 73. But, as stated, the demurrer went to the whole bill, in which two lots were, and the third was not, well described; and was, therefore, properly overruled. *George v. Banking Co.*, 101 Ala. 607, 14 South. 752; *Durling v. Hammar*, 20 N. J. Eq. 220; 1 *Daniell*, Ch. Pl. & Prac. § 583; 6 *Enc. Pl. & Prac.* 418; *Story*, Eq. Pl. § 443, 693.

Affirmed.

HARALSON, J., not sitting.

(122 Ala. 330)

GRAYSON v. ROBERTSON.

(Supreme Court of Alabama. Jan. 31, 1899.)

NONRESIDENT EXECUTORS—RIGHTS—BUILDING AND LOAN ASSOCIATIONS—WITHDRAWAL VALUE—SITUS—NOVATION—EVIDENCE.

1. Code 1896, § 1264, authorizing an administrator to transfer his decedent's stock in a corporation, and to receive dividends, does not entitle a foreign administrator of a nonresident stockholder of a building and loan association to payment of the withdrawal value of his stock, where it had not been reduced to possession by him before a resident administrator had been appointed.

2. A nonresident administratrix increased the withdrawal value of her intestate's stock in a resident building and loan association by making payments on the stock after intestate's death, and then applied for withdrawal, and surrendered the certificate. The association wrote her that the application was on file, and would be paid in its order. The shares of stock continued to stand in intestate's name. *Held*, that no novation was effected, entitling the nonresident administratrix to such withdrawal value, as against a resident administrator appointed before payment had been made.

3. For the purposes of administration, the situs of a nonresident decedent's interest in a building and loan association represented by certificates of stock is the state where the corporation is organized and has its place of business.

Appeal from chancery court, Madison county; William H. Simpson, Chancellor.

Interpleader by the Southern Building & Loan Association against Amanda L. Robertson, nonresident administratrix of the estate of Scipio H. Robertson, deceased, and John

W. Grayson, resident administrator, to determine which defendant was entitled to a fund due from complainant to said estate. From a decree for the administratrix, defendant Grayson appeals. Reversed.

Grayson & Foster, for appellant. R. W. Walker, for appellee.

PER CURIAM. Scipio H. Robertson departed this life intestate a short time prior to 18th day of September, 1896, in Atlanta, Ga., the place of his domicile. At the time of his death he was the owner of 40 shares of the stock of the Southern Building & Loan Association, a corporation organized under the laws of this state, having its principal place of business in the city of Huntsville, and carrying on the business of a building and loan association, as averred in the bill and admitted by the answers, upon the plan usually adopted by such associations. The shares were of the "par or maturity value" of \$50 each, and were evidenced by a certificate executed by the corporation, bearing date the 4th day of October, 1890. Under the rules and regulations adopted by the corporation, which by express terms became a part of the contract of membership, each shareholder was required to pay monthly in advance 35 cents for each share held by him, and any shareholder failing or neglecting to pay his monthly installments for a period of three months "forfeits his shares." These rules and regulations further provide that, if a member dies, his personal representatives may withdraw his shares at any time, if they should elect to do so, and be entitled to receive the money paid into the "loan fund" on such shares, together with interest at the rate of 6 per cent. per annum; and, further, that upon making 72 payments the shareholder, or his personal representative, may withdraw, and upon such withdrawal he would become entitled to a certain percentage of the profits which the association had earned from the date of the issue of the certificate to the date of the seventy-second payment. At the time of his death the decedent had made 67 payments, and at that time the withdrawal value of his certificate was \$960.80. On the 18th day of September, 1896, Amanda L. Robertson was appointed administratrix of the decedent's estate by the court of ordinary in and for Fulton county, in the state of Georgia; and as such administratrix she became possessed of the certificate for the 40 shares of stock, and soon after her appointment paid to the Southern Building & Loan Association the sum of \$35, which, added to the payments made by the decedent in his lifetime, made the number of payments upon the stock 72, thus entitling the holder, upon withdrawal, to a given percentage of the profits earned, under the rules and regulations above referred to. She completed this payment in January, 1897, and applied for a withdrawal, surrendering to the association the certificate of stock and

the pass book, as required by the rules and regulations; and on the 30th day of March, 1897, the association wrote her a letter, stating that her "application is on file, and will be paid in its order." After completing the 72 payments, the withdrawal value of the shares was \$1,249.92. On the 30th day of March, 1897, John W. Grayson was appointed administrator of the decedent's estate by the court of probate of Madison county, in this state, and on the same day filed with the association an application for withdrawal, and demanding that the withdrawal value of the shares be paid to him. It seems from the correspondence read in evidence that this application and demand were made before the association wrote the letter above mentioned, stating to Mrs. Robertson or her attorneys that the application was on file, and would be paid in its order. It may be added that the rules and regulations of the association provide that the maturity or withdrawal value of shares is payable at the home office, in the city of Huntsville. Thereupon the bill in this cause was filed by the association against both of the administrators of Scipio H. Robertson, deceased; praying, among other things, that they might be required to interplead, and that their respective rights to the fund in question might be determined. Both defendants answered the bill, and upon final hearing, had upon pleadings and proof, a decree was entered by the court below declaring that Amanda L. Robertson, as administratrix, was entitled to the fund, and ordering the same, less costs and certain expenses, to be paid to her; and from that decree this appeal was taken by John W. Grayson, the ancillary administrator.

While it is true that the personal assets of a decedent, though situate in different jurisdictions, constitute but one estate, and must be distributed according to the law of the domicile at the time of his death, it is equally true that letters testamentary or of administration granted by a foreign state or country, having no extraterritorial operation, do not, as a matter of right, confer title to, or authority over, personal assets found without the jurisdiction from which the grant is derived. In the absence of statutory provision, enabling in its nature, a personal representative, as such, has not the capacity to sue for the recovery of assets belonging to the estate of his decedent in any other state or country than that from which the letters were derived. In order to collect and administer such assets, there must be, in the absence of statutory provision, ancillary administrations in the different jurisdictions in which such assets may be found; such administrations, when granted, drawing to them the title to, and immediate right to the possession of, the assets, although the residuum, after the satisfaction of claims of residents, goes to the domiciliary administration for distribution. Such is the doctrine of the common law, as repeatedly recognized and declared by this court. *Hatchett v. Berney*, 65 Ala. 39; *Barclift v. Treece*, 77 Ala. 523.

Our statute, in recognition of that comity which should prevail among the different states, has given authority to a personal representative appointed in another state to maintain suits and recover or receive property belonging to the estate of his decedent, and situated in this state; but the authority thereby given is not absolute, but qualified. Before he has the right to exercise such authority, he must comply with the conditions prescribed by the statute (Code 1896, § 359). This statute is not only permissive, but it is also prohibitory,—permissive, upon the compliance with its conditions; prohibitory, in the absence of such compliance. *Hatchett v. Berney*, supra. Under the construction placed upon the statute by this court nearly 40 years ago, the right thus conferred upon a foreign administrator or executor may be defeated by the appointment of a personal representative in this state before the former has reduced the assets to possession. *Bradley v. Broughton*, 34 Ala. 694. In conferring authority upon executors or administrators deriving their office from foreign appointment, not enjoyed under the common law, the spirit of comity is manifest; but in the qualifications placed upon this authority, as well as in also placing qualifications upon an unqualified authority previously existing at common law, the intention to jealously guard and protect the rights of citizens of the state, interested in the decedent's estate, is equally manifest and pronounced.

We do not understand, however, that these principles, as general propositions, are controverted by the counsel for the appellee. Recognizing them as settled principles of law, as we understand his position, he seeks to remove the right asserted on behalf of his client in this case from their influence, by the contention (1) that, while these principles are correctly stated in their application generally to personal assets, they do not apply to the shares of the capital stock of a corporation, because of the provisions of section 1264 of the Code of 1896; and (2) that, even if they did originally apply to such shares, the payments made by his client upon these shares of stock belonging to the decedent's estate, thus increasing the withdrawal value of the shares, the filing of the application for withdrawal with, and the surrender of the certificate to, the association, and the promise of the association to pay the withdrawal value to his client, effected a novation, rightfully and lawfully made, thus conferring upon her the title to the shares, and the right to collect the withdrawal value thereof, or, as otherwise expressed by him, operated to merge the stock in a contract lawfully made by the association with his client. To neither of these propositions can we yield our assent. The statute which is relied on in support of his first contention reads: "An executor or administrator, deriving his appointment from a court of probate of this state, or, if the testator or intestate resided without the state, from the proper tri-

bunal of his domicile, may transfer the shares of stock held and owned by such testator or intestate in any private corporation existing under the laws of this state; payments of dividends on such stock may be made to such executor or administrator." Code, § 1264. Whether this statute intended to confer upon the foreign personal representative the power to transfer shares of stock in the corporation mentioned, and to receive dividends therefrom, without a compliance with the terms of section 359 of the Code, it is not now necessary to decide; for it is clear that the legislature, in enacting this statute, did not intend to confer these powers on both resident and foreign representatives, where domiciliary and ancillary administrations had been granted, making them co-existent, leaving it to a race of diligence between them as to which should exercise the powers; nor was it thereby intended to give any preference to the foreign over the domestic personal representative. The same statute gives the same powers to both, to be exercised by the one or the other according to their respective rights as declared by law. Whatever authority over the personal assets of a decedent situated in this state a foreign executor or administrator may have prior to the grant of letters by a competent court of this state, that authority ceases upon such appointment. Upon such appointment the title to all personal assets in this state vests in the person so appointed, and he is clothed with all powers incident to the administration of such assets; and this title and these powers are exclusive, leaving in the foreign and domiciliary personal representative only the right to receive the residuum of the estate upon the final settlement of the domestic or ancillary administration. *Hatchett v. Berney*, supra; *Winter v. London*, 99 Ala. 263, 12 South. 438. In the last case cited, section 1264 of the Code was before this court for consideration; and Haralson, J., speaking for the court in respect to this section, said: "But the same section confers the same power and authority on an executor or administrator deriving his appointment from a court of probate of this state." If there is any conflict between the provisions of this section, "It is our duty to construe them in pari materia, and make them both operative, if such construction can be placed upon them. There is, however, no conflict between them. The latter section merely provides for the transfer of stock by a foreign executor or administrator when there is no administration in this state. It does not deny the same right to an administrator appointed here. It is simply cumulative, in extending this authority to a foreign executor or administrator." It follows, therefore, that, even assuming the power to transfer the shares of stock in, and to receive dividends from, corporations organized under the laws of this state, conferred by the statute, includes the power to receive from the complainant the withdrawal value of the decedent's shares, such power was intercepted and defeated by

the appointment of the defendant Grayson as administrator by the court of probate of Madison county. But we cannot concede that the powers given by the statute include the powers here contended for. On the contrary, we are of the opinion that they do not. Two powers, and only two, are conferred by the statute,—the power to transfer shares, and the power to collect dividends. The power to transfer, including, it may be, the power to sell, and the power to receive dividends, are, it may be admitted, strong indicia of ownership, and, if used in other relations, might be taken as conferring all rights and powers pertaining to ownership; but given, as they are, to personal representatives, and construed in the light of the common law and of other statutes defining and declaring the rights and powers of such representatives over the personal assets belonging to decedents' estates, we are unwilling to give them such a broad construction, but rather to limit them to the restricted import of the language of the statute. In this case there was no transfer or attempted transfer of the shares, nor is the collection of dividends involved.

The shares in a building and loan association, and the rights of the holders thereof, are peculiar and sui generis, differing in essential particulars from shares and the rights of shareholders in other business corporations. In the case under consideration the shares seem to be divided into classes, and the by-laws and regulations of the association provide for the maturity of these shares, and at their maturity the association agrees to pay a sum definite in extinguishment of the rights of the shareholders; and these by-laws and regulations, as heretofore shown, provide for the withdrawal from membership upon the death of the stockholder, the association agreeing in such event to pay a certain sum, based on the amount the decedent had paid, and interest thereon at 6 per cent. per annum; and they further provide for the withdrawal, upon making 72 payments, by the shareholder himself, or, upon his death, by his personal representative, the association in such event agreeing to pay a certain sum, based on his proportion of certain profits earned by the association during his membership. In either case, upon such withdrawal, and upon a compliance with the by-laws and regulations, by surrendering the certificate and pass book, the association thereby, and eo instanti, becomes indebted to the shareholder in the amount provided for by its by-laws and regulations; and upon the payment of that sum the relation of shareholder and corporation ceases, and the rights of the shareholder in the assets and management of the corporation are extinguished, and for the amount of such indebtedness an action of assumpsit would lie against the corporation. Therefore, whether before the withdrawal the shares are to be considered as mere choses in action or not,—as to which question there is much contrariety of opinion

in the adjudications of the courts,—after the withdrawal the right of the shareholder does become a mere chose in action, controlled by the principles of law, and enforceable by the remedies, applicable to such species of property. The appellee, as administratrix, upon her appointment, no administrator having then been appointed in this state, had doubtless the right to withdraw, and thus fix the amount owing by the association to the estate of her decedent according to the regulations of the association, based upon the payments which he had made in his lifetime; or to pay to the corporation a sum of money sufficient to make 72 payments, thus, under the regulations of the association, increasing the amount coming to the estate represented by her. In either event, the effect of her act was merely to fix the amount which the corporation owed upon the shares held by her intestate, and to terminate his liability for further payments, and his right to participate in the future profits earned by the association. It appears from the evidence that the shares continued to stand on the books of the company in the name of the deceased, and no express change of ownership whatever is shown, and none results by implication of law from the acts and conduct of the parties. Such being the case, it cannot be said that there was any novation, or any merger of the rights of the estate in any contract made by the appellee with the association, entitling her to a recovery of the withdrawal value of the shares. Whatever sum she expended in enhancing the withdrawal value of the shares, she may be entitled to recover from the Alabama administration, in appropriate proceedings, or upon appropriate pleadings in this case; but such expenditure cannot affect the rights of Grayson, as the administrator appointed in this state, to collect from the association the withdrawal value of the shares.

The fact that the appellee came into the possession of the stock, and afterwards surrendered the same to the association, upon her application for withdrawal, is unimportant in determining which of the administrators is entitled to the fund in question. A certificate of stock is merely the evidence of ownership. The situs of the interest which it represents, for the purposes of administration, must be in the state in which the corporation was organized and has its place of business. It is the situs of the corporation, not the domicile of the holder of the certificate, that determines. Such was the ruling of the supreme court of Tennessee in a case involving the attachment of shares of stock in a foreign corporation, and we think the reasons are more cogent for applying the principle to the facts in this case. *Young v. Iron Co.*, 85 Tenn. 189, 2 S. W. 202; 2 Beach, Priv. Corp. § 633. The surrender of the shares was necessary, under the rules and regulations of the association, to the withdrawal, and it was surrendered to perfect

such withdrawal, and the rights of the estate, and the liability of the association, resulting therefrom. We cannot see that it has any further significance. It certainly could not and did not operate a change of ownership in the shares, or affect the right of recovery of their withdrawal value by the appellant. Before the money was paid to the appellee, whatever rights she may have had to the stock or to the withdrawal value thereof were intercepted and defeated by the appointment of the appellant.

The view which we have been constrained to take of the case renders it unnecessary to pass upon the other assignments of error. The decree of the chancery court, in so far as it adjudges that the appellee, Robertson, is entitled to the fund in question, and orders the payment thereof, less costs and expenses, to her, is erroneous; and it is therefore reversed, and the cause remanded for further proceedings in conformity with this opinion.

The foregoing opinion was prepared by former Chief Justice BRICKELL.

(122 Ala. 428)

WESTERN UNION TEL. CO. v. OHAMBLEE.

(Supreme Court of Alabama. Feb. 1, 1899.)

TELEGRAM — NEGLIGENCE IN TRANSMISSION — SENDER'S DUTY—CONTRACT TO REPEAT MESSAGE — VALIDITY—SALE FOR FUTURE DELIVERY—PRESUMPTION OF VALIDITY—NEW TRIAL—ABSENCE OF COUNSEL.

1. Where, owing to a telegraph company's negligence in transmitting a message to the sender's brokers to buy cotton, they failed to buy, the sender was not bound to purchase the next day, to prevent or lessen his loss.

2. The sender owes no duty to the telegraph company to inquire, from it or otherwise, whether his message was correctly transmitted and received.

3. A contract releasing a telegraph company from damages for mistakes in transmitting a message, unless the sender requires it repeated, is invalid.

4. A sale under a contract for future delivery will be presumed valid, unless it is apparent that no purchase and delivery were intended.

5. A new trial for absence of counsel who were engaged in other trials was properly refused where it did not appear that they made any effort to have the cases in which they were engaged laid over to try the one in question, and no necessity was shown for the absence of one of them, and it appeared that they presumed on the courtesy of the opposing counsel to delay the trial at considerable expense to his client, while there were other capable attorneys who could have been procured.

Appeal from circuit court, Morgan county; H. C. Speake, Judge.

Action by James P. Chamblee against the Western Union Telegraph Company. From a judgment for plaintiff, and from the denial of a new trial, defendant appeals. Affirmed.

This action was brought by the appellee against the appellant, to recover damages for

a mistake committed by defendant in transmitting a telegram from plaintiff at Forkville, Morgan county, Ala., to the Birmingham Exchange Company at Birmingham, Ala. The plaintiff, on September 15, 1896, delivered to the defendant's office at Forkville a telegram, which exclusive of date and signature, was as follows: "To Birmingham Exchange Co., Birmingham, Ala.: If can buy cotton Jany. 25, close pork buy cotton," which was a direction to close out plaintiff's holding in pork and buy cotton, if it could be purchased at $8\frac{25}{100}$ cents per pound. This message, after having been transmitted, was delivered to the Birmingham Exchange Company, and read as follows: "If can buy cotton Jany. 20, close pork buy cotton." The plaintiff claims that by reason of this mistake he lost \$140, in that January cotton on the day the message was sent went down to $8\frac{25}{100}$ cents per pound, but did not go down to $8\frac{20}{100}$, and that the Birmingham Exchange Company did not sell the pork and buy the cotton for plaintiff for the reason that the telegram read "20" instead of "25," and that on the next day the plaintiff telegraphed the Birmingham Exchange Company as follows: "If I am in cotton close at 50 and wire." It was then averred in the complaint that not being in cotton, he lost the difference between what it could have been purchased at "25" on the 15th and what it would have sold for on the 16th, and for the recovery of this difference the present suit is brought. To this complaint the defendant pleaded the general issue and five special pleas. The substance of the fifth and sixth pleas are sufficiently stated in the opinion. The second, third, and fourth pleas were as follows:

"(2) That the plaintiff himself was guilty of negligence in not exercising reasonable diligence to prevent or lessen his loss in that he failed to purchase January cotton on the 16th of September, 1896, when it reached the lowest point on that day, to-wit: 8.32, and such negligence contributed proximately to his injury.

"(3) That the plaintiff himself was guilty of negligence in not exercising reasonable diligence to find out on the 15th of September, 1896, whether or not the Birmingham Exchange Company had received his telegram correctly and had purchased said January cotton for him at 8.25; which negligence on his part contributed proximately to his loss.

"(4) That one of the provisions of the contract entered into by and between the plaintiff and defendant when plaintiff delivered to defendant his said message on the 15th of September, 1896, was as follows: "To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the original office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message

and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery of any unrepeatd message, beyond the amount received for sending the same." And defendant further avers that the plaintiff, not having had said message repeated, cannot recover any damages beyond the amount he paid to defendant for the transmission of the said message, to wit, 27 cents."

To the second plea, the plaintiff demurred upon the following grounds: (1) The plea does not set out specifically and definitely the facts constituting the alleged contributory negligence. (2) It does not set forth any fact or facts constituting any defense whatever to plaintiff's complaint. (3) The matters and things set forth in said plea do not furnish or constitute any defense for the negligence of the defendant set up and specified in plaintiff's complaint.

To the third plea the plaintiff demurred upon the following grounds: (1) There is no fact or facts stated in said plea which, if true, would furnish any defense for the negligence of the defendant alleged in plaintiff's complaint. (2) It does not set out and allege in said plea that it was the duty of the plaintiff to find out on September 15th, whether the Birmingham Exchange Company had received his telegram correctly and had purchased January cotton for him at 8.25. (3) It was not the duty of the plaintiff to inquire on September 15th or at any other time, whether or not the Birmingham Exchange Company had received his telegram correctly. (4) The plaintiff had a right to rely upon the correct transmission of said message by the defendant.

To the fourth plea the plaintiff demurred upon the following grounds: (1) The provisions of the contract set up in said plea show it to be an alleged contract which is against public policy and therefore void. (2) Because the defendant corporation cannot exempt itself from its negligence or the negligence of its employes by such a stipulation as is set out in said plea. (3) There are no facts set up in said plea which constitute an excuse or defense for the negligence mentioned and set out in the plaintiff's complaint.

These demurrers to the second, third, and fourth pleas were sustained, and the cause was tried upon issue joined upon the first, fifth, and sixth pleas.

There were verdict and judgment for the plaintiff. Thereupon the defendant made a motion for a new trial. The facts pertaining to the motion for a new trial are sufficiently stated in the opinion.

Upon the submission of the cause upon the facts shown and the motion for a new trial, the court overruled said motion. The defendant appeals, and assigns as error the rulings of the court in sustaining the demurrers to the second, third, and fourth pleas, and in overruling the motion of the defendants for a new trial.

Walker, Porter & Walker, for appellant. Arthur L. Brown and E. W. Godbey, for appellee.

HARALSON, J. 1. The demurrers to defendant's second and third pleas were properly sustained. The second professes to be a plea in bar, but really, it is one in mitigation of damages. It does not go to all, but to a part of the damages claimed, and should have been so pleaded. If plaintiff was, under any circumstances, under any legal obligation to defendant to attempt to partially recoup his loss in consequence of defendant's failure to comply with its contract in sending the message, it is not averred in said plea that plaintiff knew or was informed that he could thus protect himself. But, plaintiff was not bound to anticipate that defendant would not comply with its contract and he owed defendant no such duty as that averred in the second plea, arising out of such supposed obligation. Nor did plaintiff owe the defendant the duty, as averred in the third plea, to exercise diligence to ascertain by inquiry from defendant or otherwise, that the Birmingham Exchange Company, the sendee of the message, had received his telegram correctly and had purchased the cotton as instructed by him. This he might have done for his own satisfaction, but not as a duty he owed defendant. *Telegraph Co. v. Crawford*, 110 Ala. 460, 467, 20 South. 111; *Telegraph Co. v. Daughtery*, 89 Ala. 191, 7 South. 660; *Telegraph Co. v. Stephens* (Tex. Sup.) 16 S. W. 1095; 25 Am. & Eng. Enc. Law, 809.

2. It may be stated generally as a correct rule, that a telegraph company in accepting a message for transmission, is under obligation by its contract with the sender of the message, to transmit it correctly and without delay, and for a failure to do so, is liable to the sender for the damages, of which its negligence was the proximate cause. It is also well settled, that such a company is not, like a common carrier, an insurer against all accidents. 25 Am. & Eng. Enc. Law, 778, and authorities cited; *Thomp. Elect.* § 139.

In respect to the contract for the repetition of messages, and the release of the company from damages if mistakes occur in the transmission, unless the sender requires the message to be repeated, such as is set up in the fourth plea, courts have taken different views, but the great weight of authority, including our own court, is opposed to the validity of such a stipulation. The rule in respect to such, is well settled to be, that "on principle it would seem that the stipulation is invalid, in that it opposed the recognized principle that all individuals or corporations engaged in a public business cannot be allowed to contract against liability for the consequences of its own negligence, or willful wrongdoing. And since it appears that the stipulation is not, as a matter of fact, provided with a view of securing correctness in the transmission of messages, but rather to protect the company

from liability, it cannot be regarded as a reasonable regulation which it is in the company's power to provide. Regarded as a contract, the stipulation is void as having been induced by a species of moral duress. The weight of authority is, therefore, opposed to upholding such a stipulation and declines to sustain or enforce it." 25 Am. & Eng. Enc. Law, 791, 792, where authorities on the subject are collated; *Thomp. Elect.* 241; *Telegraph Co. v. Daughtery*, 89 Ala. 191, 7 South. 660. A prima facie case is made out by the plaintiff against the company for failing to correctly transmit a message, by showing that the message delivered was not a copy of the one sent, when defendant must exonerate itself by showing that the breach was not due to negligence on its part. *Pearsall v. Telegraph Co.*, 124 N. Y. 256, 26 N. E. 534, and 21 Am. St. Rep. 662; *Telegraph Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4; *Gray, Com. Tel.* §§ 26, 53, 77; *Shear. & R. Neg.* § 542; 3 *Suth. Dam.* § 957; *Thomp. Neg.* 837.

The demurrer to the fourth plea was properly sustained.

3. Issue was joined in the case on the plea of the general issue, and on the fifth and sixth pleas, the fifth setting up that the contract sued on was founded on a gambling consideration, and the sixth, that the contract sought to be made by the plaintiff with the Birmingham Exchange Company, the sendee of the message, was a contract founded on a gambling consideration, and was illegal and void. What the evidence introduced on the trial was, we are not informed by bill of exceptions. In the motion for a new trial, we are informed, that the cause was tried before a jury by the plaintiff on evidence adduced to prove his case, in the absence of defendant's counsel. Judgment was rendered for plaintiff for the sum of \$122.65 and costs.

The defendant afterwards moved the court for a new trial, which was overruled. The cause is here on bill of exceptions reserved on the trial of that motion. It is based on the ground that the attorneys for the defendant were absent by alleged unavoidable delay in consequence of being engaged in the trial of two causes in Birmingham, one in the federal and the other in the city court in that city, and on the ground that plaintiff ought not to be allowed to recover, on account of the gaming transaction in which he was engaged in sending his messages.

In the first place, we may dispose of the latter question by stating, that the messages sent by plaintiff to his correspondent in Birmingham, over defendant's line, do not conclusively reveal an intention on the part of plaintiff to deal in what are termed "futures." Such contracts, as the authorities generally concur in holding, are valid, though the vendor neither has the goods in hand, nor has contracted for the purchase of them, and has no expectation of acquiring them otherwise than by their purchase at some date before the day of delivery. But if it is apparent

that no purchase and delivery were intended, but that the transaction should be closed up on the basis of the market value of the goods at the date of delivery, the losing party paying the other the difference, it is a gambling transaction, it is contrary to public policy and void at common law, in the absence of a statute even denouncing it as such. *Hawley v. Bibb*, 69 Ala. 52; *Lee v. Boyd*, 86 Ala. 283, 5 South. 499. The demurrers to the fifth and sixth pleas were withdrawn, and issue taken on them. It may be, in a suit of this character, they were subject to demurrer, but this question is not before us, and we, therefore, do not decide it.

4. The law firm employed by defendant to defend its suit, consisted of three members, all residing in Birmingham. The case was originally set for trial on October 26, 1897, but by an agreement of counsel on both sides, and with the consent of the court, it was reset for November 3d, following. The attorneys for defendant did not appear at Decatur on the last day named. One of them telegraphed on the 2d, to the clerk of the court in Decatur,—“We are engaged in United States court. Pretty sure can be in Decatur Friday or Saturday,” requesting the clerk to show the message to Mr. Brown, attorney for plaintiff, and have case passed to Friday or Saturday. The clerk replied same day, that Brown was not there and judge refused to make order in his absence. Brown lived in Hartselle, Ala. On the 3d, the same attorney telegraphed to Brown in Decatur, “If case reached please pass until to-morrow. Our firm engaged in city and United States courts. If I cannot come will send some lawyer in my place. If case will not be reached to-morrow, wire me to-day.” To this Brown replied,—“Telegram received after case was disposed of this forenoon. Judgment against defendant for about \$120.” Defendant’s attorney then telegraphed to Brown or Judge Speake, expressing surprise at the taking of the judgment after seeing his telegram, and stating that he would be up that night with his witnesses, ready to try the case, and requesting Brown to keep his witnesses there or get them back, if they had gone. To this Brown replied: “Witnesses are gone. Heard nothing of your telegram until my client and witnesses were here ready and demanding trial. Big damage suit against Morgan county on trial, which will last several days.” It is not shown that defendant’s counsel attempted to have either of their cases in the city or federal court laid over, in order that one of them might go to the Decatur court to try this cause which had been previously set by their consent on the 3d of November. Reasons are stated why one of the counsel engaged in the city court case was needed to try that cause, and another to try the cause in the federal court, but no facts are shown why it was necessary that the third one should remain in Birmingham on account of either of said causes, further than the expression of a conclusion that it was necessary

for him to do so. It is not shown why defendant’s counsel, when apprehensive of a conflict in the trials of their causes in Birmingham and at Decatur, did not communicate with plaintiff and his attorney, Brown, both of whom lived at Hartselle, before the latter left home to come to Decatur to try said cause, and attempt to make arrangements for the postponement of this cause. It appears they presumed it would be done as a matter of courtesy, and they delayed timely effort to effect such an arrangement. The attorney of defendant, who did the correspondence by wire, in one of his messages to plaintiff’s attorney, stated that if he could not come at a certain time, if the case was laid over till then, he would send another attorney to represent him. He does not show, that he might not have done this and had the case tried when set. It also appears, there were other capable lawyers living in Decatur, who had no connection with this case, who, for aught appearing, could have represented defendant. It was the duty of defendant or his attorneys to have made some arrangement for the trial of the cause, by the appearance of one of them, or by a suitable representative for the purpose, and not to have depended on a courtesy to be shown them by opposing counsel, especially when it would have been at considerable expense to his client to do so. We will not attempt to deal with the question of courtesy between opposing counsel. The judge who tried this cause, sitting as a fair arbiter in the premises, with all the facts before him, decided that it was not his duty to grant a new trial, and we are unable to hold that he erred in so doing. This conclusion is fully justified by previous decisions of this court. *Brock v. Railroad Co.*, 65 Ala. 79; *Broda v. Greenwald*, 66 Ala. 538; *McLeod v. Manufacturing Co.*, 108 Ala. 81, 19 South. 326.

Affirmed.

(129 Ala. 375)

MAXWELL v. STATE.

(Supreme Court of Alabama. Feb. 1, 1899.)

INTOXICATING LIQUORS—PROHIBITION—DISTILLATION.

One who receives apples, to be distilled into brandy on shares, does not, by delivering to the original owner his portion of the product, violate a law prohibiting the sale, gift, or other disposition of intoxicants.

Appeal from city court of Anniston; James W. Lapsley, Judge.

John Maxwell was indicted, tried, and convicted under a local act making it unlawful to sell, give away, or otherwise dispose of spirituous, vinous, or malt liquors in Calhoun county, and appeals. There was no conflict in the evidence, there being but one witness examined, and this evidence is stated in the opinion. Reversed.

John H. Caldwell and T. O. Sensabaugh, for appellant. Chas. G. Brown, Atty. Gen., for the State.

TYSON, J. The defendant was indicted and tried for a violation of the local prohibition law in force in Calhoun county. The only evidence introduced showed that one Couch, some time in August, 1897, delivered his apples to the defendant to distill into brandy on shares. In December following, Couch went back to the still of defendant, and a son of defendant, who lived with and worked with his father at the still, delivered to him his brandy. The evidence does not disclose whether the apples were divided before distillation, and the portion belonging to Couch distilled separately by defendant, or whether all the apples were distilled, and a division of the brandy made. However, this would make no material difference in our conclusion. The contract was, in effect, that defendant was to get one-half of the brandy distilled from the apples, for manufacturing it. His share was to compensate him for the labor, etc., to be bestowed by him in the process of distillation. After the result was attained of converting the apples into brandy, the other half was the property of Couch. The defendant, so far as Couch's share of the brandy was concerned, had no such interest as that he could, by returning to Couch his property, be said to have sold, given, or otherwise disposed of the brandy to him. *Amos v. State*, 73 Ala. 493. Reversed, and prisoner discharged.

(120 Ala. 360)

HENDERSON v. STATE.

(Supreme Court of Alabama. Feb. 7, 1899.)

FORGERY—EVIDENCE—CONFESSION—REASONABLE DOUBT—INSTRUCTIONS.

1. On a trial for a forgery, alleged to have been committed a few years previously, it was error to exclude testimony of a witness as to whether the signature to the writing was that of defendant, where witness had testified that he knew what his signature was at the time it purported to have been made, though he could not testify as to his handwriting at the date of the trial.

2. What defendant said to a witness about an order alleged to have been forged by him before he presented the same was not a confession, such as is required by law to be shown to be voluntarily made before admissible.

3. On trial for forgery, an order, "Please pay the boy \$5," is not too indefinite, as to the payee, to be admitted in evidence.

4. An instruction that a reasonable doubt may arise, even when there is no probability of defendant's innocence, and that if the jury have not an abiding conviction to a moral certainty of defendant's guilt they should acquit, and that unless the guilt of defendant follows as the only conclusion of reason from the whole evidence the defendant must be acquitted, and that if there is one material fact inconsistent with the guilt of the defendant he must be acquitted, is too involved, and calculated to mislead the jury, and properly refused.

5. An instruction that, if there is a probability of defendant's innocence, the jury must acquit, was improperly refused.

Appeal from circuit court, Henry county; W. L. Parks, Judge.

Sam Henderson was indicted, tried, and convicted of forgery, and sentenced to the peni-

tentiary for five years, and appeals. Reversed.

The instrument alleged to have been forged is copied in the opinion. During the examination of one Aaron Holmes, a witness for the state, and after he had testified that, on the night before the defendant delivered the forged instrument, the latter came to his house, and the witness and his brother and the defendant went to town together next day, when the defendant is shown to have uttered the forged instrument, he was asked the following questions by the solicitor for the state: "What did the defendant say to you, the night he came to your house, before coming to town next day, about an order for some goods or for trade for five dollars?" The defendant objected to this question, upon the ground that it called for the confession and a proper predicate had not been laid. The court overruled the defendant's objection, allowed the question to be answered, and to this ruling the defendant duly excepted. The witness answered that the defendant told him he had an order for five dollars on Mr. Beach, and would go to town next day and trade it out. The defendant moved to exclude this answer from the jury, upon the ground that it was a confession, and no proper predicate had been laid. This motion the court overruled, and to this ruling the defendant duly excepted. Upon the state offering to introduce in evidence the order alleged to have been forged, the defendant objected to this introduction, upon the ground that the person to whom it was made payable was too indefinite and uncertain. The court overruled this objection, allowed the order to be introduced in evidence, and to this ruling the defendant duly excepted. The other facts are sufficiently stated in the opinion.

Upon the introduction of all the evidence, the defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "The court charges the jury that if the jury are not satisfied beyond all reasonable doubt, to a moral certainty, and to the exclusion of every reasonable hypothesis but that of defendant's guilt, they should find the defendant not guilty; and it is not necessary, to raise a reasonable doubt, that the jury should find, from all the evidence, a probability of defendant's innocence in the testimony, but such a doubt may arise even when there is no probability of defendant's innocence in the testimony, and, if the jury have not an abiding conviction to a moral certainty of his guilt, it is the duty of the jury to find the defendant not guilty." (2) "The court charges you that not only must the guilt of the defendant follow as the only conclusion of reason from the whole evidence before a conviction may be had, but, in addition to that, if a reasonable doubt follows or grows out of all the evidence, the defendant must be acquitted." (3) "To warrant a conviction, the defendant must be proven guilty so clearly and conclusively that there is no

reasonable theory on which he can be innocent, when all the evidence is considered together; and if there is any one material fact, which is proved to the satisfaction of the jury by a preponderance of the evidence, which is inconsistent with the guilt of the defendant, this is sufficient to raise a reasonable doubt."

(4) "The court charges the jury that, even after the evidence has removed all probability of the defendant's innocence, the law says that then they may entertain a reasonable doubt of defendant's guilt; and, if such doubt is entertained, it is the jury's duty to acquit the defendant." (5) "If there is a probability of defendant's innocence, the jury must acquit the defendant." (6) "If the jury believe the evidence, they will find the defendant not guilty."

Lee & Lee, for appellant. Charles G. Brown, Atty. Gen., for the State.

DOWDELL, J. The defendant was tried and convicted in the circuit court of Henry county under an indictment for forgery. The instrument alleged to have been forged, as set out in the indictment, is as follows: "June 25th, 1895. Mr. Judge Beach: Please pay the boy five dollars (\$5 dollars). Oblige me. R. F. Tharpe. June 25, 1895." The state offered evidence tending to show that defendant uttered the instrument in June, 1895, and that the same was a forgery; and also proved by one Aaron Holmes that he (witness) knew the handwriting of the defendant, and that the order or instrument alleged to have been forged, and which had been offered in evidence, was in the handwriting of the defendant. There was evidence by the defendant denying the forgery, and also the uttering of the forged instrument. One E. J. Godfrey was sworn and examined as a witness on behalf of the defendant. This witness testified that he "knew the defendant; knew defendant's handwriting in June, 1895, or the year 1895," "and saw same frequently"; and, further testifying, the witness said: "I have seen defendant's handwriting, and knew the same in the year 1895, but cannot say that I know the same now, as his handwriting might have improved. Would not say I know his handwriting now." The defendant then asked this witness if the instrument or order introduced in evidence by the state was in the defendant's handwriting; and, on the state's objection, the court refused to permit the witness to answer the question, to which ruling the defendant excepted. It is evident, from the statement of this witness, that he meant that he knew and was familiar with the handwriting of the defendant as he wrote in the year 1895, but could not say that he would know the defendant's handwriting, such as he might write now,—that is, at the time of the trial,—as witness explains that defendant may have "improved" in his handwriting since 1895. The pertinent inquiry was a knowledge of, and familiarity with, the handwriting of defendant

in 1895; that being the time the alleged forged paper was said and purported to have been written. The state having offered evidence to prove that the paper was in the handwriting of the defendant, it was clearly the right of the defendant to introduce evidence in rebuttal of this, notwithstanding he might have been convicted under the indictment for uttering the paper, though he did not forge it. The court was in error in not allowing the witness to answer the question.

There is nothing in the exception to the admission of testimony of the witness Aaron Holmes as to what counsel contends was a confession by the defendant, and not shown to have been voluntary. What the defendant said to the witness about the order was before he (defendant) ever presented the same, and only stated that he had an order for five dollars, and would go to town next day and trade it out. This was not a confession such as is required by law to be shown to have been voluntarily made before being admissible. There was no charge at the time against the defendant for any crime or offense, and nothing that would raise the presumption of duress or compulsion.

The objection to the introduction of the order, on the ground that it was too indefinite as to the payee, was without merit. It was no more indefinite than if it had been payable to bearer.

The first, second, third, and fourth charges are more or less involved, and calculated to confuse and mislead, and were properly refused.

The fifth charge requested by the defendant should have been given. An instruction to the jury in the precise language of this charge has been several times decided by this court to be proper. *Prince v. State*, 100 Ala. 145, 14 South. 409; *Bones v. State* (Ala.) 23 South. 138. See, also, *Bain v. State*, 74 Ala. 38; *Croft v. State*, 95 Ala. 3, 10 South. 517; *Whitaker v. State*, 106 Ala. 30, 17 South. 456.

The sixth charge is the general charge, and this we need not discuss, as the bill of exceptions does not purport to set out all of the evidence had on the trial. For the errors pointed out the judgment of the circuit court is reversed, and the cause remanded. The defendant will remain in custody until discharged by due course of law.

(120 Ala. 366)

CURRY v. STATE.

(Supreme Court of Alabama. Feb. 8, 1899.)
COURTS—JURORS—RIGHT TO SUMMON—ARREST OF JUDGMENT—NEW TRIAL—VERDICT.

1. Code, § 4998, provides that, if the jury commissioners fail to summon a jury for any week of a term of the circuit court, such court may direct jurors to be summoned therefor; and Acts 1894-95, p. 1221, creating the Talladega city court, declares that petit jurors therefor shall be drawn in the same manner as prescribed for the circuit court. *Held*, that jurors summoned by such city court for a week of its term for which none had been drawn by the commissioners were legally summoned.

2. A motion in arrest of judgment in a criminal case cannot be based on a fact not of record.

3. A motion for a new trial of a criminal case may be based on facts not of record.

4. The decision of a trial court denying a motion for a new trial of a criminal case cannot be reviewed on appeal.

5. A verdict finding accused guilty of assault and battery may be properly rendered under an indictment charging him with assault with intent to kill.

Appeal from city court of Talladega; G. K. Miller, Judge.

John Curry was convicted of assault and battery, and he appeals. Affirmed.

The indictment under which the defendant was tried contained two counts. The first count charged the defendant with an assault with intent to murder one Frank Noble. The second count charged the defendant with assault with intent to murder Effie McKibbon. When the cause was called for trial, the defendant moved the court to quash the panel of the petit jury summoned for the trial of the cases in court that week, upon the grounds (1) that such jury was not drawn according to law; (2) that such jury was selected and summoned by the sheriff from the citizens of Talladega county, qualified to serve as jurors, without reference to the jurors whose names were contained in the jury box of said county. The evidence for the state tended to show that, while Frank Noble and Miss Effie McKibbon were riding along a road in a buggy, the said Noble told the defendant and some other men who were walking along the road to get out of his way; that the defendant became incensed, and ran up behind the buggy and fired at said Noble and Miss McKibbon; and that Miss McKibbon was struck with a pistol ball. The evidence for the defendant tended to show that he did not fire the shot. Upon the submission of the cause to the jury, they returned the following verdict: "We, the jury, find the defendant guilty of assault and battery on the person of Frank Noble, and assess the fine at five hundred dollar." The bill of exceptions recites that after the verdict was read by the clerk "the solicitor then stated to the court that there was no evidence of any battery on the person of Frank Noble, and requested the court to so instruct the jury, and to explain what verdict they should find, which the court refused to do." The defendant then filed a motion to set aside the verdict of the jury upon the grounds that the verdict was contrary to the evidence, and that the verdict was contrary to the charge of the court, in that said charge did not authorize the jury to find the defendant guilty of an assault and battery upon Frank Noble. This motion was overruled. Thereupon the defendant filed a motion in arrest of judgment upon the following grounds: "(1) The jury before whom he was tried was not drawn according to law in this case. Said jury was drawn and summoned by the sheriff of Talladega county under an order of this court directing him to summon as jurors a

certain number of qualified jurors of said county, without naming them, and without the court having drawn said jurors from the jury box as provided by law. (2) There was a variance between the verdict of the jury and the indictment, in this: the verdict found defendant guilty of an assault and battery upon Frank Noble, where there was no allegation in the indictment of an assault and battery upon Frank Noble. (3) There was a variance between the indictment and the verdict of the jury, in that the indictment charged that defendant assaulted Frank Noble with a pistol, while the verdict was for an assault and battery without a weapon." The court overruled this motion, and the defendant duly excepted. Judgment was rendered in accordance with the verdict, adjudging that "the defendant is guilty of assault and battery."

Charles G. Brown, Atty. Gen., and Alex. M. Garber, for the State.

McCLELLAN, C. J. The special statute establishing the city court of Talladega, etc., as amended in 1895, provides that petit jurors for said court shall be drawn in the same manner as was, or might thereafter be, provided for the drawing of such jurors for the circuit court of Talladega county. Acts 1894-95, p. 1221. The drawing of such jurors for said circuit court is provided for by the Code. The petit jury which tried this case was drawn in consonance with section 4998 of the Code for a week of the city court for which no jury had been drawn by the jury commissioners, and the motion to quash the venire because not drawn by the commissioners, etc., was properly overruled.

The fact that there was no evidence of a battery committed by the defendant upon the person of Frank Noble did not appear of record in the court below. It was therefore not matter for motion in arrest of judgment, and that motion was well denied. It was proper, however, for a motion for a new trial; but, conceding that upon it the city court should have granted a new trial, its action in refusing it is not revisable by this court.

There is no merit in the theory advanced in the court below, that a battery is not embraced in an indictment charging an assault with intent to murder. *Jones v. State*, 79 Ala. 23.

Affirmed.

(122 Ala. 47)

ROBERTS v. STATE.

(Supreme Court of Alabama. Feb. 8, 1899.)

CRIMINAL LAW—EXCLUSION OF EXPERT WITNESSES
—REASONABLE DOUBT—ARGUMENTS OF
COUNSEL—RAPE—EVIDENCE.

1. It is discretionary with the court to put expert medical witnesses in a criminal case under the rule.

2. Prosecutrix testified that the rape was committed in a pasture, about 45 yards from a large pine tree, and about 80 yards from a cornfield, and about 35 yards from a branch.

A witness testified that three or four weeks after the alleged rape, in the pasture in question, he saw tracks of a man with shoes, and of bare feet, like those of a girl, leading into some bushes, where there were signs of a scuffle, but that it was not near a large pine tree, and the place was about 30 steps from the cornfield, and about 15 yards from the branch. *Held* that, since the distances testified to by the two witnesses were merely their estimates, the identification of the place was sufficient to make the evidence of the signs of the scuffle admissible.

3. Though prosecutrix has testified that after the rape there was blood on her undergarment, it is not incumbent on the state to produce it; hence, an argument for the defense based on the nonproduction of the garment is properly arrested.

4. Prosecutrix having testified that some time prior to the alleged rape accused had asked her to kiss him, and, being refused, told her that, if she told her father, accused would kill both her and her father, and that she did not tell, it was not error to refuse to exclude an argument by the state's solicitor that no one knew better than accused that she had not told, since it was but the expression of his opinion.

5. A doubt of accused's guilt is not necessarily a reasonable doubt merely because a reason therefor can be given.

6. A mere doubt of accused's guilt, though honestly entertained, does not require an acquittal.

7. The fact that prosecutrix testified on the trial that the rape was committed between 7 and 8 o'clock in the morning, and on the preliminary examination that it was committed between 8 and 9, may be considered by the jury in determining the weight to be given to her testimony.

Appeal from circuit court, Pike county; J. W. Foster, Judge.

Marion Roberts was convicted of rape, and he appeals. Reversed.

On the trial of the case, after the witness Annie Hattoway had testified to the facts attending the commission of the offense, she further testified that the place where the defendant threw her down and ravished her was in a pasture near her father's house; that it was a smooth place in some bushes, and was sandy, but the sand was not perfectly white; that it was about 45 feet from a large pine tree that had been killed by lightning, about 80 yards from a cornfield in "the bottom adjoining the pasture"; that the bushes were thick there, and it was in the southeast corner of the pasture, about 35 yards from a branch, and from 30 to 50 yards from an oat-field. The said Annie Hattoway further testified that, at the time she was raped by the defendant, she had on an undergarment and a dress, and that in the afternoon of the day the offense was committed she noticed that her undergarment had blood on it, both in front and behind. When asked about what time of the day she was assaulted by the defendant, she testified that it was between 7 and 8 o'clock in the morning. During her cross-examination she stated that she testified on the preliminary trial and on the habeas corpus proceedings that it was between 8 and 9 o'clock in the morning, but that she was now sure it was between 7 and 8 o'clock; that

she had changed the designation of the time because after the other trials she was informed that the time was an important matter in the case, and after thinking it over she was sure it was between 7 and 8 o'clock. Upon the cross-examination of one Ben Blackman, a witness for the defendant, he testified that, about three or four weeks after the day the defendant was charged with having raped Annie Hattoway, he was passing through Mr. Hattoway's pasture, and made an examination to see if he could find the place of the alleged rape; that in one place in the pasture he saw tracks of a man with shoes, and of bare feet, like the tracks of a girl; that thereupon he followed these tracks in some bushes, where he saw signs as if there had been a struggle or scuffle, but that he did not see near there a large pine tree, killed by lightning. On the redirect examination of this witness by the defendant, he was asked, "How far is this place you refer to from the cornfield?" He answered that it was about 30 steps; and, in answer to a question as to how far it was from the branch, he said it was about 15 yards. The defendant then moved the court to exclude the testimony of this witness as to any signs of a struggle or a scuffle at the place referred to by him in the pasture, on the ground that the place referred to by the witness is not sufficiently identified as being the place where the alleged rape was committed, as described by the witness Annie Hattoway. The court overruled this motion, and the defendant duly excepted. During the re-examination of the witness Annie Hattoway, she testified that, some time before the defendant raped her, he came to the cow pen one day while she was milking, and asked her to kiss him; that she refused, and the defendant told her that, if she told her father, he (the defendant) would kill her and her father, both; and that she did not tell her father about the defendant asking her to kiss him until the Sunday morning after the commission of the rape, which was on Thursday. In the course of his argument to the jury, one of the defendant's attorneys said: "Annie Hattoway says her undergarment worn that 5th day of May [the day of the alleged rape] had blood on it, behind and in front. Where are those clothes, gentlemen of the jury? Why was not that garment here as evidence in this case?" The solicitor objected to these remarks by the defendant's counsel, and moved the court to exclude them from the jury, on the ground that they were illegal. The court sustained the objection, granted the motion, and excluded said remarks from the jury. To this action of the court the defendant duly excepted. In his closing argument to the jury, the solicitor used the following language: "The circumstances and testimony in the case show that no one knew better than Roberts that she, Annie Hattoway, had not told her father, because they had been friends since Roberts asked her to kiss him, on up to the time of the alleged rape. Defendant knew he

had this girl, Annie Hattoway, in his power. He had asked her two months before this, at the cow pen, to kiss him; and he told her there, if she told her father, he would kill her. She did not tell her father about defendant's talk at the cow pen. (And no one knew better than Marion Roberts, the defendant, that Annie Hattoway had not told her father about this kissing talk at the cow pen.)" The defendant objected to that part of the solicitor's argument in parentheses, and moved the court to exclude it from the jury, on the ground that the same was illegal, since there was no evidence introduced to show whether the defendant knew, or not, whether Annie Hattoway had told her father about the incident referred to. The court overruled the objection and motion, and to this ruling the defendant duly excepted. The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(9) If the jury, after considering all the evidence in the case, have a doubt as to the guilt of the defendant, they must acquit the defendant." "(19) If a single juror has a doubt of the guilt of defendant, for which he can give a reason, there can be no conviction." "(22) The court charges the jury that, if they believe from all the evidence in the case that Annie Hattoway delayed five days in making complaint to any one of the alleged rape on her, then they may, under the law, disbelieve her entire testimony." "(24) The fact, if it be a fact, that the prosecutrix placed the time of the alleged commission of the offense between eight and nine o'clock in the morning on the preliminary trial of the case, and that she now changes the time to between seven and eight o'clock in the morning, may be considered by the jury in determining what weight they will give to her testimony."

S. M. Dinkins and L. D. Gardner, for appellant. Chas. G. Brown, Atty. Gen., for the State.

DOWDELL, J. The defendant was tried and convicted on an indictment for forcibly ravishing one Annie Hattoway. Before entering upon the trial, the witnesses were put under the rule; both state and defendant having invoked the same. W. B. Sanders (a physician, and a witness for the defendant), in violation of the rule of exclusion, remained in the court room during the trial, and heard a part of the testimony of one Dr. Pennington, who was examined as an expert on behalf of the state. On the objection of the state, the court refused to let the witness Dr. Sanders testify. It was stated at the time by the defendant that Dr. Sanders was only offered as an expert. Two other witnesses (physicians) were called and examined as experts by defendant in his behalf. It is contended by counsel for defendant that the court erred in not allowing the witness Sanders to

testify, because, as it is urged, expert testimony does not fall within the rule of exclusion of witnesses. As to what witness or witnesses may be excluded from the rule when invoked is a matter resting in the sound discretion of the trial court, and its rulings in this respect are not subject to revision. *Riley v. State*, 88 Ala. 193, 7 South. 149; *Barnes v. State*, 88 Ala. 204, 7 South. 38; *State v. Brookshire*, 2 Ala. 303. In the note to section 432, 1 Greenl. Ev. (15th Ed.), it is said: "To this rule an exception is allowed in the case of medical witnesses; but even those, on matters of medical opinion, are examined apart from each other," citing *Alia. Prac.* pp. 542-545; *Tait, Ev.* 420. It will be observed that under these authorities the witness is not excepted from the rule of exclusion during the examination of other witnesses on the matters for which he is called. Sanders was called as an expert on the same matters as to which other witnesses were called and examined. So it would seem that, under the above authority cited in appellant's brief, the witness falls within the rule, and not the exception, according to the facts in this case. There is no good reason why witnesses summoned to testify as experts should be placed upon a higher plane than other witnesses, especially as to the matters they are called to testify about. The manifest purpose of the rule is to secure the truth, and promote the ends of justice; to have the recollection of the individual witness, of the facts which he may testify to, uninfluenced by the testimony of other witnesses, or, in the case of experts, the opinion of the expert, uninfluenced by evidence of another expert. The discretion of the trial court in such cases is a wise discretion, and always to be exercised for the promotion, and never at the expense, of right and justice.

The distances testified to by the two witnesses Annie Hattoway and Blackman were merely estimates or opinions of the witnesses, and we think that the other matters of description, taken in connection with the two sets of tracks as described by the latter witness, leading up to the place where he saw signs of a scuffle on the ground, sufficiently identified the place to render the testimony of this witness competent.

It was not incumbent on the state to produce at the trial the undergarment on which the witness Annie Hattoway stated was blood in front and behind, and the failure to do so could afford no presumption unfavorable to the prosecution, under the facts in the case. The action of the court in arresting the argument of counsel on this line was without error. What the solicitor said, in the course of his argument, as to no one knowing better than the defendant that Annie Hattoway had not told her father about the kissing talk at the cow pen, was but the expression of opinion by the solicitor; and, under the testimony of the case, we would not say it was a wholly unwarranted opinion. The court did not err

in refusing to exclude these remarks of the solicitor.

A mere doubt, however honestly entertained, is not enough upon which to base an acquittal. Nor is a doubt for which a reason may be given necessarily a reasonable doubt, although a reasonable doubt may be a doubt for which a reason can be assigned. *Humbree v. State*, 81 Ala. 67, 1 South. 548.

The written charges requested by the defendant, and numbered 9 and 19, fall under the above propositions, and were properly refused.

Charge numbered 22 is conceded by counsel for appellant, in their brief, to be bad.

Charge 24 was not offensive to the rule against giving undue prominence to particular parts of the evidence, but comes within the exception to that rule, as laid down in the case of *Harris v. State*, 96 Ala. 24, 11 South. 255, and *Smith v. State*, 88 Ala. 73, 7 South. 52. It was error to refuse this charge. For the error pointed out, the judgment of the circuit court is reversed, and the cause remanded. The defendant will remain in custody until discharged by law.

(122 Ala. 326)

BUTLER et al. v. SAVANNAH GUANO CO.

(Supreme Court of Alabama. Feb. 7, 1899.)

APPEAL—CONFLICTING RECORD—GARNISHMENT—CLAIM OF THIRD PARTY.

1. Where the bill of exceptions shows that the court gave the general affirmative charge, but the judgment entry shows that the court decided the cause without a jury, the recitals in the judgment entry will prevail.

2. Where a garnishee's answer alleged indebtedness to a certain amount, and a claimant appeared and propounded its claim in writing, verified as required by Code 1886, § 2985, this was all that was necessary to give the court jurisdiction of the claim suit, the statute requiring no bond.

3. Where indebtedness admitted by garnishee was the purchase price of goods sold to him by defendant in attachment, the same being goods received by defendant from claimant on commission, the right of the claimant, as against plaintiffs in attachment, was superior.

Appeal from circuit court, Henry county; J. W. Foster, Judge.

Action by Butler & Stevens against Nicholson, Blount & Co., seeking to recover upon certain promissory notes. The plaintiffs sued out a writ of garnishment, which was served upon one J. R. Faircloth. The garnishee, Faircloth, answered the writ orally in open court, admitting that he was indebted to the defendants, but suggested that the Savannah Guano Company claimed the amount due from him to the defendants. Thereupon the defendant the Savannah Guano Company propounded its claim in writing, and verified the same by affidavit. Issue was made up between the plaintiffs and the claimant, and the cause was tried upon an agreed statement of facts, which showed the following facts in addition to those above set out: On November 30, 1896, the defendants Nicholson, Blount & Co. and

the claimant, the Savannah Guano Company, entered into a contract by which it was agreed that the guano company would consign a certain number of tons of fertilizer to Nicholson, Blount & Co., in trust for sale on commissions, and that in making the sale of the fertilizer the said Nicholson, Blount & Co. were acting as agents for the Savannah Guano Company. It was stipulated in said contract that Nicholson, Blount & Co. were to pay over to the guano company all moneys collected by them from the fertilizer when sold for cash, and to deliver notes of purchasers to the guano company. During the existence of this contract, Nicholson, Blount & Co. sold and delivered to the garnishee, Faircloth, a number of tons of guano, which were a part of the guano consigned to Nicholson, Blount & Co. by the Savannah Guano Company, and the money admitted to be due by Faircloth is the purchase price of the fertilizer sold him by the defendants out of the lot of fertilizer shipped the latter by the claimant under said contract. As is stated in the opinion, the bill of exceptions states that the court gave the general affirmative charges requested by the claimant, and refused a similar charge requested by the plaintiffs, but the judgment entry recites that the cause was tried by the court without the intervention of a jury upon an agreed statement of facts. There was judgment for the claimant. The plaintiffs appeal. Affirmed.

B. I. Moody and M. E. Milligan, for appellants. H. A. Pearce, for appellee.

DOWDELL, J. As appears from the record, both by recitals in the bill of exceptions and in the judgment entry rendered by the court, the cause was submitted and tried in the court below upon an agreed statement of facts. And the judgment entry further shows that the court decided the cause without the intervention of a jury, rendering judgment in favor of the claimant. The bill of exceptions also states that the court gave the general affirmative charge requested in writing by the claimant, and refused a like charge requested by the plaintiffs.

The fact that a cause was submitted to and tried by a jury, or tried by the court without a jury, constitutes a proper recital to be contained in a judgment entry. Where a conflict arises between recitals in the bill of exceptions and the judgment entry as to a matter which should be contained and set out in the judgment, as a general rule the recitals in the latter will prevail. *Danforth v. Railway Co.*, 93 Ala. 614, 11 South. 60; *Courie v. Goodwin*, 89 Ala. 569, 8 South. 9. But, while there is an evident inconsistency between the bill of exceptions and the judgment entry as to whether the cause was tried with or without the intervention of a jury, we think it wholly immaterial in this case; for upon the agreed statement of facts set out in the record, and upon which the cause was tried, if tried by

a jury the general charge requested by the claimant should have been given, and, if tried by the court without a jury, judgment should have been rendered for the claimant; so in either event the result would have been the same.

The garnishee, Faircloth, answered indebtedness to Nicholson, Blount & Co., defendants in attachment, in the sum of \$854.47, and suggested the Savannah Guano Company as claimant. The Savannah Guano Company appeared and propounded its claim in writing, and made oath thereto, as required by section 2985, Code 1886. This was all that was necessary to give the court jurisdiction of the claim suit. Under the above statute, no bond is required by the claimant, and manifestly for the reason that he does not acquire possession of the subject-matter of the claim suit; that is, the indebtedness admitted by the garnishee. The debt, demand, money, or effects in the hands of the garnishee, which is admitted in his answer, remains in his possession, pending the trial of the claim suit, to await the judgment of the court. In *Insurance Co. v. Teague*, 78 Ala. 147, there was a levy by the officer upon specific property; and the claim was interposed and trial had under section 3012, Code 1886. So in the cases of *Graham v. Hughes*, 77 Ala. 590, and *Walker v. Ivey*, 74 Ala. 475, cited in that case. When a claim is interposed either under section 3004 or 3012, Code 1886, in addition to the affidavit required of the claimant, the statute requires the giving of a bond by such claimant; and each of these requirements is jurisdictional, and cannot be dispensed with. But, as we have seen, section 2985 does not require the giving of a bond, and the propounding of the claim in writing and making oath thereto is alone the jurisdictional requirement. In *House v. West*, 108 Ala. 355, 19 South. 913, the failure of the claimant to give a bond was not a question in the case. The proposition upon which that case was decided was the failure of the claimant to propound her claim in writing verified by affidavit. The expression in the opinion in that case as to the bond required being jurisdictional is correct, in claim suits arising under sections 3004 and 3012, but not as to claim suits arising under section 2985, and to that extent the law there laid down in general terms is here qualified.

Under the agreed statement of facts upon which this case was tried, it is shown that the indebtedness admitted by the garnishee, Faircloth, was the purchase price of guano sold to him by the defendants in attachment; and, the same being a portion of the guano received by the defendants from the claimant on consignment, and as the agents of the claimant, we think there can be no doubt as to the right of the claimant to the debt or demand on the garnishee, as against the plaintiffs in attachment, under these facts. There is no error in the record, and the judgment of the circuit court is affirmed.

(123 Ala. 308)

RUCKER et al. v. MORGAN.

(Supreme Court of Alabama. Feb. 1, 1899.)

BILL IN EQUITY—DISMISSAL—INJUNCTION AGAINST ACTIONS AT LAW.

1. After dismissal of a bill as to necessary parties defendant against whom jurisdiction has not been acquired, the bill stands as if they had not been joined in the first instance, the allegations remaining unchanged.

2. Where stock certificates were placed in trust by complainant and another, to be delivered to a third person on their joint request, and the trustee refuses to deliver them without the consent of both, complainant cannot enjoin the third person from suing for the stock at law, since the defense at law is perfect.

3. A motion by a co-defendant to dismiss a bill as to him for want of equity apparent on its face is proper.

Appeal from circuit court, Jefferson county; James J. Banks, Judge.

This was a bill in equity by J. La Motte Morgan, the appellee, against Edmund W. Rucker and Thomas Seddon, who are alleged to be resident citizens of Birmingham, Ala.; E. A. Uehling, who is alleged to be a resident of the city of Newark, in the state of New Jersey; James W. Miller and William H. Dryenforth, who are alleged to be resident citizens of the city of Chicago, in the state of Illinois; and the Fortimolite Metal Company, which is alleged to be "a body corporate duly organized under the laws of the state of Illinois," having its principal place of business in said city of Chicago. From a decree overruling their motion to dismiss the bill for want of equity, defendants Rucker and Seddon appeal. Reversed.

The case made by the bill is substantially as follows:

The complainant, in association with the defendant Miller, was in the month of April, 1894, and for some time thereafter, "engaged, for and in behalf of the said Fortimolite Metal Company, in negotiating a contract whereby said company might grant to iron manufacturers the use of a certain process for treating iron, which said process was secured to, owned, and held by said metal company under appropriate letters patent. That said Fortimolite Metal Company had promised and agreed to and with the complainant and his associate, Miller, that it would, upon their obtaining for it such contract, in payment for their services in that regard, issue and deliver to them, in equal amounts, 3,000 shares of the capital stock of said company." That, at the time this contract was made, complainant "supposed and believed him [Miller] to be a man of good habits, character, and reputation, and dealt with him as such." That, as a result of their negotiations, on the 5th September, 1894, an agreement in writing was entered into by and between the said company, represented by its general manager, one T. P. Moody, and the Sloss Iron & Steel Company, represented by its vice president, the defendant Rucker, for the use by the Sloss Company of the said

patented process of treating iron; and subsequently this contract was merged in a more formal, definite, and specific contract, which was executed for and in behalf of the Sloss Company by its president, the defendant Seddon, by authority of its board of directors, and for and in behalf of the metal company by said Moody, as its general manager, his act being afterwards ratified by its board of directors. And that thereupon the metal company did, in performance of its contract with them (the complainant and Miller), and in payment for their services rendered in that regard, issue and deliver to each of them 1,500 shares of the capital stock of said company. It is further averred: That the complainant was absent from the state of Alabama, where the said negotiations were in progress, from about the 28th day of April, 1894, up to about the 12th day of November, 1894. That on or about the 20th day of October, 1894, he met his said associate, Miller, in the city of Chicago, and that, at various times and interviews had with him between the 20th and 22d days of October, Miller represented and stated, and endeavored to impress upon the complainant as a fact, that in the progress of the negotiations in Alabama, and to the consummation of the contract hereinabove set forth, he had derived and received great assistance from three persons, whose names he had first declined to make known, but subsequently, when pressed thereto, he stated to be the defendants Rucker, Seddon, and Uehling, and that he (the said Miller) had promised to the said three persons, for their assistance rendered to him in the securing of said contract with the Sloss Company, 1,100 shares of said metal company's stock, and agreed to deliver to them 550 shares out of his said 1,500 shares, and had agreed that complainant should deliver 550 shares out of his 1,500 shares received as above stated; the said shares to be distributed, 500 to the said Rucker, 500 to the said Seddon, and 100 to the said Uehling. That Miller then further represented to the complainant that Rucker, Seddon, and Uehling, were men of great influence in Birmingham, and that their assistance had been great and essential in carrying on the negotiations, and securing the contract with the Sloss Company; and in that connection Miller further represented, and urged as an inducement to the entering into the trust hereinafter mentioned, that Uehling had promised to turn over to complainant and Miller, in consideration for said metal company's stock to be delivered to him, certain patents which Uehling then had and held, or had applied for, and, further, that he (Miller) had reserved the right for himself and complainant to retain the said 1,100 shares of stock upon paying on the 15th day of April, 1895, to Rucker, Seddon, and Uehling, 10 per cent. of the par value thereof. That Miller also stated and represented, in this connection, to complainant, that it was essential to the successful

carrying on of future plans that the names of Rucker, Seddon, and Uehling should not be disclosed; and he urged that the stock so promised, as stated by him, should be issued to him, and in his name. That complainant at that time had confidence in the said Miller, and believed said representations to be true, but inasmuch as he had not made the promise himself, but being willing to carry out in good faith any engagements made for him by his associate with the persons named, they being known to complainant as men of influence and standing, complainant then and there, to wit, on the 22d day of October, 1894, entered into the following arrangement and agreement with Miller, induced thereto solely by the representations so made to him by Miller, namely:

"That the said 1,100 shares of stock should be issued to and in the name of the said James W. Miller, agent, in three certificates, two for 500 shares, each numbered 104 and 105, and one for 100 shares, numbered 106, and the same deposited with the defendant William H. Dryenforth as trustee; and thereupon a certain instrument in writing, evidencing such agreement, was entered into between your orator and said Miller, and accepted by the said Dryenforth, in words and figures as follows, to wit:

"Chicago, October 22nd, 1894. W. H. Dryenforth, Esqr., President—My Dear Sir: This letter will place in your hands, as trustee, (3) three certificates of the capital stock of the Fortimolite Metal Co., (2) two for (500) five hundred shares each, certificates Nos. 104 & 105, and certificate No. 106 for (100) one hundred shares, aggregating (1,100) eleven hundred shares, all in the name of James W. Miller, Agt. During recent negotiations in Alabama with a view to securing a contract for the use of the Fortimolite process, this stock (1,100 shares) was promised to three parties. We were to hold the same until April 15th, 1895. At the end of that time we engaged to pay said parties, each separately, (10) ten per centum of the par value of said stock, in cash, or to deliver to each separately the above (3) three certificates. This transaction will be consummated by the joint written request of ourselves, our heirs, executors, administrators, or assigns, until which time you will hold these papers in trust. Very truly yours, [Signed] James W. Miller. J. La Motte Morgan.

"I accept above trust. [Signed] W. H. Dryenforth."

It is further averred in the bill that complainant had not personally promised to the defendants Rucker, Seddon, and Uehling, or either of them, any of said stock, or other consideration, prior to the 22d day of October, 1894, nor since that date has he made to them, or either of them, any such promise; that he had not authorized Miller to make any such promise or agreement for him; that all the knowledge or information he had upon that subject prior to October 22d was derived

solely from the statements and representations made to him by Miller, as hereinabove set forth, and he knew nothing to the contrary thereto until after his return to Birmingham, Ala., about November 12, 1894,—“that is to say, until about 20th of November, 1894”; that he then had a personal interview with each of said defendants Rucker, Seddon, and Uehling, at which interviews each of them expressly disavowed any such agreement with Miller, and each denied to complainant that Miller had ever made to them, or either of them, any promise of a stock bonus in connection with the contract negotiated with the Sloss Company. Then follows this averment: “Your orator therefore states and charges that the said Miller had not prior to the 22d day of October, 1894, promised to the said defendants Rucker, Seddon, and Uehling, nor to any or either of them, any of said stock of the Fortmolite Metal Company, and that in fact he had not met or become acquainted with the said Rucker prior to the 22d of October, 1894; that the said parties had at no time during the negotiations aided and assisted him (the said Miller) in securing from the Sloss Company the said contract, and that the said Uehling had never promised to deliver over to him (the said Miller) and your orator, in exchange for any of said stock, any patents whatsoever, or any interest therein, and that all of said statements to those effects, as set forth in sections 4 and 5 hereof as having been made by said Miller to your orator, and which furnished the inducement to your orator to enter into the writing set forth in section 5, were untrue, false, and fraudulent, and known to the said Miller to be so, and were made by and with the intent and purpose to deceive and defraud your orator.” It is further averred in the bill that at the time of the agreement claimed to be made with Rucker, Seddon, and Uehling, he (Miller) was a person of very bad repute and character in the city of Birmingham, which character and reputation were well known to Rucker, Seddon, and Uehling; that defendants Seddon, Rucker, and Uehling were men of character and established reputation in the city of Birmingham, said Seddon being then and now the president, and said Rucker being vice president, of the Sloss Iron & Steel Company; and that they would not have had any dealings or transactions with a man of the reputation of Miller, and would not have entered into any contract with such a person as Miller, or, as he believes, with any other person, to enter into a contract for and in behalf of the company of which they were managing officers, in consideration of a stock bonus or other thing of value to be given to them personally. “And he expressly states and charges that no such contract, agreement, or promise was ever made by the said Miller to the said Rucker, Seddon, and Uehling, or to any other person for their benefit; and he expressly states and charges that the said

Thomas Seddon was not at that time a party to any such contract, agreement, or understanding, and that he was not the beneficiary, or to become the beneficiary, in any promise made by said Miller to said Rucker or to any other person for any stock bonus, as represented and stated to your orator by the said Miller, as set forth in section 4 hereof, and that the representations and statements made by him (the said Miller) to your orator at that time in that regard were entirely false, fraudulent, and untrue, and that said escrow or trust contract, having been induced and secured by the statement that the said Thomas Seddon was one of the three persons to whom the promise had been made, and that statement and representation being untrue and false, the said contract of escrow or trust is, as against your orator, fraudulent and void.” It is further averred that the statements and representations made to complainant by Miller, and which induced him to enter into said contract, were untrue, false, and fraudulent, in this: “That he, the said Miller, had not prior to said 22d day of October, 1894, nor at any other time, promised or agreed to deliver to the said defendant Uehling 100 shares of the capital stock of the said metal company, in consideration of which the said Uehling had agreed to turn over to your orator and said Miller said letters patent held by him, and he therefore charges that said contract of escrow or trust is for that reason fraudulent and void.” It is further averred that complainant never, directly or indirectly, either separately or jointly with Miller, made any request of the trustee, Dryenforth, for the execution of the trust created by the instrument hereinabove copied, but, on the contrary, has at all times since about the 29th of November, 1894, so soon as he learned the facts in regard thereto, as he states them in the bill, expressly and emphatically repudiated the said trust and contract, and has notified the said trustee of the said repudiation thereof, and demanded of him the return to him of the stock so placed in his hands as trustee. It is further averred in the bill that neither Rucker nor Seddon nor Uehling knew anything about the execution of the said contract of trust until long after its execution, and, so far as complainant is informed and believes, neither of them ever asserted any claim thereto, or to any part of the said stock so placed in trust, until some time about November 30, 1894; that their first information in regard thereto was, as complainant is informed and believes, derived from the said Miller, or the said trustee, Dryenforth, some time about the 30th day of November, 1894. And it is charged that any claim now made by them, or either of them, to said stock, or to any portion thereof, is not based upon any contract, understanding, or agreement made between them and said Miller prior to the 22d day of October, 1894, or any promise made to them, or either of them, by the said Miller prior to the 12th day of October, 1894,

but that, on the contrary, "the same is a subsequently devised scheme on the part of the said Miller, in association with the said defendants Rucker and Dryenforth, to carry into execution the original fraud devised by said Miller, to secure from your orator his said stock; and your orator charges that any claim made now to the said stock of your orator is but a conspiracy between the said defendants Miller and Dryenforth, in and through the instrumentality of the said defendant Rucker, to secure your orator's said stock, without consideration, for their mutual benefit, or for the benefit of themselves, or other persons associated with them, who are unknown to your orator." It is further averred in the bill that the shares of stock now in possession of the defendant Dryenforth, held by him under the terms and conditions of the said escrow paper hereinabove set forth, have no present fixed or ascertainable market value; that there has not been at present any fixed, ascertainable value of any kind; that their value varies from day to day, and is largely speculative in its character, depending largely upon the operations of the Sloss Iron & Steel Company under their said contract, and upon the profits to be made under the same, or the ability of said company to enter into still other contracts; that in any suit at law it would be difficult, and, as complainant believes, impossible, to establish by proof a fair and full equivalent of value for said stock; and that on or about the 29th of November, 1894, and as soon as complainant could see the defendants Miller and Dryenforth, he demanded of them a return to him of the said 550 shares of stock in the hands of the said Dryenforth, with which demand they, and each of them, refused, and do still refuse, to comply. It is further averred in the bill that the defendant Miller has no property or estate whatsoever liable to execution at law, except the interest he has in the stock of the said Fortimolite Company, and that complainant has no adequate remedy at law in the premises; that he will suffer great and irreparable loss and injury, unless Miller be temporarily, and, upon final hearing, perpetually, enjoined from in any manner disposing of or transferring said shares of stock in the hands of Dryenforth as trustee, and the said Fortimolite Metal Company also be so enjoined from transferring upon its books the said stock to any person other than the complainant. It is further averred in the bill, upon information and belief, that on or about the 15th of April, 1895, the defendants Rucker, Seddon, and Uehling demanded of the defendant Dryenforth, as trustee, the said 1,100 shares of Fortimolite Metal Company stock, covered by the said escrow contract of October 22, 1894, and have threatened to bring suit for the same, and, in the belief of complainant, they will do so, unless restrained by the orders of this "honorable court."

The prayer of the bill is that the contract of trust of October 22, 1894, be declared to be

fraudulent and void, as far as complainant's interest in said stock is concerned, and that the same be set aside and held for naught; that the defendant Dryenforth be required to surrender the certificates for said 550 shares of Fortimolite Metal Company stock held by him as trustee, and standing in the name of defendant Miller, agent, and that the same be canceled, and that the said Fortimolite Metal Company be ordered and decreed to issue to complainant a certificate or certificates for the said 550 shares of stock; that in the meantime an injunction issue, restraining the defendant Miller from transferring or in any manner interfering with the certificates for said 550 shares of Fortimolite Metal Company stock, standing in his name as agent, and further restraining the defendant Dryenforth from in any manner disposing of said certificates in his hands as trustee, and the said Fortimolite Metal Company from transferring upon its books the said 550 shares of its stock to any person other than complainant, and further restraining the defendants Rucker, Seddon, Uehling, and Miller, either as agents or otherwise, and each of them, "from asserting any claim whatsoever to the said 550 shares of the stock of the said metal company, and from bringing any suit of any kind for the recovery of the same," and further restraining Miller and each of the defendants from voting said 550 shares of the metal company stock at any meeting of the stockholders of said Fortimolite Metal Company, and commanding the said Fortimolite Metal Company, its officers and managers, to recognize the right of your orator to said 550 shares of stock, and to permit your orator to vote the same at any and all meetings of said company until the further order of this court, and that upon the final hearing of the cause said injunction be made perpetual. The prayer is also for general relief.

Upon the filing of the bill, an injunction was issued as prayed, and served upon the defendants Rucker and Seddon, who thereafter regularly appeared, and separately moved to dismiss the bill on the ground that it contained no equity, as against them and each of them. The defendants Uehling, Miller, and Dryenforth and the Fortimolite Metal Company appeared specially for the purpose of making the motion, and jointly and severally moved the court to dismiss, as to them, the bill of complaint exhibited against them in the case, upon the ground that the court had no jurisdiction. The court overruled the motion to dismiss for want of equity made by the defendants Rucker and Seddon, and sustained the motion to dismiss for want of jurisdiction as to the defendants Miller, Dryenforth, and the Fortimolite Metal Company, but overruled the motion as to Uehling; he having since the filing of the bill come within the jurisdiction of the court, and been served with process.

John P. Tillman, for appellants. Turner & Latady and Benners & Benners, for appellee.

DOWDELL, J. The bill in this case was filed in the circuit court of Jefferson county under the act of February 18, 1895 (Acts 1894-95, p. 881), conferring chancery jurisdiction on that court. The primary and principal relief sought by the bill, which is evident from the averments and prayer of the bill, is to have the "escrow or trust agreement" of October 22, 1894, declared fraudulent and void, and the certificates of stock placed in the hands of Dryenforth, as trustee, delivered up by him to be canceled, and new certificates issued. Incidentally and auxiliary to this the injunctions are prayed. The bill states that the respondents the Fortimolite Metal Company, the corporation issuing the stock, Dryenforth, the trustee, who has the certificates of stock in his possession, and Miller, in whose name, "as agent," the stock stands, are all nonresidents of the state of Alabama; residing in, and being residents of, the state of Illinois. It is also clear from the statements of the bill that the personal property, the stock of the defendant corporation, the subject of the suit, is without this state, and that the fraud and misrepresentations charged, which induced and procured the making of the agreement between the complainant and the defendant Miller, as likewise the execution or signing of the "letter" by complainant and Miller of October 22, 1894, dated at Chicago, and which was addressed to Dryenforth, as trustee, transpired and took place without this state; also, the act, the issuance and delivery of the stock by the metal company to the complainant and said Miller, under its contract with these parties, and on which the suit is founded, was to be performed without this state. The bill was dismissed by the circuit court as to the defendants Miller, Dryenforth, and the metal company, upon their motion to dismiss for want of jurisdiction. At the time of dismissal of the bill by the court as to these parties for want of jurisdiction, it overruled the motion of the defendants Rucker and Seddon to dismiss for want of equity. From the decree of the circuit court overruling this motion to dismiss the bill for want of equity the appeal is taken to this court, and that decree is now assigned as error.

When courts of chancery must take cognizance of cases in equity against nonresidents is determined by the second clause, under section 669 of the Code of 1893, which reads as follows, viz.: "Against Non-Residents. When the object of the suit concerns an estate of, lien or charge upon lands, or the disposition thereof, or any interest in, title to, or incumbrance on personal property within this state, or where the cause of action arose, or the act on which the suit is founded, was to have been performed in this state." A court of equity, as a general rule, in its decrees operates in personam, and must acquire jurisdiction of the person in order to compel his obedience to its mandates. This jurisdiction may be obtained by personal service of the

process of the court, or by the voluntary appearance of the defendant in court. Service of its process is limited and confined to the territorial boundary of the state, and, in the absence of a voluntary appearance and submission to its jurisdiction by a nonresident defendant, it can acquire no jurisdiction as to such a person, except in cases provided for in the above statute, and then not of the nonresident personally, but, in the language of the statute, "against non-residents," and to the extent and purpose of dealing with his interest in the subject-matter of the suit, and over which the court has rightfully acquired jurisdiction. The cases mentioned in the statute are stated with sufficient clearness not to admit of a misunderstanding. The jurisdiction of the chancery court as to nonresidents, being, therefore, purely statutory, must, as to such jurisdiction, be held strictly within the provisions of the statute. No personal service had been had on the nonresident defendants as to whom the bill was dismissed, and their action in procuring the dismissal on their motion for want of jurisdiction makes it clear that no jurisdiction can be had or expected by a voluntary appearance. Under the averments of the bill, the decree dismissing the bill for want of jurisdiction as to the nonresident defendants was proper. *Iron Age Pub. Co. v. W. U. Tel. Co.*, 83 Ala. 498, 3 South. 449; *Sayre v. Land Co.*, 78 Ala. 85; *Galpin v. Page*, 18 Wall. 350; *Freem., Judgm.* (3d Ed.) §§ 567, 568.

The allegations and charges in the bill in connection with these nonresidents who were sought to be made parties defendants, as to the contract for the issuance of the certain described shares of stock, the fraud practiced in procuring the issuance of certain certificates in the name of Miller, and the delivery of the same to Dryenforth, as trustee, constituting the very gravamen of the action, taken in connection with the prayer of the bill and the relief sought, show them to be necessary and indispensable parties to the suit. After the dismissal of the bill as to these defendants, and who, under its averments, are shown to be necessary parties, the bill then stood, as to any further proceedings thereon, just as though they had not been made parties in the first instance; the allegations and charges remaining unchanged. The relief prayed against Rucker and Seddon is simply and wholly injunctive. The bill expressly avers that these defendants, nor either of them, have any claim to or interest in the stock in question; that neither of them had any connection with the alleged fraud practiced by Miller on the complainant; but it does aver, upon information and belief, that they have demanded of Dryenforth the certificates, which were placed in his hands as trustee, under the joint letter of complainant and Miller of October 22, 1894, and have threatened Dryenforth with suit. This is the ground for the injunctive relief prayed against these two defendants. The letter or contract of October 22d, which ap-

pointed Dryenforth trustee, provides, in terms, that he can only deliver the certificates placed in his hands upon the joint written request of complainant and Miller. The only reasonable inference to be drawn from the allegations of the bill as to the demand made on the trustee, Dryenforth, for the certificates of stock in his hands, by these two defendants, and their threatened suit, is that Dryenforth refused their demand, and hence the threat of suit. By the averments of the bill, the defense at law to any suit brought by these defendants against Dryenforth for the recovery of the certificates is perfect and complete, and it is too well settled to call for a citation of authorities that under such circumstances a court of equity will not lend its aid by injunction.

The only remaining question is whether the motion to dismiss the bill is the proper practice, or should the objection be reached by demurrer? It was said by this court in the case of *Iron Age Pub. Co. v. W. U. Tel. Co.*, 83 Ala. 506, 3 South. 452,—a case very similar to the case at bar: "But in this case, where the granting and perpetuation of the injunction prayed for is the whole case made by the bill, we think it eminently proper that the question should be raised by demurrer or motion to dismiss, when the defect of jurisdiction appears on the face of the bill, and is raised by a co-defendant." Again, it has been decided that "when, admitting the facts apparent on the face of the bill, whether well or ill pleaded, the complainant is without right to equitable relief," the objection may be made by motion to dismiss the bill. *Seals v. Robinson*, 75 Ala. 363; *Hooper v. Railroad Co.*, 69 Ala. 529. Under these authorities, we think there can be no doubt that in this case a motion to dismiss the bill for want of equity by the defendants Rucker and Seddon was proper, and should have been granted. The decree of the circuit court is reversed, and a decree will be here rendered dismissing complainant's bill for want of equity.

(120 Ala. 274)

McLEROY v. STATE.

(Supreme Court of Alabama. Feb. 9, 1899.)

CRIMINAL LAW—PLEAS IN ABATEMENT—EVIDENCE—WAIVER OF OBJECTIONS—CONSPIRACY—HOMICIDE—DRUNKENNESS—REASONABLE DOUBT—INSTRUCTIONS.

1. A demurrer to a plea in abatement on an indictment alleging that the grand jurors were not shown to have been drawn by the county commissioners sitting as a jury commission, and that the list failed to show that the commissioners had taken the oath, or that the commission had elected one of their members president, or that the jury commission was ever duly organized, or that the jury list was ever drawn by a majority of the jury commission, was properly sustained.

2. Where defendant does not object to evidence of a conversation until all of it had been brought out, he cannot then move to exclude a part of it because the entire conversation was not had in his presence.

3. Where two or more persons conspire to do a criminal act, each is responsible for the act

of the other in furtherance of the common purpose, if he is present, and if the act is done within the scope of the common purpose, but is not responsible for an act prompted by individual malice.

4. Where the act is charged as committed with a particular intent, drunkenness, as affecting the condition of the accused, is a proper subject for the consideration of the jury.

5. Where the theory of the state is that a murder was committed by one other than defendant, but that the defendant conspired with the murderer, instructions asked by the accused as to the effect of drunkenness on his part at the time of the murder were properly refused, where they ignored any reference to the alleged conspiracy.

6. An instruction that if the jury have a reasonable doubt on the evidence as to whether defendant, being present, aiding and abetting, also participated in the felonious design to rob or kill deceased, the jury should acquit, was properly refused, as confusing and calculated to mislead.

7. Where the evidence shows without doubt that one other than defendant committed the murder, and that defendant was present at the time, an instruction that defendant must be acquitted, no matter how strong the circumstances point to his guilt, if they can be reconciled with the theory that some one else committed the act, is properly refused, there being no dispute as to who killed deceased.

8. An instruction emphasizing a particular part of the evidence is properly refused.

9. An instruction already given in substance is properly refused.

10. On a trial for murder, where the theory of the state is that deceased was killed by another, with whom the accused conspired, an instruction that if there was a plot by accused and such other to rob deceased, and the killing was after that plot had been consummated, and from a cause not connected with the plot, and was by the other, and not by accused, accused could not be convicted, should have been given.

11. Where the jury, on consideration of all the evidence, have a reasonable doubt growing out of the evidence, it should give defendant the benefit of such doubt, and acquit him.

Appeal from city court of Gadsden; John H. Diaque, Judge.

Andy McLeroy was jointly indicted with Columbus, alias Lum Evans, for the murder of Parker Rowe, and upon a severance being granted, the appellant was tried separately; was convicted of murder in the second degree, and sentenced to the penitentiary for 10 years, and appeals. Reversed.

The defendant filed a plea in abatement to the indictment, in which he alleged that the indictment should be abated on the following grounds: (1) The list of the grand jurors is not shown to have been drawn by the county commissioners sitting as a jury commission. (2) Said list fails to show that it was drawn by the jury commission of Etowah county, and if so it is not shown that the commissioners had taken the oaths required by law. (3) Said grand-jury list purporting to be drawn by the jury commission fails to show that the said jury commission elected one of their members president as the law directs. (4) Said grand-jury list if selected by the jury commission fails to show that said jury commission was ever organized. (5) Said jury list fails to show that it was drawn by all the jury commissioners of a majority

of the jury commission. (6) Said jury list was not drawn by all the jury commission or a majority of said jury commission. To this plea in abatement the state demurred upon the ground that said plea states no ground which is sufficient at law for the quashing or abatement of the indictment. This demurrer was sustained and the defendant duly excepted. The facts of the case and those pertaining to the ruling of the court upon the evidence, are sufficiently stated in the opinion.

Upon the introduction of all the evidence, the defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of these charges as requested: (1) "The court charges the jury, if they believe all the evidence in this case they must acquit the defendant." (2) "The court charges the jury that if the jury believe from the evidence that Evans alone killed Parker Rowe and that McLeroy was too drunk to aid or abet or to conspire with Evans in the commission of the crime, then the jury cannot find the defendant guilty." (3) "The court charges the jury the evidence in this case shows that Evans has been convicted of murder in the second degree, and the jury cannot under the evidence in this case convict the defendant of murder in the first degree as charged in the indictment." (4) "The court charges the jury that if upon a fair consideration of all the evidence, the jury have a reasonable doubt growing out of any part of the evidence as to whether McLeroy was sufficiently sober to form the specific intent to take the life of Rowe, the jury cannot convict the defendant McLeroy of the offense charged in the indictment." (5) "The court charges the jury that if Evans killed Rowe, and if McLeroy was too drunk to join in any conspiracy to take the life of Rowe and did not aid or abet in such killing, the jury must acquit the defendant." (6) "The court charges the jury that if the jury believe that if there was a plot between McLeroy and Evans to rob Rowe, and if the killing was after that plot had been consummated, and from a cause having no connection from the common object of the plot and was by Evans alone, the jury can not convict the defendant." (7) "The court charges the jury that if the jury have a reasonable doubt growing out of the evidence as to whether defendant besides being present aiding and abetting also participated in the felonious design to rob or kill Rowe, the jury must acquit the defendant." (8) "The court charges the jury that Evans has been acquitted of murder in the first degree, and such acquittal of Evans is an acquittal of McLeroy of murder in the first degree." (9) "The court charges the jury that if the jury believe all the evidence in this case, they cannot convict the defendant of murder in the first degree as charged in the indictment." (10) "The court charges the jury no matter how strong the circumstances are pointing to the guilt of defendant, yet if they can be reconciled with

the theory that some other person may have done the act, then defendant is not proven to be guilty." (11) "The court charges the jury that there is no conflict in this evidence that this defendant was drunk on that Saturday night, and if the jury have a reasonable doubt as to whether this defendant was sufficiently sober to form an intent to take life, they must acquit the defendant." (12) "The court charges the jury that there is no evidence in this case that McLeroy killed Parker Rowe, and before the jury can convict this defendant, they must be satisfied beyond all reasonable doubt that this defendant aided or abetted or conspired with Lum Evans who did the killing, and if the jury are so satisfied beyond all reasonable doubt that the killing was not in self-defense, or that they have no reasonable doubt that it was done in self-defense before they can find this defendant guilty of any crime." (13) "The court charges the jury that murder in the second degree is the willful, malicious and intentional killing of a human being, and unless each of these three ingredients has been proven to the jury beyond all reasonable doubt they cannot find this defendant guilty of murder in the second degree and if the jury have a reasonable doubt as to whether this defendant was sufficiently sober to form the intent to take life, then they cannot find the defendant guilty of anything." (14) "The court charges the jury that murder in the first degree is the willful, intentional, malicious and premeditated killing of a human being, that if any of these four ingredients have not been proven beyond a reasonable doubt, they cannot convict this defendant of murder in the first degree, and if the jury has a reasonable doubt as to whether this defendant was sufficiently sober to form the intent to take life, they must find this defendant not guilty of any offense." (15) "The court charges the jury that there is no evidence in this case that this defendant killed Parker Rowe, and before the jury can convict this defendant for any offense charged in this indictment they must be convinced beyond all reasonable doubt that this defendant aided and abetted Lum Evans in killing Parker Rowe by a previously formed community of purpose between said Lum Evans and this defendant, and if the jury have a reasonable doubt as to whether this defendant was sufficiently sober to form a community of purpose with Lum Evans, they must acquit this defendant." (16) "The court charges the jury that if they have a reasonable doubt as to whether the killing was done deliberately, or as to whether it was done premeditatedly, then they could not find the defendant guilty of murder in the first degree, and if they have a reasonable doubt as to whether the killing was done in malice then they could not find the defendant guilty of murder in either degree, but only of manslaughter at the most, and if after considering all the evidence the jury have a reasonable doubt as to the defendant's guilt of man-

slaughter arising out of any part of the evidence, then they should find the defendant not guilty of any offense." (17) "The court charges the jury that good character itself is part of the evidence in this case, and if the jury upon a consideration of all the evidence have a reasonable doubt growing out of any part of the evidence the jury will give the defendant the benefit of such doubt and acquit him." (18) "The court charges the jury that there is no conflict in this testimony that Lum Evans killed Parker Rowe, and there is no conflict in the evidence in this case that this defendant was drunk, and before the jury can find this defendant guilty, they must be convinced beyond a reasonable doubt that this defendant was sufficiently sober to form the intent to take life, or the intent to aid and abet Lum Evans in killing Parker Rowe, and if the jury are so convinced beyond all reasonable doubt they must further be convinced beyond all reasonable doubt that the killing of Parker Rowe by Lum Evans was not in self-defense, and if the jury have a reasonable doubt whether Lum Evans killed Parker Rowe in self-defense, they must acquit the defendant." (19) "The court charges the jury that the clothes worn by this defendant on that Saturday night are in evidence in this case, and the jury may examine these clothes, and see whether the spots on these clothes are tobacco or blood, and if the jury believe these spots are tobacco juice, or if they are not satisfied beyond a reasonable doubt that these spots are blood, they may look to that fact, if it be a fact what weight they will give the state's witness Cohenur." (20) "The court charges the jury that drunkenness is no excuse for crime. That in this case there is no conflict in this evidence that Lum Evans killed Parker Rowe, and before the jury can find this defendant guilty, the jury must be satisfied beyond all reasonable doubt that this defendant conspired with Lum Evans with the intent to commit an unlawful act, and unless the jury believe beyond all reasonable doubt that this defendant was sufficiently sober to form the specific intent to do an unlawful act you must acquit this defendant."

Burnett & Cull, for appellant. Charles G. Brown, Atty. Gen., and Hubert F. Davis, for the State.

HARALSON, J. 1. There was no error in sustaining the demurrer to the plea in abatement to the indictment. *Linnehan v. State*, 116 Ala. 471, 22 South. 662.

2. The state introduced one W. M. Wallace, who testified that he saw Evans on Monday morning after Rowe was killed, and that he told witness, that he killed Rowe because he accused him of stealing his money, and because Rowe cut him. This conversation the state introduced without objection by defendant, and as a part of this conversation which the state was drawing out, Evans told witness,—explaining when he cut Rowe,—that

after Rowe cut him and accused him of stealing his money, he, Evans, started in to kill him. The defendant,—quoting the language of the bill of exceptions,—“moved to exclude what the witness had said as to how Evans started in to kill him, because not made in the presence of defendant and it is illegal, irrelevant and immaterial,” which motion the court overruled. The ruling was justified on the grounds, that the state was introducing a conversation between witness and Evans to which no objection was raised on the part of defendant, until all of it had been brought out, and he then moved to exclude a part of it. This, if the evidence sought to be excluded was injurious to him, was an experiment he was not authorized to make. He should have objected in the beginning. But, we are unable to see any injury resulting to defendant from the ruling, even if erroneous, since the evidence was favorable to defendant. It simply showed, if true, that Evans and not he was the one who slew Rowe.

3. There were but two witnesses to the homicide, Evans and defendant. They were jointly indicted but separately tried, and Evans was convicted of murder in the second degree. On the trial of defendant, both Evans and he swore, that he had nothing in the world to do with the killing of Rowe, and never saw Rowe's money after they left Gadsden. The state introduced several witnesses who testified, that Evans told them, at different times that he himself did the killing and defendant had nothing to do with it. The evidence thus introduced was as pointed,—as to any conspiracies between the two,—that defendant had never entered into any conspiracy with Evans, either to rob or kill Rowe, or that he ever did in fact rob him. The testimony of each of these witnesses on these points, was such, as without more, the general charge could have been given for defendant.

The other evidence tends to show that Rowe had been robbed of his money; that he had about \$40 when he went to Gadsden on Saturday, in the evening of which day he was killed. If he spent any of it while there, it is not shown. It further shows, that he, in his own conveyance, and Evans and defendant in theirs, left Gadsden, and traveled together to the place where he was killed, and that on the way he showed J. W. Smith, who accompanied him about five miles out, some six or eight dollars in silver and a roll of paper money about an inch thick, the outside bill of which was a five-dollar note; and when his body was examined the next day at the place of the killing, there was found on him only twenty-five cents in dimes and nickels; that Rowe was very drunk, so much so, that he was taken into the vehicle with Evans and defendant, and the horse in his conveyance was tied to the rear end of theirs; that one of the traces in Evans' wagon became unhitched and he got out to adjust it, when Rowe being aroused, asserted that his money had been stolen and that Evans had taken it, and get-

ting out of the wagon, the altercation ensued in which he was killed by Evans. The latter in testifying to the occurrence said,—after stating that Rowe accused him of taking his money and he denied it,—that "Rowe got out from back of hack. Rowe said it was a damn lie, that I had his money, and he would get it or kill me or I kill him. I heard his knife click as he came at me. It was all over in a minute and a half. He grabbed at my collar with left hand and cut me with the right. When he came at me the last time, he was trying to make a lick at me, when I cut him several times, when he fell. During the difficulty, defendant never got out of hack. He never got out of hack till we were across the creek [after the killing]. He had nothing in the world to do with it, never saw money of Rowe after we left him at East Gadsden when Rowe was showing it to Smith. * * * When Rowe got out of the wagon, he was a drunk man. McLeroy was a drunk man and not able to take care of himself." It was otherwise shown, that defendant was drunk.

The evidence on which the state relies to show defendant's complicity in the killing is substantially that James Rowe, for the state, testified that the defendant, on Monday morning after the killing on Sunday night, told him that Rowe had money. At one time he said it was about \$15, again that it was about \$20, and at another time that it was \$25 or \$30; and that one J. O. Cohenur, testifying for the state, stated that defendant came to his house about 4:30 o'clock on Sunday morning, was riding a bay horse and leading a mule; that witness was out feeding his stock when defendant seeing him, rode up, and proposed a trade, and witness told him he would trade with him, if it was not Sunday. Defendant said, he would like to trade, as he had been in a difficulty and needed some money, and that he had been up all night; that he saw red-dish spots on his coat, vest and shirt, which he took to be vomit, but recalling it to mind, in his best judgment it was blood; that he took breakfast, but appeared to be drunk and ate but little; that witness asked him to wash his hands, but he declined, stating he had washed them; that witness traded with him for the mule and promised to give him \$10 on Monday, but did not pay him on that day, as the man who brought the order was not defendant and the order was not in defendant's handwriting, with which he was acquainted.

The defendant testified, that he was drunk on the occasion, was asleep when Evans aroused him, and asked him to hold the lines till he fixed the trace; that the clothes, which were exhibited to the jury, were the ones he wore that night, and were in the same condition they were that night, and there were no signs of blood on them; that he could not write his name nor could he read; that he got out of hack after they crossed the creek and rode his horse and led one; could hardly keep on his horse, and the one he was leading

got loose at a time when he must have been asleep; that he turned back to look for it, and in that way he became separated from Evans; that he did not tell Cohenur he had trouble and needed some money, nor did he tell him he had washed his hands; that he heard Rowe accuse Evans of having his money, and heard Evans deny it, and they came together, but that he did not and could not see any licks struck. He also testified that Rowe was a particular friend of his; and the evidence showed, that Rowe's cousin married defendant's daughter.

4. The well-settled rule in reference to conspirators is, that "when two or more persons combine or conspire to do an unlawful act, or to commit a criminal offense, each is equally responsible for the act of the others in furtherance of the common purpose, if he is present at the time, aiding, encouraging, or ready to assist if necessary, and if the act done is within the scope of their common purpose, or is the natural and proximate consequence of the act intended; but they are not responsible for an act prompted by the individual malice of the perpetrator, and it is a question for the jury whether the act done was within the scope of the common purpose, or grew out of the individual malice of the perpetrator." *Pierson v. State*, 99 Ala. 148, 13 South. 550; *Williams v. State*, 81 Ala. 1, 1 South. 179; *Evans v. State*, 109 Ala. 11, 19 South. 535.

It is also the well-settled doctrine of this court, that when the act charged is one committed with a particular or specific intent, which is of the essence of the crime, drunkenness, as affecting the mental state and condition of the accused, is a proper subject for the consideration of the jury in deciding the question of intent. *White v. State*, 103 Ala. 73, 16 South. 63; *Chatham v. State*, 92 Ala. 47, 9 South. 607; *Engelhardt v. State*, 88 Ala. 100, 7 South. 154.

5. From the foregoing it will appear that charges requested by defendant, numbered 2, 4, 5, 11, 13, 15, and 16, each ignored any reference to the alleged conspiracy formed between Evans and defendant, upon which the state relied for his conviction, and were on that account properly refused.

The seventh was confused, not clear, and was calculated to mislead.

The tenth was bad. It is not disputed who killed Rowe. Evans did it, and yet the charge postulates that if he did, defendant could not have been guilty. He may have been guilty also. It was for the jury to determine under all the facts.

The twelfth and nineteenth are faulty, if for no other reason, in not setting forth the ingredients of self-defense. *Roden v. State*, 97 Ala. 54, 12 South. 419; *Miller v. State*, 107 Ala. 42, 19 South. 37.

The eighteenth finds duplication in given charges C and D, and was unnecessary to be repeated.

The twentieth, in calling attention to and emphasizing a particular part of the evidence,

has been too often condemned, to require comment.

Refused charges 6, 17 and 21 appear to be free from fault and should have been given, and for the error in refusing to give them, the judgment must be reversed and the cause remanded.

Reversed and remanded.

(123 Ala. 439)

EWING v. WOFFORD.

(Supreme Court of Alabama. Feb. 11, 1899.)

APPEAL—MOTIONS—BILL OF EXCEPTIONS.

A ruling on a motion cannot be reviewed, unless the motion is incorporated in the bill of exceptions, or the transcript shows that it was by order enrolled on the records of the court, since its motion docket is not a court record; and it is not sufficient that copies of the motion appear in the transcript.

Appeal from circuit court, Etowah county; James A. Bilbro, Judge.

Action by Charles W. Ewing, surviving partner, against Thomas J. Wofford, Jr. Judgment for plaintiff. On April 10, 1897, Thomas J. Wofford, Jr., filed a motion asking the court to set aside the sale of certain lands made by the sheriff under the levy of an execution on March 18, 1895, which execution was issued on the judgment, alleging in said motion that prior to the levy of said execution the movant had filed in the probate office of Etowah county a declaration and claim to said lands as exempt to him, under the constitution and laws of Alabama, as a homestead. This motion nowhere appears in the bill of exceptions contained in the transcript on this appeal, nor does it appear from said transcript that the motion was enrolled upon the records of the court. The judgment entry recites that the motion was granted, and that the sale was set aside and annulled. From the judgment, plaintiff appeals. Affirmed.

Oliver R. Hood, for appellant. George D. Motley, for appellee.

TYSON, J. An examination of the transcript in this case discloses that the motion inserted therein was upon the motion docket, and it nowhere appears in the bill of exceptions, or that it was enrolled upon the records of the court. This court has uniformly held that the motion docket of the circuit court is not a record of that court, and that the only method by which the ruling of the lower court upon a motion can be reviewed by this court is by incorporating the motion in a bill of exceptions, or by having the transcript show that it was enrolled upon the records of the circuit court by an order thereof. Rule of practice No. 2, Code 1896, p. 1195 (Code 1896, p. 807); *Ex parte Highland Ave. & B. R. Co.*, 105 Ala. 221, 17 South. 182; *Railroad Co. v. Jones*, 102 Ala. 212, 14 South. 786; *Leinkauf v. Advancing Co.*, 99 Ala. 619, 12 South. 918; *David v. David's Adm'r*, 66

Ala. 139; *Waring v. Gilbert*, 25 Ala. 295. The fact, as insisted by appellant, that a copy of the motion appears in two other places in the transcript, can avail him nothing, since these two copies are the ones issued and served upon the respondent, and should have appeared in the bill of exceptions. *James v. Mosely*, 47 Ala. 299; *Barclay v. Barclay*, 42 Ala. 345; *Connolly v. Railroad Co.*, 29 Ala. 373, and authorities cited. The judgment entry in the transcript refers to the motion, but fails to set out the grounds thereof. There is not enough recited in it for this court to determine what issues were presented by the motion. As we are precluded, under the authorities cited above, from considering the motion, we are unable to determine whether the evidence recited in the bill of exceptions was admissible under the issues presented to the circuit court for decision, or whether it was sufficient to support the judgment. For the same reason, we are unable to say there was error in granting the motion as shown by the judgment entry. Judgment affirmed.

(119 Ala. 555)

ALABAMA G. S. R. CO. v. BURGESS.¹

(Supreme Court of Alabama. Oct. 29, 1898.)

RAILROADS—PERSONAL INJURIES—WANTONNESS OF EMPLOYE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—INSTRUCTIONS—DAMAGES—EXCESSIVENESS.

1. A witness not shown to know the time or distance within which a train can be stopped is incompetent to give his opinion in regard thereto.

2. Where evidence is erroneously admitted, the court's right to exclude it cannot be defeated because the opposite party has introduced evidence which puts him to a disadvantage, since he can protect himself by withdrawing his evidence.

3. Where an engineer discovers a child in peril in time to avoid injuring it by the exercise of reasonable diligence, and consciously fails to exercise such diligence, such failure is wanton negligence; and the company is liable, though the child is negligent.

4. An intent of a railroad company's employe to injure is not essential to liability, notwithstanding contributory negligence, since it is enough if he is so reckless as to imply an indifference as to whether an injury is inflicted.

5. An instruction to find for defendant in an action against a railroad company, unless the evidence satisfies the jury that its engineer wantonly injured plaintiff, exacts too high a degree of proof, since plaintiff is not required to satisfy the jury absolutely of intentional wrong, but only to reasonably satisfy it.

6. In an action for injuries resulting from willful negligence, it is not error to instruct that, if plaintiff is entitled to recover, the jury may award such damages as they see proper, not in excess of the amount claimed.

7. If a party fears that the jury may not understand the court's charge, he must request an explanation.

8. A verdict for \$5,000 against a railroad company, in favor of a father, for personal injuries to his child, where no permanent injury results, is excessive.

Appeal from circuit court, Etowah county; John A. Bilbro, Judge.

¹ Rehearing denied.

Action by Telly John Burgess against the Alabama Great Southern Railroad Company for damages for personal injuries. There was a judgment for plaintiff, and defendant appeals. Reversed.

The cause was tried upon the second and seventh counts of the complaint. The second count charges that the defendant "wantonly and intentionally, through its agents or servants, drove and propelled its engine and train upon and against plaintiff, in said county, who was then and there a minor, between seven and eight years of age, knocking him down and fracturing his skull, and otherwise wounding and injuring him, to his great damage, as aforesaid." The seventh count was identical with the second, with the exception that it alleged that the defendant "willfully, wantonly, and intentionally, through its agents or servants, drove," etc. It was shown upon the trial of the cause that the plaintiff was injured by being struck by the engine connected with one of the defendant's trains. Two practicing physicians testified that there was a scalp wound of about three inches on the left side of the plaintiff's head, and that the outer plate of the plaintiff's skull was fractured $2\frac{1}{2}$ inches, and that there was a slight depression in the head, as the result of the injury. These witnesses further testified that plaintiff was rendered unconscious by the blow, and remained so about two days; that there was a temporary loss of speech; that the chances were nine to one that there would be no permanent injury resulting from the wounds. The evidence for the plaintiff tended to show that the accident occurred at 4 o'clock in the afternoon, and that it was a clear, bright afternoon; that the track where the accident occurred was straight for some 2 miles from the place where the injury was inflicted, towards the south, from which direction the train was coming; that for about 400 yards from the south, to the trestle where the plaintiff was injured, the plaintiff could have been seen by the engineer, and was seen by the engineer. The evidence for the defendant tended to show that when about 400 yards from the trestle, where the plaintiff was injured, the engineer saw an object on the track, but could not distinguish what it was; that he did not discover that it was a child on the track until he was within 50 yards of the plaintiff; that, immediately upon discovering that the object on the track was a child, he gave the signal alarm, reversed his engine, put on the brakes, and did everything in his power to avert the accident, but that it was impossible to stop the train until after the plaintiff had been struck. The defendant's testimony further tended to show that when a train is going at the rate of 35 miles or 40 miles an hour, as the defendant's train was at the time in question, such train could not stop within about 200 yards. During the examination of L. F. Burgess, the father of the child, and after he had testified to his having lived within a

short distance from, and in full view of, the track where the accident occurred, and that he had seen passenger trains running on that railroad frequently at the rate of 35 or 40 miles an hour, plaintiff asked the witness the following question: "Have you ever seen that train, running on schedule time, stop there on that grade?" The defendant objected to this question on the ground that it called for immaterial, irrelevant, and incompetent testimony. The court overruled the defendant's objection, and the defendant duly excepted. The witness answered that he had seen the train that goes along the road at the same time of the afternoon as the one which injured the plaintiff stop on that grade when the road was in the same condition as at the time of the injury. The defendant objected to this answer on the ground that it was immaterial, irrelevant, and incompetent evidence, and upon the ground that the conditions were not shown to have been the same, that the engine was not shown to have been in the same condition as at the time of the accident, and that the speed of the train was not shown to have been the same as at the time of the accident. The court overruled the objection, and the defendant duly excepted. The witness then testified that he was a farmer, had never ridden on the train but a few times in his life, had never ridden on an engine, and had no experience as an engineer. The witness was then asked the following question: "Within what distance can a passenger train, running on regular schedule, going north, be stopped at that place, as the road was at that time?" The defendant objected to this question on the grounds that it called for the conclusion of the witness, and the witness was not shown to have been an expert, and that it called for irrelevant, immaterial, and incompetent testimony; that it was not shown that the conditions were the same, or that the rate of speed at which the train was running was the same, as at the time of the accident. The court overruled the objection, and the defendant duly excepted. The witness answered that a train could be stopped in about 200 yards. The defendant moved to exclude this answer of the witness upon the same grounds as the objection to the question was based. The court overruled this objection, and the defendant duly excepted. The bill of exceptions recites that the plaintiff "asked the court to be allowed to withdraw questions 1 and 2 propounded to L. F. Burgess by plaintiff on direct examination, and the answers to said questions. (Said questions and answers were in reference to witness having seen train stopped on that grade, and as to distance within which train could be stopped.) The court allowed the plaintiff to withdraw the testimony, and stated to the jury that there was no evidence before them on the subject of distance within which train could be stopped, except the evidence of defendant; and to this statement of the court to the jury defendant objected and

excepted. Counsel for the defendant stated in open court that he did not consent to the course taken by counsel for the plaintiff, and protested that the introduction of the testimony had worked injury to the defendant, which could not be healed by withdrawing it; and counsel for the defendant stated to the court that he still insisted upon an exception to the action of the court in admitting the testimony."

The defendant separately excepted to the following portions of the court's general charge to the jury: "To both these counts (2 and 7) the defendant pleads that it is not guilty of the wrongs complained of. So, therefore, gentlemen, I charge you, if you believe from the evidence that the defendant was propelling an engine, with cars, along its track, and that the defendant saw that the plaintiff was in danger of injury by said engine, and that defendant, after discovering plaintiff's peril, consciously failed at the time to use the means at hand, which the circumstances reasonably required, to avert the injury, and that in consequence of such failure the engine was driven against the plaintiff, and injured him, then the plaintiff is entitled to recover, under the second or seventh counts of his complaint, such damages as you see proper to assess, not exceeding the amount claimed in either count."

At the request of the plaintiff the court gave to the jury the following written charges: "(1) The court charges the jury that the impossibility of definitely measuring the damages, by a money standard, where pain is claimed as an element of damages, is no ground for denying pecuniary relief, if the jury believe plaintiff is entitled to recover in this case. (2) In order for the plaintiff to recover in this case, it is not necessary that the jury should find that the engineer intended to injure plaintiff, if the case is made out in all other respects. (3) The court charges the jury that if they are reasonably satisfied from the evidence that the engineer saw the child (plaintiff) on the track, and saw that he was in peril, in time to avoid injuring him by the exercise of reasonable diligence, and they further find from the evidence that the engineer consciously failed to exercise such reasonable diligence to avoid injury to plaintiff, and the child was injured in consequence of such failure, then such failure would be wanton negligence; and the plaintiff would be entitled to recover in this case, not exceeding twenty-five thousand dollars, if the case is made out in all other respects. (4) The court charges the jury that what is meant in this case by 'wanton negligence' is the conscious failure on the part of defendant to use reasonable care, under the circumstances, to avoid the injury, after discovering the danger of the child, if they find there was such failure, and injury resulted therefrom. (5) The court charges the jury that although the plaintiff, Telly Burgess, was himself negligent, or at an improper place, when he was struck by the train, yet if the

engineer saw the plaintiff's peril in time to stop the train, and could have stopped it, by the use of reasonable care, before plaintiff was struck, and consciously failed to do so, and plaintiff was struck by the train and injured, the defendant would be liable; and the jury should find for the plaintiff such damages as they think he is entitled to recover, not exceeding the sum claimed in the complaint." To the giving of each of these charges the defendant separately excepted, and also separately excepted to the court's refusal to give each of the following charges requested by it: "(6) The court charges the jury that, if they believe all the evidence in this case, they must find a verdict for the defendant on the seventh count of the complaint. (7) The court charges the jury that if they find from the evidence that if plaintiff voluntarily went on the track, and was injured while on the track, and that the plaintiff had sufficient capacity to know that the track was a dangerous place, and also to know that the way to escape from the danger was to keep off the track, then they should find a verdict for the defendant, unless the evidence satisfies them that the engineer willfully, wantonly, or intentionally injured the plaintiff. (8) The court charges the jury that, if they believe all the evidence, they should find a verdict for the defendant. (9) The court charges the jury that, if they believe all the evidence, they should find a verdict for the defendant on the second count of plaintiff's complaint. (10) The court charges the jury that, if they believe all the evidence, they should find a verdict for the defendant on the counts of plaintiff's complaint which charge willful, wanton, or intentional negligence."

The jury returned a verdict in favor of the plaintiff, assessing his damages at \$7,000. Thereupon the defendant moved the court to set aside the verdict of the jury, upon the ground, among others, that the verdict was excessive and contrary to the evidence. Upon proceeding to hear and determine this motion, the presiding judge stated that in the opinion of the court the damages assessed "were excessive, and that five thousand dollars as damages was sufficient." The bill of exceptions recites that thereupon the plaintiff, "in open court, remitted two thousand dollars of the damages assessed by the jury, and thereupon the court made the following order in said cause: 'On this the 20th day of November, 1897, come the parties by attorneys, and the defendant (movant) moves the court to set aside the verdict of the jury in this case, and the judgment rendered thereon, and grant a new trial of the cause, upon the grounds specifically set forth in said motion, which said motion is in writing, and spread upon the motion docket of this court; and the plaintiff now, in open court, remitting \$2,000 of the damages assessed by the jury, upon due consideration it is ordered and adjudged by the court that said motion be, and the same is hereby, overruled.'"

To the rendition of this

judgment overruling said motion the defendant duly excepted. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Amos E. Goodhue, for appellant. Dortch & Martin, for appellee.

MCCLELLAN, J. The witness L. F. Burgess was not shown to know anything about the time or distance within which a train could be stopped under any circumstances or conditions. He should not, therefore, have been allowed to give his opinion that defendant's train could have been stopped on the occasion of the injury within a distance of 200 yards. The error of receiving this testimony was, however, cured by its subsequent exclusion. And the court's right and power to thus correct itself cannot be defeated of exercise by the fact that the defendant was forced, in view of this testimony being improperly before the jury at one time, to introduce evidence which put it at a disadvantage after this was withdrawn. The defendant, it may be, was entitled to protection against such a result, through a request to be allowed to withdraw the evidence it had been thus forced to offer; but the court was not bound to persist in the error it had committed.

The case made by one tendency of the evidence is this: A child between seven and eight years of age was upon defendant's track. A train was approaching at the speed of 35 or 40 miles an hour. When 400 yards from the child, the engineer discovered it in its perilous condition. With due care and diligence (i. e. by the use of the means at his command), he could have stopped the train within 200 yards, and thus have avoided the injury to the child. Knowing this, he nevertheless failed to so stop his train. If he consciously failed to exercise the care it was his duty to exercise under the circumstances; if, having in mind what to do in order to save the child, and having in hand the means to that end, he failed to use those means,—this cannot be less than a conscious failure of obvious duty in view of probable disastrous consequences; and such failure of such duty, with the probable consequences standing out before him, is at the least wanton and reckless disregard of the child's safety, for which the defendant would be liable, though the child's own negligence may have contributed to the result. We understand that part of the court's general charge to which an exception was reserved, and charges 2, 4, and 5 given at plaintiff's request, to so state the law; and the court did not err in any of these instructions. Of course, an intent to injure on the part of defendant's employes is not essential to liability, notwithstanding contributory negligence. It is enough if they exhibit such wantonness and recklessness as to probable consequences as implies a willingness to inflict injury, or an indifference as to whether injury is inflicted, though they may not have any

such affirmative purpose. Charge 2 correctly asserts this last proposition, when referred to the evidence, in that it affirms that an intent on the part of the engineer to injure the plaintiff was not essential to recovery. In the case of *Railroad Co. v. Burgess*, 22 South. 913, a charge (there numbered 7) much like charge No. 5 given for the plaintiff in this case was criticised and condemned. It was as follows: "That all that is meant in this case by 'wanton, willful, or intentional negligence' is the conscious failure on the part of the defendant to use reasonable care, under the circumstances, to avoid the injury, after discovering the danger of the child, if the jury find from the evidence there was such failure, and the injury resulted therefrom." The ground of the criticism was that the charge did not hypothesize a consciousness on the part of the defendant that the injury would probably result from the conscious failure to use the means at hand to avoid it. We now think that this criticism was ill founded. The charge does hypothesize that the danger in which the child was had been discovered by the defendant's employes, and was known to them; it does hypothesize that there were means at hand, known to the employes, to avoid the injury which was imminent; and it does hypothesize that they consciously failed to use these means, and that in consequence thereof the injury was inflicted. It was not a mere negligent, inadvertent, unintentional failure to use the means at hand, of which willfulness and wantonness cannot be affirmed, even though they knew the danger; but it was a conscious omission to use a known means to a known end, after having discovered, and therefore at the time knowing, the peril to be averted by such use. We now think it cannot be fairly said but that, on the facts hypothesized in that charge, the defendant's employes were conscious that their omission to act would likely result in the injury complained of. *COLEMAN, J.*, adheres to the views on this point he expressed in the case just cited,—that said charge, on account of its phraseology, was misleading.

It is sufficient to say in condemnation of charge 7, refused to defendant, that it exacts too high a degree of proof. It was not on the plaintiff to satisfy the jury absolutely of wantonness, willfulness, or intentional wrong on the part of defendant's employes, but only to reasonably satisfy them. *Torrey v. Burney*, 113 Ala. 496, 21 South. 348.

Where, as in this case, the recovery must be rested upon the wanton or willful misconduct of the defendant's employes, and the damages may be punitive as well as compensatory in character, and where, as here, compensatory damages are claimed for physical and mental pain and suffering, the court does not err in instructing the jury that, if the plaintiff is entitled to recover at all, they may award him such damages as they see proper to assess, not in excess of the amount claim-

ed in the complaint. Such a charge, in truth and in fact, refers the assessment to the sound discretion of the jury. If it be supposed or feared that the jury might not so understand it, or might by it be misled to an unbridled and capricious assessment, an explanatory instruction should be requested. *Railroad Co. v. Bailey*, 112 Ala. 167, 20 South. 313; *Railroad Co. v. Mallette*, 92 Ala. 200, 9 South. 363. And when, to the consideration that physical and mental pain and suffering were to be compensated for in this case, and that accurate measurement of such compensation is not practicable, is added the consideration that exemplary and punitive damages were within the sound discretion of the jury in this case, we do not see our way to the conclusion that the assessment of \$7,000 was excessive. Whether, conceding that assessment to have been excessive, and \$5,000 not to be excessive, the trial court should have set the verdict aside, instead of requiring plaintiff to remit \$2,000 as a condition to overruling the motion to vacate the verdict, we need not decide. It is, therefore, the writer's opinion that the assessment of \$7,000 was not excessive, and, of course, that the reduced verdict was not excessive, and should be allowed to stand. A majority of the court, however, holds that the reduced verdict was excessive, and that the trial court should have granted a new trial on that ground. For this error the judgment must be reversed. The cause is remanded. Reversed and remanded.

(119 Ala. 1)

MARTIN v. STATE.

(Supreme Court of Alabama. Nov. 9, 1898.)

CRIMINAL LAW—IMPEACHMENT OF WITNESSES—
HOMICIDE—INSANITY—INSTRUCTIONS—
MANSLAUGHTER.

1. A witness who, for the purpose of impeachment, has been asked whether he did not make certain contradictory statements to a certain person, which he denies, cannot be permitted to state what he did say to him where accused was not present, until the introduction of evidence that he did make the statements inquired about.

2. In an instruction on murder in the first degree, the term "formed design" does not embody the willfulness, deliberation, malice, and premeditation necessary to constitute the crime.

3. Accused has the burden of showing his insanity at the time of the homicide by a preponderance of the evidence, and evidence which merely raises a reasonable doubt as to his sanity is insufficient.

4. One who, without malice, kills another in a heat of passion, suddenly aroused, is guilty of manslaughter.

Coleman, J., dissenting.

Appeal from city court of Gadsden; John H. Disque, Judge.

Frank Martin was convicted of murder, and he appeals. Reversed.

The appellant was indicted and tried for the murder of William Alexander, was convicted of murder in the first degree, and sen-

tenced to the penitentiary for life. The defendant pleaded not guilty, and not guilty by reason of insanity. The evidence for the state tended to show that the defendant and the deceased had a quarrel about a monkey wrench; that the deceased was seen running with the monkey wrench in his hand, and the defendant running after him, holding an ax in his hand; that, after running about 75 steps, the deceased turned to the left, and, as he did so, the defendant struck him with the ax, and the deceased fell on his knees; that, as the defendant struck the deceased a second blow, he (the deceased) struck the defendant in the head with the monkey wrench; that the defendant then struck the deceased in the head with the ax, knocking him to the ground, and then hit him four times after he had fallen, from the effects of which the deceased died where he fell. The testimony introduced in behalf of the defendant was directed to the establishment of the plea of insanity. A physician examined on behalf of the defendant testified that he was weak-minded and of weak intellect, but that, in his opinion, the defendant was capable of doing business, and knew right from wrong. There were several witnesses introduced in behalf of the defendant, who testified as to his having been weak-minded. The mother, father, and sister of the defendant testified that he was given to having spells once a month, at which time he was unable to distinguish between right and wrong. There was also evidence on behalf of the defendant to the effect that, when the defendant's passions were aroused, he seemed to lose his mind entirely. The state, in rebuttal, introduced evidence tending to show that the defendant was capable of distinguishing between right and wrong, and was employed at different times as other men, and acted as other men did. During the examination of John Higgins, one of the state's witnesses, and after he had testified to the circumstances of the killing, he was asked by the defendant the following question: "Didn't you, in the presence of the Woodards, at the engine, after the killing, tell A. L. Martin, the father of the defendant, that Alexander struck at the defendant twice before the defendant struck at deceased?" The witness answered that he did not tell him that. Upon the redirect examination of this witness, he was asked by the state the following question: "Did you have any conversation at the place and time asked about by the defendant?" Upon the witness answering that he did, the state then asked him to tell what he did say about the number of licks. The defendant objected to this question asked the witness by the state, on the grounds that it was illegal, irrelevant, and incompetent, and because it was hearsay, and the conversation did not take place in the presence of the defendant. The court overruled the objection, and the defendant then and there duly excepted. The portions of the court's oral charge to which exceptions were

reserved are sufficiently stated in the opinion.

The defendant requested the court to give to the jury, among others, the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "The court charges the jury that, in order to sustain the defense of insanity, it is not necessary that the insanity of the accused be established by a preponderance of the evidence; but if, from all the evidence, the jury entertain a reasonable doubt as to the sanity of the accused, they should find him not guilty under his plea of insanity." (2) "The court charges the jury that, while the law presumes every man to be sane and responsible for his acts until the contrary appears from the evidence, still, if there is evidence in the case tending to rebut this presumption sufficient to raise a reasonable doubt upon the issues of sanity, then the jury should give the defendant the benefit of the doubt, and find him not guilty under his plea of insanity." (3) "The court charges the jury that if they reasonably believe from all the evidence in this case that the deceased struck the first blow, and the defendant, by reason of the lick on the head and his weak intellect, was unable to control his actions at the time the fatal blow was struck, then they must find the defendant not guilty under his plea of insanity." (4) "The court charges the jury that the existence or nonexistence of sanity is a question for the jury, to be determined from all the evidence in the case; and, if the jury have a reasonable doubt as to whether the defendant was insane when he struck the fatal blow, then they should find him not guilty under his plea of insanity." (7) "The court charges the jury that if the killing was the result of a blow by the deceased, which, by reason of the weak intellect of the defendant and the violence of the blow received by the defendant, rendered him incapable of controlling his actions, they should find him not guilty under his plea of insanity." (8) "The court charges the jury that, when insanity is set up as a defense in a criminal case, the burden of proof is not on the defendant to establish his insanity by a preponderance of the evidence; but, if all the evidence raises in the minds of the jury a reasonable doubt as to whether or not the defendant was insane when he struck the fatal blow, they should find him not guilty under his plea of insanity." (9) "The court charges the jury that, when the plea of insanity is interposed in a criminal case, the burden of proof is on the state to show to the satisfaction of the jury that the defendant was sane at the time of the commission of the crime charged; and if, from the whole evidence, they have a reasonable doubt as to the sanity of the defendant at the time of the commission of the alleged crime, they must find him not guilty by reason of insanity." (10) "The court charges the jury that if they have a reasonable doubt, from all the evidence, whether the defendant had the capacity to distinguish be-

tween right and wrong as to the particular act or inability to refrain from doing the act, there is no legal responsibility; and, unless the jury are so satisfied beyond a reasonable doubt, they should find the defendant not guilty by reason of insanity." (11) "The court charges the jury that, if the evidence as to his insanity raises a reasonable doubt in the minds of the jury, they must give the defendant the benefit of that doubt, and find him not guilty under his plea of insanity." (12) "The court charges the jury that unless they are satisfied beyond a reasonable doubt, from all the evidence, that the defendant was sane at the time of the commission of the alleged offense, they must find him not guilty under his plea of insanity." (13) "The court charges the jury that, to warrant a conviction in this case, it is incumbent on the state to establish, by evidence to the satisfaction of the jury, beyond a reasonable doubt, the existence of every element necessary to constitute the offense alleged; and if the jury, after a careful and impartial examination of all the evidence in the case, entertain a reasonable doubt of the defendant's sanity, they should give him the benefit of the doubt, and find him not guilty under his plea of insanity." (14) "The court charges the jury that, if they believe from all the evidence that the defendant was moved to action by reason of the blow and insane impulse by reason of his weak intellect which controlled his will, then the jury should find him not guilty under his plea of insanity." (16) "The court charges the jury that it is the law in this state that if there be either incapacity to distinguish between right and wrong as to the particular act, or inability to refrain from doing the act, there is no legal responsibility; and the jury should, if they have a reasonable doubt as to whether the defendant had the capacity or the ability to refrain from doing of the act, find the defendant not guilty under his plea of insanity." (18) "The court charges the jury that mental capacity to commit an offense is as much an ingredient of the offense charged as the doing of the act itself. If the jury has a reasonable doubt, from all the evidence, as to whether the defendant, by reason of his weak intellect, was incapable of knowing the consequences of his act, then the jury should find him not guilty under his plea of insanity." (20) "The court charges the jury that, if the killing was the consequence of passion suddenly aroused by a blow given, they cannot convict the defendant of murder." (21) "The court charges the jury that if the killing was the result of a sudden blow which aroused the defendant to sudden action, or if they have a reasonable doubt as to whether the killing was a result of passion suddenly aroused by a blow from the deceased, they cannot find this defendant guilty of murder." (28) "The court charges the jury that they must be satisfied beyond a reasonable doubt that the killing was wilful, deliberate, malicious, and premeditated, and that, if either one of these are not proven beyond a

reasonable doubt, then the jury cannot convict the defendant of murder in the first degree." (34) "The court charges the jury that there is no possible state of facts from which the law presumes the concurrence and co-existence of willful, deliberate, malicious, and premeditated killing; but every one of these facts must be proven by the state to the satisfaction of the jury, beyond a reasonable doubt, before they can convict the defendant of murder in the first degree."

Motley & Short, for appellant. Wm. O. Fitts, Atty. Gen., for the State.

HEAD, J. The testimony of state witness Higgins of the conversation had between him and the defendant's father was hearsay, and ought to have been rejected. The previous effort of the defendant to impeach the witness by asking him if he did not, at that time and place, make a particular statement, contradictory of what he had testified on the stand, and the simple denial of the witness that he had made such a statement, not going into the supposed conversation at all, did not authorize the state to prove the statements really made by the witness in the conversation. The time for the state to consider what further right it had to bring out what the witness had said in the conversation was not until the introduction by the defendant of other impeaching proof, showing that he did make the contradictory statement inquired about. Having denied that he made such statement, he stood unimpeached, until by evidence introduced by the defendant, which the jury believed, it was shown that he did make it. The state could not support the character of its unimpeached witness in that way. The court erred in allowing the evidence. 1 Greenl. Ev. § 467.

The court, in its oral instructions to the jury, made this statement: "Murder in the first degree is any willful, deliberate, malicious, and premeditated killing of a human being. 'Willful' means governed by the will, without yielding to reason. 'Deliberate' means formed with deliberation, in contradistinction to a sudden, rash act. 'Malicious' means with fixed hate, or done with wicked intentions, or motives not the result of sudden passion. 'Premeditated' means contrived beforehand or designed previously. To bring the crime within this degree of homicide, all these qualities must co-exist, and they may all be grouped under the very expressive phrase 'formed design.'" The defendant excepted to the words "and they may all be grouped under the very expressive phrase 'formed design.'" It is settled by many decisions of this court that the instruction copied, omitting the part excepted to, correctly defines murder in the first degree, under our statute; and until some recent rulings overturning *Mitchell v. State*, 60 Ala. 28, and other cases which followed it, it was recognized that the term "formed design" was an embodiment of these several

essential elements; and it was for a long time customary so to inform the jury in murder trials. But the recent cases of *Hornsby v. State*, 94 Ala. 55, 10 South. 522, *Domingus v. State*, 94 Ala. 9, 11 South. 190, *Miller v. State*, 107 Ala. 40, 19 South. 37, and *Burton v. State*, 107 Ala. 108, 18 South. 294, modified that rule, and held it to be error to tell the jury that "formed design" included all the elements of murder in the first degree; and such must now be regarded as the rule of this court. It is probable the trial judge was inadvertent to these later decisions at the time the instruction was given. As the judgment must be reversed for another error, we will not decide whether the words excepted to were not so connected with the preceding correct definition of murder in the first degree as to come within the discretionary power of this court, conferred by the last clause of section 4333 of the Code of 1896.

The court ruled correctly in its several instructions on the burden and measure of proof resting upon and required of the defendant of his plea of insanity. The following authorities lay down the rule prevailing in this state: *Boswell v. State*, 63 Ala. 307; *Ford v. State*, 71 Ala. 385; *Parsons v. State*, 81 Ala. 577, 2 South. 854; *Gunter v. State*, 83 Ala. 98, 3 South. 600; *Maxwell v. State*, 89 Ala. 150, 7 South. 824; *Fonville v. State*, 91 Ala. 39, 8 South. 688; *Walker v. State*, 91 Ala. 76, 9 South. 87. It is thus too firmly fixed to be now opened up as questionable. Our statute on the subject is in accord with the principle, and cannot be said to invade any constitutional right of the defendant in imposing upon him the burden of proving the plea of insanity, if, indeed, such would have been its effect had our rule of decision been otherwise.

Homicide may be committed in the heat of passion suddenly aroused by a blow, and yet be done maliciously. Suddenly aroused passion and malice may co-exist, and both cause the act. When that is the case, the homicide, otherwise indefensible murder, is not reduced to manslaughter by reason of the passion. *Ex parte Brown*, 65 Ala. 446; *Jackson v. State*, 74 Ala. 26; *Prior v. State*, 77 Ala. 56; *Hawes v. State*, 88 Ala. 37, 7 South. 302; *Reese v. State*, 90 Ala. 624, 8 South. 818; *Hornsby v. State*, 94 Ala. 55, 10 South. 522. But the charges touching the law of manslaughter which the court refused to the defendant, we think, excluded the existence of malice, correctly defined manslaughter, and ought to have been given. For the errors pointed out, the judgment is reversed, and the cause remanded. The defendant will remain in custody until discharged by due course of law. Reversed and remanded.

COLEMAN, J. (dissenting). The doctrine of stare decisis should never be applied in criminal prosecutions, if it is clear that, under the former rule, persons may be wrongfully convicted. This court has departed

from its former ruling with regard to the defense of an alibi, also as to the prima facie or presumption of guilt arising from the possession of articles recently stolen, and, under certain circumstances, the burden that rested upon a defendant, accused of unlawful homicide, to establish self-defense. The rule in this state, and, so far as the writer is advised, in every state of the Union, is that, to authorize a conviction, the evidence must be such as to establish beyond a reasonable doubt every element which is a necessary constituent of the offense; and the further rule prevails that the defendant is entitled to an acquittal if the jury, after considering all the evidence, have a reasonable doubt of the guilt of the accused, arising out of any part of the evidence. No person can commit an offense who is not legally capable of committing a crime. The act, whatever its results, cannot amount to an offense, unless the person who commits the act is legally capable of committing an offense. How, then, can it be said that the jury may legally convict if, after considering all the evidence, they have a reasonable doubt, arising out of any part of the evidence, that the accused was legally capable of committing crime? The court, in its opinion, does not attempt to show that the rule declared is sound. It contents itself with the rule of "stare decisis." If there should be any discrimination, it should be in favor of the insane; but the rule places on the insane the burden of satisfying the jury, by a preponderance of the evidence, that he was not legally capable of committing crime. As to all other classes of people, the only burden is to create a reasonable doubt of guilt. The writer's views are expressed in the case of *Henson v. State*, 112 Ala. 41, 21 South. 79. The argument of the court in the case of *Davis v. U. S.*, 160 U. S. 469, 16 Sup. Ct. 353, states the only just rule, and, in the opinion of the writer, is unanswerable.

(122 Ala. 539)

GEORGIA & A. RY. CO. v. STOLLENWERCK.

(Supreme Court of Alabama. Feb. 11, 1899.)

GARNISHMENT—RESIDENCE OF GARNISHEE—NOTICE TO PRINCIPAL DEFENDANT.

1. Where a railroad company was incorporated both in Georgia and Alabama, it had a residence in each of the states, and, when sued in either state, could not plead its nonresidence in the other.

2. Where a railroad company is operating its line in the state, it is subject to garnishment, though the debt due to defendant may have been created in another state, and he may have been a nonresident at the date of the service of the garnishment.

3. Under Code 1896, § 2176 (Code 1886, § 2971), requiring notice to defendant in judgment before judgment against the garnishee, where defendant at the time of the garnishment is a nonresident no service on him need be had, as the only object of the service is to give defendant a right to claim his exemptions, which right is not given to a nonresident.

Appeal from city court of Birmingham; W. W. Wilkerson, Judge.

Action by Estelle Stollenwerck against E. A. Smith. Judgment for plaintiff, and garnishment issued against the Georgia & Alabama Railway Company. Judgment for plaintiff, and garnishee appeals. Affirmed.

Estelle Stollenwerck on September 7, 1896, recovered a judgment in the city court of Birmingham against E. A. Smith for \$545.90 and costs. On March 24, 1897, the plaintiff in said judgment sued out a writ of garnishment against the Georgia & Alabama Railway Company. On March 30, 1897, the writ of garnishment was served upon said garnishee. On April 24, 1897, the garnishee filed its written answer, and thereafter, on February 12, 1898, on motion of the plaintiff, the garnishee was required to appear and answer orally in open court. There was no notice of this hearing of the answer of the garnishee in open court issued, or served upon the defendant in the judgment. The following facts were disclosed by the answers of the garnishee: The Georgia & Alabama Railway Company was a body corporate, incorporated under the laws of Georgia on August 15, 1895, and subsequently, during the same month, incorporated under the laws of Alabama. E. A. Smith, the defendant in the original suit, was employed by the garnishee as soliciting freight agent, and at the time of the service of the garnishment, and for some time prior thereto, he had his headquarters at Evansville, Ind., and was a nonresident of the state of Alabama. When the writ of garnishment was served, the garnishee owed Smith his salary for the month of March, 1897. Smith continued in the service of the garnishee up to March 15, 1897. Under the contract existing between the garnishee and Smith, they were to pay his traveling expenses; and the arrangement was that Smith was to pay them, and at the end of the month he would be reimbursed therefor. After the service of the writ of garnishment, the garnishee reimbursed Smith for his traveling expenses during the month of March and April to the extent of \$85. From the time of the service of the writ of garnishment to the time Smith left the service of the garnishee, there was a balance due Smith from the garnishee, for salary, of \$250.50. The garnishee moved the court to dismiss it on its answer. The court overruled this motion, and the garnishee duly excepted. The garnishee then suggested to the court that the defendant, E. A. Smith, had never been notified or served with any notice of garnishment in this suit, and thereupon moved the court to dismiss said suit against the garnishee on these grounds. The court overruled the motion, and the garnishee duly excepted. The plaintiff then moved the court to render judgment against the garnishee in her favor for the amount the garnishee admitted it owed Smith, and for the amount which was paid to Smith to reimburse him for traveling expenses after the service

of the writ of garnishment. This motion was granted, and the court rendered judgment accordingly for \$350.50. To the rendition of this judgment the garnishee duly excepted, and also excepted to the court's rendering judgment against it for the amount due Smith for salary, and for the amount paid Smith to reimburse him for traveling expenses during the months of March and April, respectively. The garnishee appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

John D. & C. H. Roquemore, for appellant.
George Huddleston and W. T. Hill, for appellee.

TYSON, J. 1. The proof shows that the appellant company, the garnishee below, was incorporated in the state of Georgia on the 15th August, 1895, and was subsequently, in the same month, incorporated in the state of Alabama. It had, therefore, legal existence or residence in each of these states, for the purposes of operating its line and transacting its corporate business. For such purposes the corporation was a legal unit, and, when sued in either state, it could not plead its nonresidence in the other. *Railroad Co. v. Carr*, 76 Ala. 388; *Memphis & C. R. Co. v. Alabama*, 107 U. S. 581, 2 Sup. Ct. 432; 2 *Mor. Priv. Corp.* § 991.

2. The appellant company, having been chartered by, and operating its line and transacting business within, this state, was subject to the process of garnishment in this suit, although the debt due the defendant may have been created in another state, and he may have been a nonresident of this state at the date of the service of the garnishment writ. The situs of a debt, in the absence of stipulation to the contrary, is the domicile of the creditor. *Railroad Co. v. Kennedy*, 83 Ala. 462, 3 South. 852; *Railroad Co. v. Chumley*, 92 Ala. 317, 9 South. 286; *Railroad Co. v. Dooley*, 78 Ala. 524.

3. The writ of garnishment was executed on the garnishee on the 30th of March, 1897. It was sued out in aid of the collection of a judgment theretofore rendered in favor of the appellee against the defendant, E. A. Smith, in the city court of Birmingham, on the 7th day of September, 1896, for \$555.90 debt and damages, and \$7.30 costs therein. At that time, by section 2971 of the Code of 1896, it was provided that "process of garnishment may issue on a judgment or decree on which execution can issue, without bond or security, and may be sued out by the assignee of such judgment or decree." It is to be observed that in such case no notice was required by statute to be given to the defendant in the judgment or decree, and the garnishment suit proceeded without notice. That section, as carried into the Code of 1896, as section 2176 therein, was so amended as to require notice to defendant in the judgment of at least five days before judgment against the garnishee.

In cases of attachments it was provided that they might be levied on real estate or on personal property of the defendant in attachment, or executed by summoning any person indebted to the defendant to answer as garnishee. Code 1886, § 2945 (Code 1896, § 540). And notice was then, as is now, required to be given by personal service, if the defendant was resident, or by publication if nonresident. Code 1886, §§ 2936, 2937 (Code 1896, §§ 531, 532). It may be added, as to garnishments in aid of a pending suit, in which judgment was sought against the debtor, that prior to December 9, 1893, no notice was required by statute to the defendant of the issuance of the garnishment process. On that date, by act of the general assembly amending section 3219 of the Code of 1876, it was provided that notice of the garnishment should issue to the defendant, which notice was required to be served at least 10 days before judgment against the garnishee. See Code 1893, p. 652; note. It is familiar that the object of the garnishment is to enable a creditor to appropriate to the satisfaction of the debt due him the property of the debtor in the hands of the garnishee, or a debt owing by the garnishee to the debtor. It operates as a levy upon the property or debt in his hands, as a seizure by the officer does upon property in the possession of defendant. The service of the process upon the garnishee arrests the debt or property in his hands belonging to defendant, and gives the court jurisdiction to condemn it to the payment of plaintiff's demand. The garnishee is in the attitude of a mere stakeholder, supposed to be indifferent between the plaintiff and defendant; and the judgment condemning the debt owing by him to defendant is conclusive, as between him and defendant, to the extent of the judgment, unless the defendant prosecutes an appeal from such judgment, which he may do in his own name. 3 *Brick. Dig.* p. 524, §§ 1, 7; Code 1896, § 2185 (2093); *Merrill v. Vaughan* (Ala.) 24 South. 580; *Light Co. v. Merrick*, 61 Ala. 534; 8 *Am. & Eng. Enc. Law*, 1118. It is provided by statute that when money, choses in action, or personal property are garnished, the defendant may claim the same as exempt, in the manner prescribed. Code 1896, §§ 2041 (2515), 2047 (2521), 2050 (2533). It would seem, therefore, that, in any garnishment proceeding, the real debtor (the defendant in the main suit) should have notice thereof, in order to avail himself of the right to interpose his claim of exemption. But this right is bestowed on residents of this state, and not upon nonresidents. The latter class can set up no claim of exemptions under the constitution and laws of this state, which have reference to, and are for the benefit of, residents only. The defendant in this proceeding, as shown, was at the time of the service of the garnishment process a resident of the state of Indiana. We know of no other right, save that of claiming his exemption, of which he could be deprived from lack of notice of

the garnishment. The judgment, so far as appears, was duly and legally rendered against him by a court of competent jurisdiction, and it stands unreversed and unsatisfied. If the debt he owes plaintiff is satisfied in whole or in part by the garnishment process, the money so appropriated by the order of the court is an appropriation in his own interest, and is done by due process of law.

The foregoing covers all the points insisted on by counsel for appellant in their brief and argument. Other assignments of error will be treated as waived. Affirmed.

(51 La. Ann. 411)

FRAZEE, Tax Collector, v. DUPRE. (No. 12,988.)

BOAGNI v. SAME.

(Supreme Court of Louisiana. Feb. 20, 1899.)

VENDOR'S LIEN—PRIVILEGE OF STATE AND PARISH.

One selling real property on terms of credit, and retaining a vendor's lien and mortgage on the property sold as security for the purchase price, subsequent to the passage of the license statute of 1894, conferring a first lien and privilege on all property, real and personal, of the license debtor, in favor of the state and parish, must be presumed to have possessed full knowledge thereof, and made the sale subject to the contingency that said privilege of the state and parish might prime his mortgage and vendor's lien on the proceeds of its sale.

(Syllabus by the Court.)

Appeals from judicial district court, parish of St. Landry; E. B. Du Buisson, Judge ad hoc.

Rule by W. S. Frazee, tax collector, against Achille K. Dupré for licenses due the state, and action by Vincent Boagni against the same defendant. The actions were consolidated, and from a judgment Boagni appeals. Affirmed.

Kenneth Baillio, for appellant Boagni. W. J. Sandoz, for appellee tax collector.

WATKINS, J. As the appellant's counsel has presented us with a very careful analysis of the pleadings in his brief, we have reproduced same in its entirety, as follows, viz.: "The first of the above suits was a proceeding by rule against the defendant, Achille E. Dupré, claiming the sum of \$210 for licenses due by him to the state and parish as retail merchant and liquor dealer for the year 1898. Pending a hearing on the rule, plaintiff in the second suit, Vincent Boagni, obtained an order of seizure and sale on a note for the sum of \$600, dated August 16, 1894, payable one year from said date, bearing 8 per cent. interest from maturity, and 10 per cent. for attorney's fee, and secured by vendor's privilege and special mortgage upon the following described property, viz.: A certain tract or parcel of land situated in Plaisance, in this parish, together with the gin house, gin stand, steam engine, and all other improve-

ments thereon, having a front of one arpent on the Grand Prairie and Opelousas road, and containing two superficial arpents, bounded on the north and east by land of Frank J. Davy, and south by the Opelousas and Grand Prairie road. To the tax collector's suit the defendant pleads the general issue; and in the suit of Vincent Boagni (a sale having been ordered of the above property) the tax collector intervened, and by third opposition claimed a preference over the proceeds of sale of said property, to the extent of the aforesaid sum of \$210, with 2 per centum per annum thereon as interest, and 10 per centum for attorney's fees, and obtained an order directing the sheriff to retain in his hands an amount sufficient to pay said sum, interest, and attorney's fees. To this third opposition suit of the tax collector, Vincent Boagni, seizing creditor, answered first by a general denial, denying the right of the tax collector to be paid by privilege and preference, and asserting his preference over the proceeds, in virtue of his rights as vendor and special mortgage creditor. He further averred that the revenue laws of the state of Louisiana, in so far as they purport to grant to the state and parish a first privilege upon all property, movable and immovable, of the license debtor, even as against antecedent mortgages, is violative of the federal and state constitutions, which expressly forbid the passage by the legislature of any law impairing the obligations of contracts, or divesting vested rights; and he accordingly prayed that said revenue laws, in so far as they purport to grant or do grant such extraordinary rights to the state and parish, be decreed unconstitutional, null, and void; and he prayed that the demands of the tax collector be rejected and disallowed, and that the disputed fund be ordered paid over to him. There was judgment in favor of the tax collector, ordering the sheriff to retain the amount of the aforesaid state and parish licenses, with interest and attorney's fees, as prayed for. From this judgment Vincent Boagni prosecuted the present suspensive appeal to this court. The appellant having died after perfecting said suspensive appeal, his heirs and legal representatives were, on proper motion, made parties to this suit, and are now prosecuting same."

It appears from the record that the tax collector, proceeding by rule against the defendant as a delinquent license payor, filed the requisite proceedings, and obtained the necessary order from the judge on the 7th of July, 1898; and in the petition it is alleged that the defendant is indebted to the state and the parish of St. Landry in the full sum of \$210, for licenses due the state and parish "for carrying on the business of retail liquor dealer within the territorial limits of said parish during the current year 1898." It is further alleged "that said license has been delinquent since March 1, 1898," and that there is due, in addition to the capital sum

of said licenses, as a penalty, "two per centum per month interest thereon from March 1, 1898, until paid, and ten per cent. additional on said sum, principal and interest, as attorney's fees"; and his prayer is for a rule on the defendant to show cause why he should not pay same. While these proceedings were yet pending, Dr. Vincent Boagni obtained an order for the seizure and sale of certain real estate of the defendant, and all the buildings and improvements thereon, in the foreclosure of a vendor's lien and special mortgage thereon, as securing the payment of a note of the defendant for \$600, payable to his own order, and indorsed at twelve months after its date. This sale was granted by the judge on the 19th of August, 1898, and the note and act of mortgage were executed on the 16th of August, 1894; said mortgage and vendor's lien having been stipulated in an act of sale from Godfrey Dupré to the defendant of the latter date. The recital of said act of sale and mortgage is that the consideration thereof is the sum and price of \$600, represented by one note of the purchaser, of the aforesaid description; said note having been paraphed *ne varietur*, in order to identify same with the act of sale and mortgage. The record shows that the act of sale and mortgage were duly inscribed in the mortgage office on the day of their execution. Pending the executory proceedings the tax collector filed therein a third opposition on the 8th of October, 1898, which is founded upon his prior proceedings by rule against the execution debtor, to which reference is made; and he then alleges that said defendant debtor "is insolvent, and has no other property than that seized in the executory proceedings," and from the proceeds of the sale of which alone said licenses and penalties can be paid, and upon which the state and parish have a first lien and privilege, and that they are consequently entitled to be paid therefor by preference and priority. To that effect the third opponent prayed for and obtained an order requiring the sheriff to hold in his hands a sufficiency of the proceeds to pay and satisfy said licenses, penalties, and costs, subject to the final decision of said opposition. The purport of the answer of the executory creditor is, in substance, that he is entitled to be paid in preference to any and all other creditors, in virtue of his mortgage and vendor's lien, from the proceeds of sale; and, if the revenue statutes on which the counsel for the tax collector rely as conferring a preference on the state and parish are so construed, same will have the effect of impairing the obligation of his contract, within the terms of the contract clause of the federal constitution. Its further averment is "that the law as existing at the time said note and special mortgage were executed is a part of said contract, and any subsequent law that abridges the obligation of the contract is violative of the constitution of the United States, and therefore void."

The evidence clearly shows that the defendant was engaged in retailing spirituous liquors in the parish of St. Landry during the months of January and February, 1898, and had failed to pay either the state or parish license therefor, anterior to the filing of the plaintiff's rule. The proof shows that the property not only sold for an insufficient amount to pay both creditors, but an amount insufficient to pay the state and parish licenses and penalties. In the course of the statement of his reasons for judgment, the judge *a quo* said: "There is no merit in the contention [of the defendant] that section 28 of Act No. 171 of 1898 impairs the obligation of his contract, in violation of the constitution of the United States, for the simple reason that said section is the same, *ipseissimis verbis*, as section 28 of Act No. 150 of 1890, as amended by Act No. 106 of 1894, which was in existence and in force at the time that the said contract was entered into."

The following are the provisions of the original act of 1890, and the amendment of 1894, *viz.*:

Act No. 150 of 1890, § 28: "Be it further enacted," etc., "that all unpaid licenses shall bear interest at the rate of 2 per cent. per month, from the first day of March, and the payment thereof shall be secured by *first privilege* in favor of the state, and the tax collectors shall collect said license and interest in the manner provided by existing laws."

Act No. 106 of 1894, § 2: "Be it further enacted," etc., "that section twenty-six (26) of Act No. 150 of 1890 be amended and re-enacted so as to read as follows: 'That all unpaid licenses shall bear interest at the rate of 2 per cent. per month from the first day of March, and the payment thereon [thereof] shall be secured by *first privilege* in favor of the state *upon the property, movable or immovable, of the delinquent owing the license*, and the tax collector or *ex-officio* tax collector shall collect said license and interest in the manner provided by existing laws.'" (Our italics.)

The foregoing act was finally passed and approved on the 7th of July, 1894, prior to the execution of the act of sale and mortgage in question on the 16th of August, 1894. Consequently the original creditor, Godfrey Dupré, was charged with full knowledge of the existence and import of this enactment when he made sale to the defendant, and accepted the mortgage and vendor's lien upon the property conveyed as a security for the purchase price; and he must be presumed to have entered into the engagement with full knowledge that his rights might ultimately be defeated by the first privilege of the state and parish. Act No. 109 of 1894 remained in force until Act No. 171 of 1898 was enacted; but said latter statute had no effect upon the rights and obligations of the parties, because it was not approved until July 14, 1898, just one week subsequent to the date of the filing of the tax collector's

rule, and that is the date at which the test must be applied. Therefore we are dispensed from giving any consideration to that act, section 28 of which secures the licenses of the state and parish by a "first mortgage" only; and, as the act of mortgage and vendor's lien on which the creditor relies were executed since the act of 1894 went into operation, it would serve no useful purpose to discuss and decide the constitutional question raised. Judgment affirmed.

(51 La. Ann. 451)

BENTLEY et al. v. FISCHER LUMBER & MANUFACTURING CO., Limited,
et al. (No. 12,884.)

(Supreme Court of Louisiana. Feb. 20, 1899.)

TRESPASS—REMOTE DAMAGES—ATTORNEY'S FEES—VINDICTIVE DAMAGES.

1. The building of a levee on the land of another without his consent, by which it is claimed his land was made unfit for cultivation, will subject the party constructing the levee to the damages; but he will not be responsible for damages caused by the cutting of the levee by a mob, the law excluding such damages, under the rule that the party who commits the wrong cannot be held for what the law deems remote damages. Sedg. Meas. Dam. § 57 et seq.; Cooley, Torts, p. 69; Gaulden v. McPhaul, 4 La. Ann. 79.

2. Our law seeks to compensate damages resulting from the wrongful act of defendant, but our jurisprudence does not favor the allowance, as part of the damages, of the fee of the attorney of the plaintiff in the suit. Eatman v. Railway Co., 35 La. Ann. 1018; Roos v. Goldman, 36 La. Ann. 133; Fox v. Jones, 3 South. 95, 39 La. Ann. 931.

3. There is a limit even to vindictive damages, proportioned as they should be to the nature of the wrong, and with some reference to the actual loss of the injured party. Grant v. McDonogh, 7 La. Ann. 447.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; George H. Théard, Judge.

Action by Mrs. Joyce J. Bentley and others against the Fischer Lumber & Manufacturing Company, Limited, and others. From a judgment awarding plaintiff only part of her claim, she appeals. Affirmed.

O. B. Sansum and Carroll & Carroll, for appellant. Farrar, Jonas, Kruttschnitt & Guley, for appellees.

MILLER, J. The plaintiff appeals from a judgment awarding her only part of the damages she claims to have sustained by the building of a levee on her land by the defendants. The defendant Conrad B. Fischer, the owner of swamp land, found it essential, in order to float the timber cut on his land to the Atchafalaya river, to construct a lock in a bayou, by means of which it was expected sufficient water would be accumulated to float the timber. The bayou was on the plaintiff's land, as we find it stated in the brief; but, being a natural outlet for the adjacent lands, the police jury of the parish conceived they

had the right to grant the defendant the privilege of placing the lock in the bayou; and, besides that authority, he obtained plaintiff's consent to the construction of the lock, on payment of the amount she claimed for the building of the lock, and other privileges in respect to her property that the defendant desired. The lock, however, proved ineffective for his purposes, and, to obtain water sufficient to float his timber, he caused to be built a levee from the lock across the adjacent low or swamp land; and this levee, combined with the lock, proved serviceable in checking the flow of water through the bayou, and gave to him, on his swamp land, the requisite water to float his timber to the river. This levee was built across a strip of swamp land belonging to plaintiff,—the defendant claims, by her consent, given through her husband; and implied, as defendant insists, by the privilege she gave for the making of the lock,—useless, it is claimed, without the levee, to accomplish the defendant's purpose. Owing to this levee obstructing the natural flow of the water through the bayou, a portion of plaintiff's land above or north of the levee was flooded, preventing the seasonable replanting for another year, and the damages thereby sustained form part of the plaintiff's demand in this suit. The plaintiff urges another complaint arising from the cutting of the levee: Obstructing a natural outlet for the lands of others besides plaintiff, the levee proved a source of discontent to the landowners in the vicinity; and the result was that a number of men assembled, and cut the levee, causing the confined water to escape on plaintiff's cultivated lands, below or south of it, destroying her crop, and unfitting the land for the production of the full crop it would have yielded but for the precipitation of the water on the land at a time too far advanced in the season to admit of successful replanting; and the plaintiff's alleged loss in this respect is also claimed in this suit. Before the mob cut the levee, the defendant had made gaps he deemed sufficient to allow enough water to escape, for the protection of the lands from overflow. After all these openings had been made in the levee, the plaintiff, apprehending that defendant would rebuild it, enjoined him from doing so; and the expense which she supposes will be requisite to level the space occupied by the levee forms another part of the damages claimed in this suit. The plaintiff's petition averred that the defendant C. B. Fischer and the Fischer Lumber & Manufacturing Company had wrongfully entered upon, and built the levee on, her land; averred the loss of crops above the levee by stopping the flow of the water from the land, and below the levee by the precipitation of the water through the gaps made by the mob. The expense of leveling the space occupied by the levee, including replacing the earth in the pits, was also claimed, and, with the punitive damages demanded, made up the \$4,537 sought to be recovered. The answer is substantially the

general issue. The lower court awarded plaintiff \$567.45. She seeks by this appeal to have that amount increased; and the defendants, answering the appeal, demand that the damages given by the lower court be reduced, and that the injunction of plaintiff against rebuilding the levee be dissolved, with damages. In our view, the defendants have shown no consent from the plaintiff to build the levee on her land. The testimony of C. B. Fischer is that the plaintiff's husband gave his consent, but his testimony is to the contrary. The whole testimony impresses us that the lock in the bayou, without the levee, would not have arrested or checked the flow of water to that degree required to accumulate the water on defendant's land so as to enable him to float his timber; but we cannot infer that, because plaintiff gave the defendant the privilege of the lock, she thereby assented to the levee on her land. The defendant C. B. Fischer must respond for the damages the plaintiff sustained, arising from the building of that levee.

We first direct our attention to the alleged loss on the crop above or north of the levee, caused by the water resting for, say, three months on the plaintiff's field, because of the obstruction to the natural flow interposed by the levee. The witnesses for the plaintiff fix this cultivated area covered by the water at 25 acres. On the other hand, there is the testimony of two witnesses (surveyors), who carefully surveyed the land, guided by the water stains on the trees in the adjacent swamps, who concur in fixing the cultivated area overflowed at 13.71 acres. It is true, this survey was made about a year after the water subsided. It is claimed that water stains are not sufficiently distinct to be reliable guides, and at best do not indicate the surface of the water, or height the water attains. We find the stress of the testimony to be that the discrepancy between the stain and the height of the water, if any, is inconsiderable, and that a difference in levels of 2 inches would not change the area surveyed more than 1.2 acres. The testimony of these surveyors is to the effect that the water stains were distinct, agreed with the bench marks of the state engineers, and confirmed, they state, by the information derived by them from the residents. Leaving out of view the statements of the residents, there remains the testimony of the surveyor testifying on the basis afforded by the distinct water stains. We think equal, if not greater, effect is due to their testimony than that of witnesses who gave the area in a round number, not, as far as we can ascertain, based on any survey. The lower court on this issue adopted the area given by the surveyor, 13.71 acres, and we do not find the basis to disturb that finding. On this land a crop was made, that the witnesses call a half crop. It is claimed that a full crop would have been a bale to the acre. The lower court allowed for the loss of the half crop, and assumed the weight of the bale at 500 pounds, and that 6 cents per pound would have been

obtained, and that the profit of plaintiff would have been \$10 per acre, and hence plaintiff's loss was \$5 per acre. A theory that rests on the assumption of \$10 per acre clear profit to the cotton planter, in the light of the record, strikes us as liberal, not to qualify it as excessive. Thus deduced, the plaintiff's loss (\$5 per acre on her cultivated lands) was \$68.65. We find no warrant to increase it, even by the usual value of cotton seed yielded by that acreage.

We gather from the record that there was a part of the land flooded, above the levee, on which the trees were deadened, covered with underbrush, not inclosed, and never in cultivation. The plaintiff claims that she should be allowed for the flooding of the "deadened lands," as they are called,—never cultivated, nor inclosed, fenced, or ditched,—a loss of \$12 per acre, making \$1,380, the largest item of the demand, except that of \$2,700 punitive damages, including attorney's fees. We have testimony that the land could have been rented; that, if rented, it would have yielded a net profit of \$10 per acre, which plaintiff claims should be increased \$2 an acre for the yield of the cotton seed. The testimony is, of course, entirely hypothetical. It consists of the opinions of the witnesses, enforced by the testimony of a witness to the effect that he desired to rent the lands, visited the locality for that purpose, but would not rent because the lands were wet from the standing water. We find a comment on this kind of testimony as a basis for damages in the case of *Grant v. McDonogh*, 7 La. Ann. 448. Opposed to the view that a man really desirous of renting the lands would have been deterred by the effect of the water that had stood on the land, it is in evidence that cotton can be planted, and good crops made, after the date when it is proved the water receded from the land. While the plaintiff should be fully compensated for her loss, we cannot find the basis to allow damages on the theory that land in the condition exhibited by the testimony could have been cultivated, and, if cultivated, would have yielded a profit to the owner of \$12 per acre. In the opinion of the lower court, this part of the plaintiff's case was not supported. Unless we can award damages on a basis purely hypothetical, and in our opinion not possible, we must reject this part of the demand.

The claim for damages in respect to the land below or south of the levee encounters the difficulty that the inundation causing the alleged loss of crops was the result of the act of the mob cutting the levee. In this view, it was not the levee that caused the damage; for, while the levee stood, there could be no flooding of the land. Can the defendants be held for the violence of the mob that precipitated the water on the land? The law is clear that in suits of this character, in computing actual damages, the proximate cause is that which the law regards. When the law awards other damages than those attributable

to the proximate cause, they are given as punitive. Sedg. Meas. Dam. § 58 et seq.; 2 Greenl. Ev. § 256. We have given attention to the line of authority cited by plaintiff to connect the act of the defendant in building the levee with the subsequent violence of the mob cutting it. The "Squib Case" is found in the text-books to illustrate the rule that distinguishes the remote from the proximate cause. The squib is thrown in the market house, lights on one stall, then on another, from both of which it is thrown, and finally the squib thus thrown from the last stall enters the plaintiff's eye and destroys his sight. The court attributed the plaintiff's injury to the party who first threw the squib. In other words his act was deemed the proximate cause of the loss. The text-books call attention to the concurrence to the full extent of the decision of but one of the four judges, and to the dissent of Justice Blackstone. Sedg. Meas. Dam. p. 58, note. This type of cases, cited in support of plaintiff's demand, does not, in our view, support it. The hurling of the squib in the case cited (the wrongful act) is the effective and direct cause of the loss of the plaintiff's eye. In the case before us the levee built by defendant was harmless, in respect to plaintiff's loss. The act of the mob was the direct cause of that loss. Our law, and the general law in this class of cases, restrict damages, unless given by way of punishment, to the loss arising from the proximate cause. *Gaulden v. McPhaul*, 4 La. Ann. 79; *Grant v. McDonogh*, 7 La. Ann. 448. With the most patient consideration on this part of the case, we reach the conclusion of our learned brother of the district court, that the plaintiff's demand in this respect cannot be sustained.

The lower court allowed \$348 for leveling the space occupied by the levee. The allowance is based on the number of cubic yards the levee contained, and supposes that this levee built in the swamp will have to be taken down in all its course, and the earth replaced in the pits from which it was taken. We think there is reason in defendant's argument that a less expensive method, whether by the gaps already made, or other modes, would avert any danger from the obstruction of the levee to the flow of the water. The lower court, in dealing with this question, has adopted the medium of the cost of taking down the levee exhibited in the testimony. This allowance is \$348, and plaintiff claims it should have been \$360. We do not think the allowance should be increased.

The plaintiff claims a large measure of punitive damages, including \$1,250 attorney's fees. The case discloses an encroachment by defendants on the plaintiff's property, and an injunction to protect her rights. The levee was built on a strip of swamp land. The injunction to prevent its rebuilding was promptly issued, and enforced by the punishment of the defendants for its violation. In all this we recognize, as did the lower court, the basis

for exemplary damages. Our jurisprudence has not favored the allowance of attorney's fees as part of the damages to be awarded for injuries to persons or property. Our courts, in cases like this, have aimed to compel full restitution, to the extent possible of accomplishment, for the plaintiff's injuries; but the policy and spirit of our jurisprudence have not been to introduce the fee of the plaintiff's attorney as an element of the damages to be given. *Eatman v. Railway Co.*, 35 La. Ann. 1018; *Roos v. Goldman*, 36 La. Ann. 133; *Fox v. Jones*, 39 La. Ann. 931, 3 South. 95. Our attention has been called to one case in which such fees were allowed. The case was exceptional,—that of the dispossession of the property of the plaintiff under the threat of taking his life, if he resisted. *Cooper v. Cappel*, 29 La. Ann. 213. This case presents no such features. The defendant Fischer testifies that he built the levee believing he had the right, and he testifies further that plaintiff's husband consented. The impression we derive from the testimony is that he assumed the right to build the levee on the idea that plaintiff would not object, and it is in proof that before this suit was brought he offered to pay the damages caused by the obstructed water. His defense is directed against the measure of damages claimed by plaintiff, and the absence of any liability for the acts of the mob. The case, therefore, in our opinion, does not exhibit the feature of violence, and other aggravated features, conspicuous in the Cappel Case, and in other cases for damages that have come before this court. We do not feel at liberty to establish in this case the precedent of attorney's fees as damages. On the question of the amount to be given as exemplary damages, we must be guided to some extent by the plaintiff's actual loss. Rejecting her demand for damages done by the mob, and the claim that land never cultivated or fit for cultivation, except that the trees were deadened, would have been rented and cultivated in cotton at a profit of \$10 per acre, a little over \$500 (and that, too, on the most liberal mode of computation) covers all of plaintiff's actual damages, strongly contrasted with the amount of punitive damages claimed, swelling the entire demand up to over \$5,000, as we find it figured in the brief. Our courts have time and again held that even punitive damages have a limit, and must bear some proportion to the real injury. *Grant v. McDonogh*, 7 La. Ann. 447; *Campbell v. Short*, 35 La. Ann. 465. And others of the same type might be arrayed. With the most patient consideration, we can find no basis to increase the amount allowed by the lower court as exemplary damages.

We think the levee was built in the interest of the Fischer Lumber & Manufacturing Company, and impliedly with their consent. We will not disturb the judgment holding the company and C. B. Fischer liable.

We find a reference in the briefs to the ex-

penses of plaintiff for maps and documentary evidence constituting necessary proof in the cause. For all such expenses that are essential to make out plaintiff's case, the power is in the lower court to tax such expenses as costs. Code Prac. art. 552, and amendment.

We regret to find in one of the briefs for plaintiff language to the effect that the issue of this litigation is awaited with interest by "the people," and that, if the judgment does not grant redress, "the people" will resort to violence. By "redress" we can only understand the measure of relief contended for by the plaintiffs. The judges of this court, and presumably of all courts, perform their duties under a deep sense of responsibility, and with an earnest desire to do justice to the plaintiff seeking relief, and to the defendant equally entitled to protection if the demand against him is exaggerated or unfounded. Our learned brother of the district court devoted great care to this case. We have scanned this record, and given the closest attention to the argument, and to the law we conceive applicable. We concur in the conclusion of the lower court. The meaning conveyed by the part of the brief under discussion is that the courts must adopt the standard of rights and measure of relief claimed by the litigant and presented by his counsel, or provoke that violence which the brief implies, if it does not expressly state, will be the necessary and appropriate redress to which the people will resort. There is neither persuasion nor propriety in these lines put in the brief. The courts of the country would forfeit the public confidence, if the least influence were accorded to the method adopted in this brief of enforcing the plaintiff's demand; and we would fail in our duty, if we passed over the brief without suitable expression. The forbearance of further comment that might well be deemed appropriate on the language of this brief is perhaps as expressive as that more explicit condemnation we do not care to put in words. It is ordered, adjudged, and decreed that the judgment of the lower court be affirmed, with costs.

(51 La. Ann. 352)

HOLMES v. CROWELL & SPENCER LUMBER CO., Limited. (No. 13,046.)

(Supreme Court of Louisiana. Feb. 20, 1899.)

MASTER AND SERVANT—INJURIES TO VOLUNTEER.

1. A lad, at the instance of the engineer in charge of a company's engine, gave a helping hand to two of the company's employes in loading 8 or 10 ties upon the engine, to be by it taken to a break in the company's road about a mile distant, and, having done so, rode down in the engineer's cab to the break, for amusement and from curiosity. While so riding, he threw a few sticks of wood into the furnace connected with the locomotive, at the request of the engineer. *Held*, these facts did not place him in the company's employment, particularly as the engineer was without authority to employ persons under him. He was substantially a volunteer.

2. A company is not responsible for injuries received by a person who, holding no contractual relations with it, either as a passenger or an employe, and with no invitation from it, attempts to board one of its moving engines by steps leading up to the engineer's cab, even though the injury should have been due to the defective condition of the steps.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Rapides; Edwin G. Hunter, Judge.

Action by John W. Holmes, for the use of Willis St. Clair Holmes, against the Crowell & Spencer Lumber Company, Limited. Judgment for plaintiff. Defendants appeal. Reversed.

The plaintiff, a minor, represented by his father, obtained judgment in the district court of Rapides for the sum of \$5,000, for personal injuries received by him in attempting to enter the engineer's cab of an engine operated by defendant's employes. The accident was alleged to have occurred by reason of a defective step leading up to the cab. The defendants appealed, and the plaintiff, in the supreme court, applied for an increase of damages. Plaintiff's cause of action is set out in two petitions. In the first he alleged that on or about the 19th day of February, 1898, said minor was working in the employ of the defendant company as a log washer, or washing logs with hose; and, while in such employment on the day mentioned, he got on defendants' tram railway, as employes were allowed and instructed to do; that he had gone out to assist in the loading of ties; that he was returning from such employment, had gotten off, and was about to remount said engine, when his foot slipped, on account of absence of properly adjusted appliances and the poorly-constructed, crooked, and broken step; that it was contributory negligence on defendants' part, and wanton and harmful disregard for the safety of their employes; that the minor was in no fault whatever; that, from such culpable negligence on the part of defendant company in not having the step properly adjusted, the minor's left foot slipped into the cogs, and was crushed and torn off; the leaders of the leg were cut in divers places; the flesh torn above the knee, exposing the bone; that amputation of the foot became necessary; that all of this could have been prevented had it not been for the gross negligence of the company; that the minor, by reason of said facts, had suffered damages to an amount of \$10,500; that the minor was about 16 years of age; that he was not a skilled workman, but was receiving 75 cents a day for his labor; that by the loss of his foot he had become totally incapacitated for labor by which he gained his living and assisted in supporting his family. In the second petition it was alleged that, the minor being employed as a log washer, it was his added duty also to do any other work that might be assigned him; that, in addition to being on the engine and the allegation thereof, he was ordered by the engineer of the

tram road of defendants to "fire" upon the said engine, the fireman being absent; that the said engineer was considered a superior, and had a right to command; that the child obeyed, and, in the discharge of his newly-assigned duty, he was injured from the defective machinery. Defendants filed an answer, under reservation of a peremptory exception of no cause of action. The latter was predicated upon the allegation that the demand for damages was based substantially upon the averment that "plaintiff was in the act of boarding a running locomotive" when the injury was received, without the same being necessary in the discharge of any duty in his employment, or in obedience to the order of any officer or superior of defendant company; that such act was the immediate and proximate cause of the injury, and was contributory negligence, so gross as to bar any right of recovery in plaintiff. In their answer, defendants pleaded, first, the general issue. Further answering, they averred that plaintiff wantonly, recklessly, and voluntarily put himself in a position of danger by boarding a moving locomotive, when the same was not necessary in the discharge of any duty, or in response to the order of any officer or superior of the company, and this reckless and wanton conduct was the immediate and proximate cause of the injury he received; that the plaintiff had no right nor business on said locomotive, or even in its immediate proximity; that he was there without the knowledge, consent, or procurement of respondents, and against their well-known expressed and published orders; that respondents had positively forbidden all persons, not even excepting their employes, to board or ride on the locomotive or log train drawn by it, and this rule was published by posting in the cab of the locomotive and other public places about the premises; that all of its appliances for the running and handling of its train, and for the protection of those employed thereon, were complete and in good order. They specially averred that, in this connection, they owed no duty to the plaintiff, except not to wantonly harm him, as he was not employed on the locomotive, but was there for his own pleasure, and at his own peril. Defendants denied that plaintiff was employed either in loading ties, or in firing on the engine, or, if so engaged, it was without their knowledge or consent, or without the knowledge or consent or procurement of any of their employes having authority to so employ him. They denied that the minor was in their employ on the day the accident happened. They averred that at other times and on other days, when he was employed by them, his duty was to wash logs as they were taken from the skidway and carried to the mill, and that his post of duty under such employment was at a point some distance from the locomotive or track on which it ran, and that he was never employed by them, or any one having their authority, to perform any other service, and

that, in the performance of said service, he was in no danger whatever from the locomotive.

Andrews & Hackenyos, Horace H. White, and D. B. H. Chaffe, for appellants. John C. Blackman, Allen T. Hunter, and Robert P. Hunter, for appellee.

NICHOLLS, C. J. (after stating the facts). We have given the testimony in this case our most careful consideration, and have reached the conclusion that there was no basis whatever for a judgment in favor of the plaintiff against the defendants. The defendants owned a sawmill in the parish of Rapides, and were engaged in the business of sawing of logs, which were carried to their mill by means of a locomotive and cars operated by their employes upon a tramway which they had constructed. The business seems to have been an extensive one, requiring for its proper working the creation of distinct departments at the head of which were foremen or managers, with separate and independent duties and obligations. One of these departments, known as the "Milling Department," was in charge of a Mr. Maynard. The other, known as the "woods" or "logging" department, was under the control of a Mr. Evans. Each head of department had the exclusive right of employing workmen for his own department, and the duties of the men so employed were confined to the work called for therein. The selection and control of the men connected with the operation of the railway was intrusted to Evans. One of the locomotives upon the tramway had for its engineer a man by the name of Patterson, and for its fireman one Hardy Her. There was strictly no necessity for a fireman upon the locomotive, as the character of the work done and the distances run was such as to enable the engineer, not only to act as such, but to perform the duty of a fireman, and for some considerable time the engineer had, in fact, performed the duties of both.

The evidence shows there were duplicate steps leading up to the engine on the right and left sides of this particular locomotive; that there were cogwheels under and in front of the steps, upon the right side of the locomotive, but none under and in front of those upon the left; that the engineer's usual position was upon the right of the engine cab, and that of the fireman was upon the left; that each habitually entered the cab by the steps on the side next to the position he was called upon to occupy. It is quite likely that on the 19th of February, 1898, the steps upon the right of the locomotive were not in as good condition, nor as well protected, for purposes of safety, as they should have been. What the condition of the steps on the left were upon that day was not made to appear. On the 19th of February, 1898, defendants' sawmill for some reason was not in operation, but the trains were out in the woods, engaged in the

work of bringing in logs. Shortly after 12 o'clock of that day, Patterson's engine, with cars loaded with logs attached thereto, was making its way to the mill, when it was discovered at a distance of about a mile therefrom that the ties upon the tramway were in such a condition as to make it necessary to stop the cars, and put in new rails, before proceeding further. It was possible, however, for the locomotive to pass over. In order to remedy the trouble, the locomotive was detached from the cars, and sent forward to the mill, Patterson receiving instructions to have some ties which were at the mill loaded upon the engine and tender, and to return with them to the break in the road. Hardy Iler, the fireman, was upon the locomotive at that time. He remained upon it some time after it reached the mill, and assisted in placing the new ties upon the engine. When the engine reached the mill, Patterson found there several men and a number of lads (among them the plaintiff) loitering around the mill for want of employment. The plaintiff had been in defendants' service for some time, employed as a log washer; but, that duty not being continuous, he was only engaged from day to day, as occasion required. On that particular day the plaintiff was not engaged. When the time came for loading up the engine, Patterson called upon several men to assist in doing so; and, according to the testimony of the plaintiff, he called upon him, and the other boys, to give a helping hand, which they did. When the engine started back, these boys got upon it, and went down to the break; the plaintiff and a boy named Graham being permitted to enter the cab. The fireman, Iler, did not go down on the engine to the break, but remained at the mill. Plaintiff testified that, on the way down, Patterson called upon him to "fire up," and that he filled up the furnace with wood; that Patterson had told him before getting on the engine that he wanted some one to fire up. The engine remained at the break some 20 or 30 minutes while the ties were being unloaded, and then returned to the mill. In this interval, the boys had gone down to a creek in the neighborhood, but they were recalled by Patterson's calling out to them, as he started his engine on its return, "Come on, boys, if you want to go back." Before they could reach the engine, it had gotten under way, and they climbed upon the back end of the tender, which the testimony shows was a place of perfect safety. Just before the engine reached the mill, and while it was "slowing up," plaintiff got down from the left of the rear of the tender, ran over to and along its right side, up to and opposite the steps leading to the engineer's cab, and there attempted to get into the cab. As he placed his foot on the step, it slipped off, and got entangled in some cogwheels which were under and in front of the steps. The engine was at once stopped, and the boy extricated, but his foot was crushed, and his leg badly cut. He was taken to his home, where the

front part of his foot was amputated. He remained in bed several months, necessarily suffering great pain. His injuries are permanent, and it is shown that his ability to perform work such as his station in life would call for has been greatly impaired.

The jury evidently permitted their sympathy to get the better of their judgment. Well-directed and judiciously controlled sympathy is commendable at all times, but sympathy which seeks to remedy a distressing accident, by casting loss and responsibility upon parties who are in no wise blamable on account of it, is not permitted in a court of justice. This accident, by which a young lad has been maimed for life, is certainly much to be deplored, but defendants in no way contributed to it. Patterson was not authorized to employ the plaintiff in any capacity, and his permission to him to enter the engineer's cab, when the engine was going down to the break, was in violation of positive prohibitory orders. The mere call upon the boys who were loitering around the mill to give a helping hand in putting the ties upon the engine can in no sense be called an employment of them by the company. Their responding to such a call was purely a voluntary and gratuitous act, such as any one standing in the neighborhood of the engine would have responded to, not as employment, but as a favor. The nature and character of what occurred is very expressively explained by the statement made by one of these boys on the stand,—"that they were helping just to be helping."

We see nothing in the record which would justify us in reaching the conclusion that Patterson ever thought of employing plaintiff, or that plaintiff ever thought of being employed, as a "fireman" upon the engine. Had not this accident occurred, we have no idea that such a claim would have ever been put forward. Woodward, one of the men who went down to the break on the engine, says that he heard Patterson say to the plaintiff, while the latter was in the cab, "Willis throw some wood in the furnace;" but this is nothing more than a request which might well have been addressed to Woodward himself. Everything negatives the idea that plaintiff could have been under any employment as a fireman even had Patterson had the authority (which he did not have) to employ him as such. The boys evidently went down on the engine as an amusement, or from curiosity, to see the situation at the break. The fireman, Iler, testified that he did not go back on the engine to the break, for the reason that knowing where it was going, and how long it would be away before returning, he had "fired up" before the engine left the mill, putting on steam enough to last until it would return; and the testimony shows there was no necessity for any further "firing up." Assuming, however, that Patterson ever intended to employ plaintiff as a fireman, and that plaintiff understood that he was so employed,

the employment would not have extended beyond the outgoing trip, and the relations of the parties on that score terminated at the break. If Patterson had imagined that plaintiff had been employed as a fireman, and that his services as such were needed for the return trip, he certainly would not have started back to the mill without seeing that he was aboard. His calling out to the boys as he was leaving, "Come on, boys, if you want to go back," clearly indicates what the actual situation was. Patterson did not call upon the plaintiff on the return trip to go into the cab, nor did the latter attempt to go into it until the engine was nearing the end of the trip, and within a few yards of the mill, and when it was perfectly apparent that it would reach the roundhouse, as in fact it did reach the roundhouse without any further "firing up." We do not know why the plaintiff left his place on the rear of the tender, and attempted to go into the cab while the engine was in motion. The reason assigned by him that he thought it was necessary to fire up cannot be received as the correct one, in view of the situation of the engine at that time. He was not called upon to go into the cab. There was no reason for his doing so. There was no reason for his supposing it was necessary for him to have done so. He left a place of safety, and without any necessity, and in the discharge of no duty, attempted to board a moving engine. The defendant company is not responsible for the consequences of that act. There were no contractual relations of any kind at that time between the parties. Under the evidence, we have no alternative but to set aside the verdict of the jury, and the judgment of the court based thereon, and to reject plaintiff's demand. For the reasons assigned, it is ordered, adjudged, and decreed that the verdict of the jury be set aside; that the judgment thereon rendered be, and the same is hereby, annulled, avoided, and reversed, and plaintiff's demand be rejected, with costs in both courts.

J. A. FAY & EGAN CO. et al. v. MONROE NAT. BANK et al. (No. 13,026.)

(Supreme Court of Louisiana. Feb. 6, 1899.)
CORPORATIONS—MORTGAGES—FORECLOSURE—PROCEEDS—FRAUDULENT CONVEYANCES.

The contest was among creditors over the proceeds of the sale. The mortgage creditor whose mortgage was foreclosed was not a director of the corporation debtor, and was not concerned in so far as related to the payment by the latter of its indebtedness. The mortgage creditor, holder of notes deposited as collateral security, had the right to foreclose, and to have the property sold. The testimony does not disclose, as between the two corporations, that the property was sold in the proceedings of foreclosure for the purpose of defrauding creditors by change of title. There was no collusive agreement between the two.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Ouachita; W. N. Potts, Judge.

Injunction by J. A. Fay & Egan Company and others against the Monroe National Bank and others to restrain defendants from foreclosing a mortgage of the property of the Ouachita Excelsior Saw & Planing Mills, Limited, and to annul the same. From a decree in favor of defendants, plaintiffs appeal. Affirmed.

A. A. Gunby, for appellants. Hudson, Potts & Bernstein, for appellees.

BREAUX, J. Plaintiffs, judgment creditors of the Ouachita Excelsior Saw & Planing Mills, Limited, brought an injunction suit against the defendant to enjoin it from foreclosing its mortgage, and to annul the mortgage the latter was seeking to foreclose. The injunction was bonded by the defendant, and it proceeded with the foreclosure of its mortgage, and had the property mortgaged sold. The property was bought for the bank, and, at the request of the bank, it was afterwards transferred to the West Monroe Lumber Company. The property thus sold was all the property owned by the Ouachita Excelsior Saw & Planing Mills. The notes upon which the bank foreclosed were held as collateral security to secure the payment of the amount of its claim against the Ouachita Excelsior Saw & Planing Mills. One of plaintiffs' contentions is that the mortgage was executed in favor of L. D. McLain, as a party who was to accept the mortgage, who was not a creditor of the Ouachita Excelsior Saw & Planing Mills, and that he had no right to dispose of the notes; and the mortgage securing those notes, as to their payment, is attacked on a number of grounds, chiefly that the saw-mill company did not owe the bank anything, and that it neither owned nor possessed the notes, the basis of the proceedings of foreclosure. Plaintiffs charge in argument that the sale was a consent sale, a mere simulation, whereby a number of creditors, including plaintiffs, lost their claims. The indebtedness of the mill to the building and loan association was \$13,456.60, and the bank \$8,861.02. There does not seem to be any serious question about the indebtedness to the former. As to the latter, Flournoy, the cashier of the bank, swears that it was due by the Ouachita Excelsior Saw & Planing Mills to the bank. With reference to the notes deposited as collateral security to secure this last-stated sum, the cashier swore: "Q. Were they delivered to you then as collateral for the indebtedness of L. D. McLain, or for the Ouachita Excelsior Saw & Planing Mills? A. For the mill, as that receipt states. Q. Not for any indebtedness to Capt. McLain? A. No, sir." Further testifying, he said: "Our interest was to get our debt of six thousand eight hundred and sixty-one 02/100 dollars." In the district court plaintiffs' demand was rejected. From the judgment, plaintiffs prosecute this appeal.

It was shown by sufficient testimony that the Ouachita National Bank was a creditor in the amount before mentioned. As such, it

had a right to accept notes as collateral security, and, at their maturity, to foreclose the mortgage by which they were secured. We take it that the mill company was indebted, beyond question, in the amounts before stated; but we understand that the complaint is directed against L. D. McLain, who was one of the directors of the mill company, and against the method followed, which resulted in a transfer of the mill property of the Ouachita Excelsior Saw & Planing Mill Company to another company, known as the "West Monroe Mill," organized, plaintiffs charge, for the purpose of succeeding to the business of the former company, and thereby enable it to escape the execution of its creditors. The president of the bank testified that the debt was contracted before the creation of the debt due plaintiff. The bank had the right to foreclose its mortgage. The notes that had passed through the hands of one of the directors of the mill company to facilitate the transaction, as we take it, and not with the view of benefiting the directors, became its notes in due course of business. The intervention of the director in the negotiation, which resulted in the bank becoming owner of these notes in good faith, did not affect its right to collect them. The insistence is that no money was paid by the bank; but this is not sustained by the testimony. It is true that the bank claimed the face value of the notes it held, and obtained an order of seizure for the whole, while in reality the principal was considerably less,—a claim, it is true, which should not have been made; yet a demand for a larger amount than should have been claimed does not affect the right to collect the sum actually due. After the injunction had been bonded, the property was offered for sale by public auction, in accordance with the terms of the advertisement made in the foreclosure proceedings; and it was adjudicated to an attorney, as we take it, acting for the bank. We do not understand that the right to bond *vel non* is before us for decision. The attorney, shortly after, in accordance with the direction of his principal, sold the property to the West Monroe Mill Company. In argument at bar, and in the brief, complaint was directed against their adjudication and subsequent sale to the West Monroe Lumber Company. The judge of the district court states in his reasons for judgment that he refused to admit testimony to show a collusive agreement to sell this property, and have it purchased by the West Monroe Lumber Company, for the purpose of defrauding creditors of the Ouachita Excelsior Mill Company, as nothing of this sort was mentioned in the allegations. We agree with our learned Brother of the district court that it was not an issue of the case.

As to pleadings, of course, plaintiffs must specifically set forth the grounds upon which they base their action; but, if we should take it that the testimony received without objection reformed the pleadings, the testimony ad-

mitted does not sustain a cause against the West Monroe Lumber Company, a corporation not responsible for individual acts of a director. This company bought the property virtually from the bank, and, in the light of the evidence before us, the corporation itself has committed no wrong for which it can be held in these proceedings. We have not found ground to annul the act of sale made to the West Monroe Lumber Company. By means of its purchase, the price, part of which went towards paying a portion of the claim of one of the plaintiffs, was paid, or a settlement equivalent to payment was entered into with the creditor, the bank. The following may serve to illustrate: A. proposes to B. to buy C.'s property, mortgaged to B., provided, in case of purchase at public auction, B. will assist him, A., in paying the price. The transaction is not condemnable under the law, even though it may have the effect of reducing C. to a condition of absolute insolvency. The maneuvers of others cannot affect the rights of A., who becomes the owner. Here, the West Monroe Lumber Company may be said to be in the position of A. If there had been a pre-determination to wreck the Ouachita Excelsior Saw & Planing Mill Company, with the evidence before us and under the pleadings, it would not be possible to hold the West Monroe Lumber Company, an independent organization, responsible for the wreckage. It stood for the price at which the property was adjudicated. It was divided among the creditors, prior in rank of claims, and, among them, to an amount stated, was one of the plaintiffs. There was to that extent, so far as we have found, no offending against the law,—no collusive agreement. The directors, as we understand, are not claiming anything in opposition to creditors. It is a contest among creditors over the proceeds of a sale made in foreclosure proceedings. The case does not come within the application of the rule laid down in *Butchers' Union, etc., v. Land Co.*, *Crescent City, etc., v. Slaughter-House Co.*, 4 Sup. Ct. 652.

We well understand that a president has no right, in the interest of the bank he represents, and much less in his own, to form corporations to defeat creditors. Such combinations do not meet with the law's sanction; but in a case in which the purpose was to annul a mortgage, in face of the fact that all the evidence proves the reality of the mortgage, we have not found it possible, on allegations made, in law, to hold that such a combination was entered into. The new company is not such a *corpus sine animus extrinsecus apparens intrinsecus nihil habens* as it would have to be in order not to take it into account at all,—to ignore it altogether. It is an "intellectual body, created by law, composed of individuals united under a common name," and, as such, entitled to citation, and to stand in judgment in all matters affecting its rights. There is a question about \$363 of the price; as to how it was credited, if at all. As to

this amount, plaintiffs' rights are reserved as in case of nonsuit. For reasons assigned, it is ordered, adjudged, and decreed that the judgment appealed from is affirmed, save as to \$363, the right to which is reserved as just stated.

On Application for a Rehearing.

(March 7, 1899.)

We have re-examined this case, and reconsidered the law and the facts involved. We are convinced that our decree is correct, particularly for the reason that the company, West Monroe Mill, owner of the property whose title is attacked, is not a party. We have not changed our views, as heretofore expressed, save in an unimportant particular. The Code of Practice (article 908) directs: "If the judgment be reversed, in whatever degree it may be, the appellee shall pay the costs." Having disturbed the judgment below in matter involving \$363, and reserved to each party (plaintiff and defendant) his right as to claim, we think the change is enough to carry costs. The question being plain enough without further hearing, the change as relates to costs is ordered. Our decree remains, the defendant and appellee to pay the costs. Rehearing refused.

(51 La. Ann. 468)

STEMPEL v. FULTON et al. (No. 13,075.)

(Supreme Court of Louisiana. Feb. 20, 1899.)

SUSPENSIVE APPEAL—INSUFFICIENT BOND—DEVOLUTIVE APPEAL.

When the judge of the district court has, by inadvertence, fixed an insufficient bond for a suspensive appeal, and thereafter has dismissed the appeal, on application for a certiorari to the circuit court by defendant, the transcript of appeal having been filed in the court of appeal, that court should direct the appeal to stand as a devolutive appeal, the bond being sufficient to secure costs, and being for the amount fixed by the district court. *Marshall v. Banking Co.*, 5 La. Ann. 361; *Ralph v. Hogatt*, 2 La. Ann. 462.

(Syllabus by the Court.)

Action by Mrs. Mary G. T. Stempel against E. Fulton and others. Judgment for plaintiff. Application by E. Fulton for certiorari or writ of review to the court of appeals of parish of Orleans. Writ granted.

Theo. Cotonio, for petitioner. E. Howard McCaleb, for respondents.

MILLER, J. The relator seeks the writ of certiorari to the court of appeals for the parish of Orleans to review its action in refusing a mandamus to compel the allowance of a suspensive appeal by the district court from the judgment against relator. The judgment against relator by the district court was for \$1,000. By an inadvertence of the judge, the bond for the suspensive appeal was fixed at \$50, the amount being inserted by the counsel for the appellant, and the bond was furnished.

Thereafter the plaintiff took a rule to set aside the suspensive appeal, on the ground the surety was not good and sufficient, and because of the insufficiency of the bond in amount. The insufficiency of the bond would with more propriety have been addressed to the appellate court, though the jurisdiction of the lower court has been affirmed to set aside an erroneous order, such as to direct a suspensive appeal on a bond for costs to suspend a money judgment of \$1,000. *State v. Judge of Twenty-Fourth Judicial Dist. Court*, 32 La. Ann. 816; *State v. Judge of Tenth Dist.*, 6 La. Ann. 548; 1 Hen. Dig. p. 330, note 3. But it is clear that, though the bond fixed by the district court was insufficient for a suspensive appeal, the bond was good for a devolutive appeal; and the district court, instead of setting aside the appeal, should have maintained it as a devolutive appeal. This error the relator sought to correct on his application to the court of appeal, but his prominent ground of complaint was that, because of a bond furnished for costs, the district court could not set aside an improvident order for the suspensive appeal. In our view, the district court should have been directed to modify its order so as to maintain the relator's appeal as devolutive only, or, in view of the fact that the record of appeal has been filed in the court of appeals, as relator brings to our notice in his application to the court, that the order to be made by the court of appeals is that the appeal of the relator stand as a devolutive appeal, reserving to the plaintiff in the lower court to proceed with his execution; and our learned Brothers of the court of appeals, well advised of the law, doubtless assumed that, on the bond for costs, the relator would have the benefit of a devolutive appeal, and had no purpose to disturb it. It is therefore ordered and decreed that the court of appeals for the parish of Orleans, on the application to it of the relator, do maintain his appeal as devolutive, reserving the right of plaintiff in execution to proceed with it.

(51 La. Ann. 496)

COUDROY et al. v. PECOT et al.

(No. 13,000.)¹

(Supreme Court of Louisiana. Feb. 6, 1899.)

APPEAL—RETURN DAY—ABANDONMENT—FILING TRANSCRIPT.

1. An order for an appeal, suspensive or devolutive, returnable according to law, is returnable at the first return day for the parish after the order. The appeal under that particular order is abandoned if not perfected by that time. *Mortee v. Edwards*, 20 La. Ann. 236.

2. The filing of a transcript after an appeal has been abandoned is without effect, and appellee is entitled at any time to have the lapsing of the appeal declared.

(Syllabus by the Court.)

Appeal from judicial district court, parish of St. Mary; A. C. Allen, Judge.

¹ Rehearing denied March 7, 1899.

Action by Mrs. Angele Coudroy, widow, and others, against Ernest Pecot and others. Judgment for plaintiffs. Defendants appeal. Dismissed.

Don Caffery & Son, for appellants. Walter J. Burke & Bro., for appellees.

NICHOLLS, C. J. Judgment was rendered in this case by the district court on the 30th of June, 1897, in favor of the plaintiffs. On the same day, counsel for defendants, by motion, applied for and obtained an order of appeal returnable to the supreme court according to law, the order being in the alternative for a suspensive or a devolutive appeal. In case of a devolutive appeal the court fixed the appeal bond at \$50. In case of a suspensive appeal it ordered bond to be given for the amount required by law. No bond was furnished by the defendants until 22d June, 1898, when an appeal bond for \$50 was furnished, the condition of the bond reciting that it was given under an order of the district court granting defendants a devolutive appeal. The transcript in the case was filed in the supreme court on December 1, 1898. No new order of appeal was asked for or granted, nor was there any application made for delay, or for an extension of the return day. Appeals from the parish of St. Mary were returnable at that time on the fourth Mondays of March and November (Act No. 69, of 1894), and since, under Act No. 78 of 1898, on the fourth Mondays of January, March, June, and November. Plaintiffs have moved to dismiss the appeal, on the ground that, when the bond was furnished and the transcript was lodged in the supreme court, the appeal had lapsed by abandonment; that no notice had ever been served upon him that the appeal would be or was being prosecuted, and he had only learned casually of the filing of the transcript; that he had never consented to an extension of time. We are of the opinion that the appeal should be dismissed. Defendants having failed to furnish bond either for a devolutive or a suspensive appeal under the order of appeal granted 30th June, 1897, within the return day, and having failed to obtain an extension of the return day, the effect of that particular order terminated. If they were entitled to an appeal, it would be an appeal under the new order of appeal and bond given under it, and after proper citation to appellees. *Mortee v. Edwards*, 20 La. Ann. 236.

Appellants maintain that, assuming the grounds urged for dismissal to have been well founded, they could only have been urged within three days from the filing of the transcript at any one of the return days for the parish of St. Mary during the year in which devolutive appeal could be taken. If the appeal was abandoned under the order of appeal as taken (as we hold it was), the effect was self-acting, needing no order of court to make it operative. An order of court on that sub-

ject would be merely declaratory of an existing fact. The first return day having passed without the filing of the transcript, appellees was not called upon to be in court upon any subsequent return day for the parish, to ascertain whether the transcript would be filed, and, if so, at what time. There would be no fixed period to which the three days' rule could be made to apply. The appeal is dismissed.

(51 La. Ann. 478)

EQUITABLE SECURITIES CO. v. BLOCH
(ROBIN, Intervener. No. 12,974).

(Supreme Court of Louisiana. Feb. 20, 1899.)

CANCELLATION OF INSTRUMENTS—JUDGMENTS—COLLATERAL ATTACK—ANNULMENT—DIRECT PROCEEDING—EXECUTIONS—CLAIM BY THIRD PERSON.

1. The asserted mortgage of the wife was canceled twice on separate rules filed, and served upon all parties concerned.

2. The court had jurisdiction over the subject-matter, and passed upon questions at issue. Whether the court's decisions on these rules were erroneous or correct do not present grounds enough for collateral attacks of the proceedings.

3. The third opponent cannot treat the judgments, ordering cancellation of the mortgage, as absolute nullities, and recover the proceeds of the sale of the property on which she claims she has a mortgage, by way of a third opposition.

4. Even on a confession of a married woman (if there be anything in the nature of consent in these cancellations), a direct action must be brought to annul a judgment. *Bell v. Francke*, 23 La. Ann. 599.

(Syllabus by the Court.)

Appeal from judicial district court, parish of St. Landry; Gilbert L. Dupre, Judge.

Action by the Equitable Securities Company against Joseph Bloch, in which Mrs. Josephine Robin intervened and claimed the property seized by plaintiff on execution. From a judgment in favor of plaintiff, intervenor appeals. Affirmed.

E. North Cullom, for appellant. Farrar, Jonas, Kruttschnitt & Gurley and Kenneth Baillio, for appellee.

BREAUX, J. This was a third opposition by a married woman, who claims a mortgage superior in rank to that of the seizing creditor. The facts, as relates to the mortgage right and its foreclosure by the plaintiff, are that it sued out executory process against Joseph Bloch, and seized his plantation, in the parish of St. Landry, and, in due course of proceedings, it was adjudicated to it for the price of \$9,905.

The following is a recital of the right claimed by plaintiff: Lehman, Abraham & Co., judgment creditors of Ludger and Lucien Lastrapes, owners of the property, had their judgment executed and the property sold. Vincent Boagni was the adjudicatee at the sale. As the certificate of the recorder of

mortgages, which was read to the public at the sheriff's sale, made known that there was of record a statement of a general mortgage, bearing on all properties of Ludger and Lucien Lastrapes, in favor of Josephine Robin, his wife, resulting from inscription of a receipt purporting to have been signed by Lastrapes for money advanced to his wife by her father and mother, Boagni, the buyer, deposited the amount due to the seizing creditors, Lehman, Abraham & Co., in the hands of the sheriff, and filed proceedings against the sheriff, against the recorder of mortgages, and against Josephine Robin, wife of Lastrapes, to regulate the distribution of the proceeds of the sale, and to bring about a cancellation of all mortgages on the books of the recorder of mortgages. Due notice of the application to cancel the mortgage was given to Mrs. Robin and her husband, Lastrapes. For reasons stated in the judgment, the court decreed the cancellation of the mortgage, evidenced, it was claimed, by a receipt under private signature, in which Mrs. Robin's husband acknowledged to have received from her father and her mother, living at the time, the sum of \$8,000 on account, as an advance of the portion she was to receive at their death. The court in the judgment authorized the sheriff to pay the proceeds of the sale to the seizing creditors, Lehman, Abraham & Co. Some time afterwards, Vincent Boagni sold the property he had bought at this sale to Joseph Bloch, and on the same day the vendee of Boagni, Bloch, sold it to Ludger, Francois, and Gabriel Lastrapes for the sum of \$17,897.40. Ludger bought one-half, and the others one-fourth each, of the property. About two years after their purchase, they retroceded the property to Bloch, their vendor. They declared, in the deed of retrocession, that they had paid no portion of the price, and that they retroceded the property on condition of a return of their notes which represented the price. After this retrocession, Bloch brought suit, setting forth in his petition that the retrocession operated a resolution of the sale, and that consequently all mortgages acquired against the Lastrapes, his vendees, during their ownership, were canceled and extinguished. He mentioned in his petition, among others, the claim of Mrs. Josephine Robin, wife of Lastrapes, for the amount of \$8,000, which had been previously canceled in the suit of Boagni against Duseon, sheriff, to which we have already referred. Judgment upon his petition was rendered, canceling and erasing all the mortgages described in this petition. It is in place to state here that Mrs. Robin obtained, in 1892, a judgment of separation of property from her husband; a *fi. fa.* issued, and was returned *nulla bona*; that the judgment was rendered for the amount paid by her father to her husband, *i. e.* the sum of \$8,000, as evidenced by a receipt recorded in the office of the recorder in 1871, at which time the

father and mother of Mrs. Robin were alive. In opposition to plaintiff's claim, as just stated, opponents pleaded that her paraphernal funds were secured by a mortgage which primed plaintiff's. To this intervention plaintiff filed an exception of no cause of action. Intervener prayed to amend her petition so as to cite Vincent Boagni to show cause why the judgment rendered in 1890 should not be canceled. The exception was referred to the merits. The amendment was not allowed. The answer of plaintiff to the intervention admits that intervener obtained a judgment against her husband, and sought to have it executed, and that, as she alleges, she did have the receipt inscribed; but plaintiff avers that the registry of the receipt and the mortgage claimed by the intervener were canceled in the first proceedings for cancellation, in case of Vincent Boagni against C. C. Duseon, sheriff (No. 13,553), to which we have referred, in which plaintiff avers the wife was authorized to stand in judgment. Plaintiff sets forth, also, that, after the cancellation and annulment of her mortgage in accordance with the judgment rendered on the first application to cancel her mortgage, Mrs. Robin brought about a second reinscription, which was also canceled in the suit above referred to, of Joseph Bloch against C. M. Thompson, rendered after due citation of all parties concerned; and that in this suit Mrs. Robin, duly authorized, filed an answer, in which she averred that she had no objection to the cancellation of the mortgage, as prayed for by the plaintiff, being satisfied that the mortgage she now claims did not bear on the property seized by plaintiff in the case before us for decision. Plaintiff averred that these judgments were final, and could not be collaterally attacked in the proceedings by intervention and third opposition; that Mrs. Robin's answer was a judicial admission that legally concluded her demands; that, at the date of registry of plaintiff's mortgage, intervener had no recorded claim on the property. From a judgment dismissing her demand, Mrs. Robin appeals.

The mortgage of the wife to secure the payment of her separate rights is well defined, and whenever it is first in rank, and unaffected by any proceedings, it must, in law, be recognized and given effect; but if she has consented to the cancellation and erasures of her mortgage, or has been cast in a suit which resulted in the cancellation and erasure of her mortgage, she is bound by the rules of practice applying in such cases. The remedies which the law gives must be kept distinct. The ordinary mortgagee, whose mortgage is twice canceled, in accordance with a decree of a competent court, is left without right to ignore the cancellation and claim as third opponent.

As relates to the proceeds of the sale of the property on which her mortgage was extant prior to the cancellation, Mrs. Robin is not, un-

der the law, permitted to recover them in a third opposition. She is precluded from asserting any right she may have collaterally and by third opposition. She must bring a direct action to avoid the judgment of cancellation. The truth of the judgment ordering the cancellation cannot be collaterally questioned.

Counsel seeks to avoid the difficulty by urging that the judgment ordering the cancellation was null ab initio, and requires no annulling action. There is here a petitio principii. Of course, if the position assumed, that the judgment is an absolute nullity, was correct in law, its noneffects would follow.

This leads us to the inquiry: Is it an absolute nullity? Should we, in these proceedings, deny all validity? The court had jurisdiction to decree a cancellation and erasure. The question was considered. Whether it was decided correctly or incorrectly, it is not for us to determine in this case, and not contradictorily with the parties in whose interest the cancellation was made. Such judgments are considered invulnerable against collateral attacks.

The third opponent sets forth a number of grounds to sustain her contention that the judgment is an absolute nullity; such as that the consent of the wife to a cancellation of the mortgage renders the judgment based upon the consent an absolute nullity. This court has decided in *Bell v. Francke*, 23 La. Ann. 509, that where the wife is separated in property from her husband, "if a judgment be so illegal as to be a nullity, resort should be had to an action of nullity, and not an injunction." Judge Martin, as the organ of the court in *Cook v. State*, 16 La. 288, said: "And, if the judgment is so illegal that it ought to be set aside by an action of nullity, such an action ought to have been brought, and may still be instituted." We think the principle laid down in that decision applies here. We think that the orderly conduct of judicial proceedings, as well as the public interest, requires that we adhere to the rule of the Code and of the jurisprudence. In another case this court said: "Daily experience teaches us that justice cannot be administered unless the different remedies which the law gives are kept distinct from each other." *Jones v. Lawrence*, 4 La. Ann. 280. Moreover, the property had passed out of the possession and ownership of her debtor. Bloch was, as to this claim, a third person. Her executory title, if she has one, would be against the third possessor, and not personally against the seizing creditor, to compel him to pay from the proceeds of the sale under seizure. Bloch received only such title as the seizing creditor had acquired. Whatever mortgage claim Mrs. Robin may have remained on the property; her claim was not transferred to the proceeds. The law and the evidence being for plaintiff, and against defendants, it is ordered, adjudged, and decreed that the judgment appealed from is affirmed.

ROPES v. McCABE.

(Supreme Court of Florida. Jan. 9, 1899.)

PARTITION—DECREE PRO CONFESSO.

1. Until defendant files his answer, or a decree pro confesso is regularly entered against him in a partition suit, it is error for the court to decree partition between the parties.

2. A decree pro confesso entered by the clerk of a circuit court on a day other than a rule day, not entered in pursuance of default in pleading committed on that day, nor in pursuance of an order of the judge, is unauthorized.

(Syllabus by the Court.)

Appeal from circuit court, Volusia county; John D. Broome, Judge.

Bill by William McCabe against E. E. Ropes. Judgment for plaintiff, and defendant appeals. Reversed.

E. E. Ropes, in pro. per.

CARTER, J. Appellant and appellee were tenants in common of 376.94 acres of land in Volusia county, known as "Forbes' Island," to partition which a bill was filed in the circuit court by appellee.

Appellant appeared specially, moving to quash the subpoena, and also filed a motion to dismiss the bill. On January 23, 1894, while these motions were undisposed of, the clerk entered an order upon application of complainant's solicitor, reciting that defendant had appeared on November 6, 1893, for a special purpose, and that, having failed to plead, answer, or demur to the bill, it was therefore ordered that the bill be taken as confessed by defendant, and that complainant have leave to proceed ex parte. On application of complainant the court appointed a master to take testimony, and afterwards commissioners to partition the land. Although defendant was notified of the time and place of taking testimony, he never appeared at any of the hearings before the master. The commissioners reported to the court that the land could not be equitably partitioned on account of its nature and location. The court thereupon decreed a public sale of the land, at which sale complainant became the purchaser, at the sum of \$220. The court confirmed this sale, directed that a deed be executed to the purchaser, approved bills of costs due to the master, commissioners, a surveyor employed by them, witnesses, and court officers, amounting to \$146.86, and a fee of \$300 for complainant's solicitor. The court further directed that the \$220, purchase money, be used in payment of these expenses; and as, after paying the \$146.86 above named, only \$73.14 remained to be applied to attorney's fees, leaving a balance due of \$226.86, the court entered judgment against complainant in favor of his attorney for one half that sum, \$113.43, and a similar judgment against defendant for the other half, and directed executions to issue therefor. Thus, an ex parte proceeding to divide nearly 400 acres of land resulted in a total loss of each party's entire

interest therein, and, in addition, a personal judgment against each in favor of the attorney who brought the suit, for an amount in excess of one-half the value of the land realized at public sale.

We do not deem it necessary to consider any error assigned, except that relating to the entry of the decree pro confesso against appellant. This decree was not entered on a rule day. It was not entered in pursuance of any default in pleading committed on that day, nor was it entered in pursuance of any order of the judge. The clerk was therefore without any authority to grant it (*Ballard v. Kennedy*, 34 Fla. 483, 16 South. 327); and, as there was no valid decree pro confesso against appellant, the court erred in proceeding to decree partition, because partition cannot regularly be decreed until the defendant answers, or is barred from filing an answer by a decree pro confesso (Rev. St. § 1494; *Street v. Benner*, 20 Fla. 700).

The decree pro confesso and all subsequent decrees in the case are reversed, and the cause remanded, with directions that the circuit court fix a time within which appellant shall plead, answer, or demur to the bill of complaint, and for further proceedings.

(40 Fla. 404)

WEST FLORIDA LAND CO. v. LEWIS.

(Supreme Court of Florida. Jan. 9, 1899.)

DECRET—EVIDENCE.

Where plaintiff in an action for fraud and deceit in the sale of a tract of land testifies that the defendant, at the time of the sale, represented to him that there was a street 75 feet wide fronting the land on the east, it is error to permit another witness, on behalf of plaintiff, to whom, long after the sale was consummated, the defendant pointed out the land, stating that he had sold it to plaintiff, to testify that defendant then told her there was a street 75 feet wide on all sides of the tract; such testimony being irrelevant, and not admissible in corroboration of the plaintiff's testimony.

(Syllabus by the Court.)

Error to circuit court, Walton county; William D. Barnes, Judge.

Action by Andrew Lewis against the West Florida Land Company. Judgment for plaintiff. Defendant brings error. Reversed.

McLeod & Reeves, for plaintiff in error. Daniel Campbell, for defendant in error.

CARTER, J. Defendant in error sued plaintiff in error in the circuit court of Walton county, in an action on the case for fraud and deceit in the sale of a block of land in the vicinity of De Funiak Springs. The declaration alleged that defendant's agent falsely represented that there was a street 75 feet in width fronting the block purchased on the east; that defendant executed to plaintiff a deed which reserved a strip 37½ feet from plaintiff's block on the east, falsely representing that there was reserved from the western portion of the adjoining block 37½ feet for a

street, which, with the reservation of 37½ feet from plaintiff's block, made a 75-foot street between them. Defendant pleaded the general issue, and also several special pleas, denying particular allegations of the declaration. Issues were joined, and a trial had, resulting in verdict and judgment for plaintiff in the sum of \$150, from which defendant sued out this writ of error.

The plaintiff testified that George W. Banfill, defendant's agent, represented to him that "there was to be reserved from each of the blocks * * * a strip of land thirty-seven and one-half feet wide, so as to make between them a street seventy-five feet wide." The plaintiff's wife then testified that she married plaintiff after he had purchased the block from defendant; that, some time after her marriage, she was out driving with Mr. Banfill; that he showed her the property which he stated he had sold her husband, and stated that there was a street 75 feet wide on all sides of the block. Defendant moved to strike this testimony, contending that it was not pertinent to any issue involved, and that the statement to Mrs. Lewis was made long after the sale was consummated, and constituted no inducement therefor. The court refused this motion, holding that the testimony tended to corroborate the statements or representations claimed by plaintiff to have been made by defendant at the time of making the sale. Plaintiff was then recalled, and testified that Banfill told him that defendant owned both of the blocks of land before referred to, and that "there was a reservation of thirty-seven and one-half feet from both blocks * * * for a street between them."

G. W. Banfill was sworn on the part of defendant, and testified that he did not represent to plaintiff that there was a 75-foot street between the blocks, but did tell him that, in making sales, defendant was authorized by the owners of the two blocks to reserve from each block a strip 37½ feet wide for the purpose of making a 75-foot street between them; that defendant at that time did have that authority, and exercised it, so far as the block sold plaintiff was concerned, by reserving from his deed 37½ feet for a street; but that when the owner of the other block executed a deed for it, several years after the sale to plaintiff, he neglected to make the reservation which defendant had been authorized to make.

The errors assigned in this court relate to the ruling on the motion to strike Mrs. Lewis' testimony, and to the refusal of the court to grant a new trial. As we remand the case for a new trial because of the ruling on motion to strike testimony, it becomes unnecessary for us to determine whether the evidence was sufficient to support the verdict.

No rule is better established than that which confines the evidence to the points in issue, and excludes all evidence of collateral facts which are incapable of affording any reasonable presumption as to the principal matters in dispute. This rule includes, in general, the

acts and declarations, either of third persons or of one of the parties in his dealings with others not parties to the suit; and, while there are some well-recognized exceptions to the rule, it is not perceived that the testimony of Mrs. Lewis falls within any of these exceptions. Her testimony did not relate to any attempt upon the part of Banfill to perpetrate a fraud upon her or any other person; nor did the statements made to her have any connection with the alleged fraud before that time perpetrated upon plaintiff; nor did they tend in the slightest degree to prove that Banfill had before that time made similar statements to her husband. Banfill's statements to her did not purport to narrate any representations made by him to her husband at the time of his purchase; and, having been made long after the sale to plaintiff, they did not enter into the inducements or representations held out to him to make the purchase. The court below seems to have admitted the evidence upon the theory that it tended to corroborate plaintiff's testimony, to the effect that Banfill told him a 75-foot street was reserved between the two blocks. We are clearly of opinion that the evidence was inadmissible for that purpose. It has been frequently held that, in general, no reasonable presumption can be drawn as to the making or execution of a contract by a party with one person, in consequence of the mode in which he has made or executed similar contracts with other persons. *Aiken v. Kennison*, 58 Vt. 665, 5 Atl. 767; *Kelley v. Schupp*, 60 Wis. 76, 18 N. W. 725; *Evans v. Koons*, 10 Ind. App. 603, 38 N. E. 350; *Barden v. Keverberg*, 2 Mees. & W. 61. The same is true of verbal declarations. Because a party has said to one person a certain thing at one time, it does not logically follow that he said the same thing to another person at another time. It is true that, in cases of fraud, great latitude is allowed in the admission of evidence; and, where fraud in the purchase and sale of property is in evidence, other frauds of like character committed by the same party at or near the same time are admissible; but the ground of the admission is that it tends to illustrate or prove a material issue in the case, viz. the mental state or fraudulent intent of the person charged with fraud, not because it tends to corroborate any witness' version of the manner in which the fraud was perpetrated. Testimony concerning other fraudulent acts is not admitted in proof of the fraudulent acts in issue, but in proof of the mental state accompanying or actuating the acts in issue. *Land Co. v. Studebaker*, 37 Fla. 28, 19 South. 176. The precise question here involved was considered in the case of *Huganir v. Cotter*, 92 Wis. 1, 65 N. W. 364; and, with the ruling denying the admissibility of such evidence there made, we are in entire accord. See, also, *Wilson v. Carpenter's Adm'r*, 91 Va. 183, 21 S. E. 243; *Johnson v. Gulick*, 46 Neb. 817, 65 N. W. 883.

The judgment of the court below is reversed, and a new trial granted.

(40 Fla. 443)

DAY et al. v. JONES et ux.

(Supreme Court of Florida. Jan. 9, 1899.)

EQUITY—SWORN ANSWER—CONCLUSIVENESS.

When complainants, in their bill to set aside a conveyance alleged to be fraudulent, require defendants to answer under oath as to the consideration for and delivery of such conveyance, and all other allegations of the bill impeaching its validity, and the defendants answer under oath, asserting due delivery of the deed, disclosing fully the consideration inducing its execution, and how and when it was paid, and deny all allegations of the bill impeaching the validity of the conveyance, such answers are binding upon complainants, unless overcome by the testimony of two witnesses, or by one witness and corroborating circumstances.

(Syllabus by the Court.)

Appeal from circuit court, Bradford county; Rhodon M. Call, Judge.

Bill by N. J. Jones and wife against Milley Day and others. Judgment for plaintiffs, and defendants appeal. Reversed.

On August 26, 1893, appellees filed their bill of complaint against appellants in the circuit court of Bradford county, alleging that on March 7, 1892, Mary G. Witkovski purchased a certain parcel of land in said county at a sheriff's sale under execution issued upon a judgment recovered by her against Milley Day on November 19, 1891; that on June 30, 1892, Mary G. Witkovski conveyed said land to complainant Bonita E. Jones, who, with her husband, entered into, and continued to hold, possession thereof; that on September 9, 1891, while Mrs. Witkovski's suit against Milley Day was pending, the latter executed a deed to her daughter, Mattie A. Demorest, conveying in fee simple, with warranty, the parcel of land mentioned, and caused same to be filed for record; that, at the time of the execution and acknowledgment of this deed, Mrs. Day was in Bradford county, and her daughter in Rochester, N. Y.; that at said time, and at the time of the levy of the execution, Mrs. Day owned no other visible property in Florida subject to execution; that the deed to Mrs. Demorest was not delivered until after levy of the execution upon the land; that it was a voluntary conveyance, made for the purpose of hindering and defrauding Mrs. Witkovski; that the recital of a \$500 consideration therein was false and fraudulent; and, upon information and belief, the truth was alleged to be that no consideration whatever was paid for said conveyance.

It was further alleged that on June 19, 1893, Mrs. Demorest began an action of ejectment against complainants to recover the land; that, subsequent to the execution of the deed, Mrs. Day told complainant N. J. Jones that Mrs. Demorest had paid nothing for the lot, and she also tried to borrow money from one W. W. Sapp, offering a mortgage on the lot as security. Specific interrogatories were, in the bill, required to be answered under oath, concerning the consideration for the deed to Mrs. Demorest; how

paid; and, if by check or draft, to attach same to the answer, and, if in money, to state who was present, and when and where it was paid, and whether it was ever returned to Mrs. Demorest, or any one for her; inquiring, also, where Mrs. Demorest was at the time the deed was made, who filed it for record, to whom it was delivered, and whether by Mrs. Demorest's authority; whether it had ever been delivered to Mrs. Demorest, and, if so, when, where, who was present, and by whom it was delivered; inquiring, also, if there had ever been any correspondence between Mrs. Day and Mrs. Demorest regarding sale of said property prior to September 9, 1891, and, if so, to attach same to the answer; and whether Mrs. Day, subsequent to September 9, 1891, did not claim to be the owner of the lot, and attempt to borrow money, offering the lot as security.

The bill prayed that the deed from Mrs. Day to Mrs. Demorest be declared fraudulent and void; that it be surrendered and canceled; that the record thereof be canceled; that Mrs. Demorest and her husband be enjoined from prosecuting the action of ejectment, and from prosecuting any action to recover possession of the lot. A temporary injunction issued as prayed on August 30, 1893.

The defendants filed separate answers. That of James Demorest, filed November 6, 1893, alleged that some time in the year 1883 Mrs. Day agreed to sell to Mrs. Demorest the land in controversy for \$500; that at that time Mrs. Demorest paid \$80, in his presence, on account of such purchase; that Mrs. Day afterwards boarded with Mrs. Demorest, the amount to be credited on said purchase; that Mrs. Demorest at various times, in Rochester, N. Y., paid moneys to defendant Milley Day, and sent money to her at Starke, Fla., on different occasions, on account of the purchase, and that long before the execution of the deed Mrs. Day acknowledged that she had been fully paid; that the precise amounts, and the time paid, defendant was unable to state, as at the time he anticipated no trouble concerning the transaction; that Mrs. Demorest received the deed from Mrs. Day by due course of mail; that defendant handed same to his wife, and the deed remained in her possession until it was sent to her attorney to institute the action of ejectment mentioned in the bill. Upon information and belief, defendant averred that no part of the money paid Mrs. Day by Mrs. Demorest had ever been returned to the latter, or to any one for her, and defendant denied that at the time of the execution of said deed he or his wife had any knowledge that Mrs. Day was indebted to Mrs. Witkovski or any one else. Answering the special interrogatories, defendant said that the consideration agreed upon was \$500; that Mrs. Day, long prior to the execution of the deed, acknowledged that she had been paid in full. He knew a part of it was paid in board, a part in money at Rochester, N. Y., and a

part in money sent to Starke. He did not remember that any one else than the defendant and his wife were present when the money was paid in Rochester. The money sent to Starke was in bank checks, and the checks were in possession of the bank, so that he could not attach them to his answer. He did not know that any of this money had ever been returned to Mrs. Demorest, or any one for her; that Mrs. Demorest was in Rochester at the time the deed was executed; that he did not know who filed the deed for record, or to whom the recording clerk delivered it, but he did know that it came to Mrs. Demorest by due course of mail, and that Mrs. Demorest had orally and by letter requested Mrs. Day to execute the deed, have it recorded, and forward it to her by mail; that the deed was received by Mrs. Demorest, at Rochester, N. Y., by due course of mail, in two or three days after its execution, and defendant was present at the time of its reception by her; that there was considerable correspondence between Mrs. Demorest and Mrs. Day prior to September 9, 1891, in reference to the purchase, but defendant was informed and believed that it had been destroyed; that he did not know that after September 9, 1891, Mrs. Day claimed to be owner of, or attempted to borrow money on, the land; that, if she did, defendant never heard of it before the bill was filed.

Mrs. Demorest's answer was filed November 6, 1893. Among other things, and in answer to the specific interrogatories in the bill, it alleged that the deed from Mrs. Day to her was executed in consideration of \$500 paid in full; that payments were made at various times, in board and money; that part of the money was paid in Rochester, and a part sent to Starke by bank drafts, and these drafts were then in bank, and could not be attached to the answer; that it had been so long since these amounts were paid that defendant could not remember who was present, except her husband; that no part of the amount had ever been returned to her; that she was in Rochester, N. Y., at the time of the execution of the deed; that Mrs. Day filed it for record, and subsequently forwarded it to her, at Rochester, by mail, as she had authorized Mrs. Day to do, and it was duly received by defendant a few days after its record, being handed to her by her husband, who received it from the mail; that there was correspondence between defendant and Mrs. Day prior to September 9, 1891, but, defendant not anticipating any trouble, the correspondence had been destroyed; that defendant did not know whether Mrs. Day had claimed to own, or attempted to borrow money on, the land in controversy, after September 9, 1891, but, if she did, it was without defendant's knowledge or consent, and was unauthorized by her. Defendant, further answering, alleged that, if Mrs. Day told complainant that defendant had paid nothing for the lot, the statement was untrue; that the

deed from Milley Day was not voluntary, or made for the purpose of defrauding Mrs. Witkovski, but that defendant bought and paid for same the sum of \$500 in good faith, —and denied that she, at the time of the execution of the deed, knew that Mrs. Day was indebted to Mrs. Witkovski or any one else.

Mrs. Day's answer, filed November 25, 1893, admitted the judgment and execution, and sale thereunder, and the making of the deed to Mrs. Demorest; denied that the deed was without consideration, and alleged that the consideration, \$500, was paid to her by Mrs. Demorest prior to the execution of the deed; denied that the deed was executed in bad faith, or with any intention to defraud Mrs. Witkovski or any one else; averred that on the day the deed was executed she had it recorded, and sent it immediately to Mrs. Demorest by mail; denied that she ever told complainant that Mrs. Demorest had not paid for the land; denied that she attempted to borrow money, offering a mortgage on the land as security. The answer alleged that the \$500 was paid partly in board, partly in money at Rochester, N. Y., and partly in checks sent to Starke; that defendant did not have the checks, and could not attach them to her answer, as she turned them over to the bank where they were cashed; that the precise amounts and dates of payments defendant could not remember, she being over 80 years of age and blind; that the entire consideration had been paid, and no part returned to Mrs. Demorest; that there was correspondence between her and Mrs. Demorest about purchase of the lot prior to September 9, 1891, but it had been mislaid or destroyed.

To these answers a general replication was filed, and a special master appointed to take testimony February 3, 1894. On June 12, 1894, the cause was heard upon the pleadings and proof, and the court decreed that the deed from Mrs. Day to Mrs. Demorest was void, and directed that it be canceled, and that a perpetual injunction issue, restraining ejectment for possession of the property. From this decree the present appeal was taken.

L. B. Rhodes, for appellants. W. B. Young, for appellees.

CARTER, J. (after stating the facts). We think the court below erred in granting the final decree in this case. The bill called upon the defendants, not only in general terms, but by specific interrogatories, to answer under oath, stating what consideration induced the execution of the deed alleged to be fraudulent; when and how it was paid; whether the deed had ever been delivered, and, if so, when, where, and who was present; whether Mrs. Demorest or her husband knew of Mrs. Day's indebtedness to Mrs. Witkovski or other persons at the time of its execution; and, in fact, to answer specifically each allegation of the bill which sought to impeach

the validity of the conveyance. The answers met these allegations fully, denying that the conveyance was voluntary, and that Mrs. Demorest had any knowledge of Mrs. Day's indebtedness at the time of its execution, and asserting that the deed was executed in good faith, in pursuance of a purchase for a valuable consideration actually paid, and availing the manner in which it was paid. The complainants, having called for these answers under oath, are bound by them, unless overcome by the testimony of two witnesses, or by one witness and corroborating circumstances. *Walter v. McNabb*, 1 Heisk. 703; *Culbertson v. Luckey*, 13 Iowa, 12; *Wright v. Wheeler*, 14 Iowa, 8; *Allen v. Mower*, 17 Vt. 61; *Feigley v. Feigley*, 7 Md. 537; *Hartshorn v. Eames*, 31 Me. 93; *Parkman v. Welch*, 19 Pick. 231; *Parkhurst v. McGraw*, 24 Miss. 134; *Fulton v. Woodman*, 54 Miss. 158; *Pattison v. Bragg*, 95 Ala. 55, 10 South. 257; *Bank v. Steele*, 98 Ala. 85, 12 South. 783; *Gray v. Faria*, 7 Yerg. 154; *Klittering v. Parker*, 8 Ind. 44; *Blow v. Gage*, 44 Ill. 208; *Myers v. Kinzie*, 28 Ill. 36; *Clark v. Bailey*, 2 Strob. Eq. 143. The quantum of proof required to overcome these answers has not been produced in this case. There was no testimony directly impeaching the purchase alleged by defendants' answer, or the payment of the consideration or the delivery of the deed as alleged in the answers. Several circumstances were shown by the evidence, which, standing alone and unexplained, would have furnished inferences of fraud,—whether sufficient to entitle complainants to recover, it is unnecessary for us to determine; but these matters were either explained or denied in answer to specific interrogatories in the bill, and these answers have not been overcome by the requisite amount of testimony.

The decree of the circuit court is reversed, with directions to dissolve the injunction and dismiss the bill.

(40 Fla. 428)

STANSEL v. ROUNTREE et al.

(Supreme Court of Florida. Jan. 9, 1899.)

ATTACHMENT—CLAIMS BY THIRD PERSONS.

In order to maintain a claim under the statutes of this state to personal property levied upon by an officer, the claimant must, at the time he institutes his proceeding, have not only some right in the property superior to the writ levied upon it, but he must have a right to present possession of such property.

(Syllabus by the Court.)

Error to circuit court, Madison county; John F. White, Judge.

An execution in favor of Richard J. Stansel against David Brown and others was levied on property to which Andrew J. Rountree and another, partners as Rountree & Co., interposed a claim. There was a judgment for claimants, and plaintiff brings error. Reversed.

H. J. McCall, for plaintiff in error. W. C. McCall, for defendants in error.

CARTER, J. On September 25, 1893, defendants in error interposed a claim to certain personal property levied on by the sheriff of Madison county under a writ of attachment in favor of plaintiff in error, against David Brown, June Brown, Daniel Brown, and Handy Brown, by making affidavit that said property belonged to them, and giving bond payable to plaintiff in error, conditioned as required by our statutes. The writ of attachment does not appear in the record, nor does the record show when it issued, nor the date of the levy. The claim proceeding was tried October 12, 1894, in the circuit court of Madison county, and the jury found for claimants. Plaintiff in error moved for a new trial, which was overruled, and, from the judgment entered upon the verdict, sued out this writ of error.

Rountree & Co. based their claim to the property upon an instrument in writing, as follows:

"Georgia, Brooks County. By the 1st day of January, after date, we or either of us promise to pay Rountree & Co., or bearer, one hundred and twenty-five and $\frac{99}{100}$ dollars, with interest from maturity at eight per cent. per annum, and reasonable charges, not less than ten per cent., for attorney's fees, if any are incurred in the collection hereof, hereby waiving and expressly renouncing all homestead and exemption rights, for value received,—one bay mare, colt, and one bay horse. And, to secure the payment of said indebtedness, I hereby bargain, sell, and convey to the payees of this note, their heirs and assigns, the following property, which is expressly declared to be my individual property, free from any lien whatever, to wit: One bay mare, about thirteen years old, and colt; one roan Texas horse, about four years old, bo't of Mr. Theus; and Dan Brown m'tg's one mare mule, about twelve years old, named Pet, and one bay mare mule, about seven years old, same stock mortgage in mortgage signed with June Brown; one mouse-colored Texas mule, about eight years old, named —, mortgaged by Handy Brown; also one sorrel pony, Charlie. And, in case of failure to pay said indebtedness, at the maturity thereof, the payees of this note, their agents, attorneys, heirs, or assigns, are hereby irrevocably authorized and empowered to seize and take possession of said property, and to sell the same for cash, at public outcry, in front of the court-house door in said county, after having advertised said property at said court-house door for ten days by written or printed notices, and apply the proceeds of said sale to the payment of said indebtedness and all costs of said sale, including ten per cent. additional for further attorney's fees, and the balance, if any, to be subject to my order. And the payees of said note, their agents, attorneys, heirs, and assigns, are fully author-

ized to bid at said sale, and to make a fee-simple title to the said property to the purchaser or purchasers.

"Witness my hand and seal, this January 9th, 1893. Daniel Brown. [L. S.]

"Handy Brown. [L. S.]

"Signed, sealed, and delivered in presence of "L. M. Rodgers.

"Lewis Joiner, N. P. B. C. Ga."

Although the trial was had after the debt mentioned in this instrument had matured, there was nothing to show that this debt was not paid by the Browns at maturity.

Evidence intended to show that, under the laws of the state of Georgia, this instrument was a conveyance passing title, and not a mere mortgage, with power of sale, was introduced by claimants; also evidence tending to prove that the property therein described was the identical property involved in the claim proceeding. This property, after the execution of the instrument above set forth, remained in possession of the Browns until the claim was interposed; and it seems to have been redelivered to the Browns by claimants, after obtaining possession of same under their claim proceedings. There was no evidence to show that the property was in the state of Georgia at the time of the execution of the instrument above mentioned, but it does appear that some time in the spring or summer of 1893 the property was removed from Georgia to Florida by the Browns.

The only question presented for adjudication is whether the evidence is sufficient to support the verdict. Plaintiff in error contends that the conveyance to claimants from the attachment defendants was a mere mortgage, conveying no title sufficient to authorize the interposition of a claim. Defendants in error contend that the conveyance was, under the laws of the state of Georgia, not a mortgage, but a deed passing title, and that the same construction should, by reason of private international law, be given to it in this state. We regard it as immaterial whether the instrument is to be treated as a deed or a mortgage, because, under our view of the nature of a claim proceeding, we think it essential that claimants should have a right of present possession, to enable them to maintain a claim to the property levied upon. This instrument, whether deed or mortgage, by authorizing claimants to take possession of the property upon default in payment of the debt at maturity, impliedly leaves possession of the property with the Browns until such default; and the parties themselves seem to have so construed it. No default in payment of the debt had happened at the time the claim was interposed in this case, for the debt was not then due. In *Price v. Sanchez*, 8 Fla. 136 (text, 143), this court said that the claim proceeding is a substitute for the action of trespass or trover at common law, and differs only in its being summary, and not having formal pleadings. A claimant should not be permitted to deprive an officer of the pos-

session of property levied upon, unless his right to possession is superior to that of the officer; nor can he maintain trespass or trover at common law for injuries to or conversion of goods and chattels, unless he has a right to present possession of such property. Valuable, temporary, or limited interests in personal property would be practically exempt from execution if the ultimate owner is permitted to recover the property from an officer before his right to reduce it to possession had accrued. In order to maintain a claim under our statute, the claimant must not only have some right in the property superior to the writ levied upon it, but he must have a right to present possession of such property. *Freem. Ex'ns*, § 277; *Allen v. Russell*, 19 Tex. 87; *Willis v. Thompson*, 85 Tex. 301, 20 S. W. 155; *Kirschenschlager v. Armitage Herschel Co.*, 58 Mo. App. 165; *Paper Co. v. Mangan*, 60 Mo. App. 76; *Hamilton v. Mitchell*, 6 Blackf. (Ind.) 131; *Philbrick v. Goodwin*, 7 Blackf. (Ind.) 18.

The judgment is reversed, and a new trial granted.

(40 Fla. 409)

STATE ex rel. BRADLEY v. CONE, Sheriff.

(Supreme Court of Florida. Jan. 9, 1899.)

MANDAMUS—EXECUTION SALES.

Mandamus does not lie to compel a sheriff to sell real estate levied upon by him under an execution issued upon an ordinary money judgment, as in such case the relator has other adequate remedies at law against the sheriff for his neglect of duty.

(Syllabus by the Court.)

Mandamus by the state, on the relation of Charles E. Bradley, executor of the will of Calvin W. Bradley, deceased, against W. N. Cone, sheriff. Peremptory writ denied.

R. W. Williams, for relator. W. N. Cone, in pro. per.

CARTER, J. This court, on January 22, 1895, upon petition of the relator, issued an alternative writ of mandamus to respondent, commanding him to sell, according to law, certain real estate levied upon by him under an execution more fully described hereinafter, and to collect the amount due upon said execution, or show cause before this court why he had not done so on February 5, 1895. From the recitals of the alternative writ, it appears that on May 8, 1894, the relator obtained judgment against George A. Lamb, N. M. Bowen, H. H. Emmons, and William Hardon for \$286.19 and costs, in the circuit court of Leon county; that thereafter, on May 10, 1894, a writ of execution issued upon said judgment from said court, addressed to all and singular the sheriffs of the state of Florida to execute; that this execution was, by the sheriff of Leon county, transmitted to respondent, with instructions to levy and collect same from property in Columbia county subject thereto; that respondent received said

writ, and about May 24, 1894, levied same upon certain real estate in Columbia county as the property of said William Hardon, and advertised same to be sold on the first Monday in July, 1894; that, disregarding his duty in the premises, the respondent declined to sell the property as advertised, and declined and refused to readvertise, or to take any other or further steps to sell said property to satisfy the execution, although relator had repeatedly demanded of him to proceed with said sale. The respondent's return denies none of these allegations, but insists that his refusal to sell was rightful, because, as he alleges, the judgment upon which said execution issued was recovered in Leon county circuit court, and a transcript thereof had never been recorded in the proper record of Columbia county, where the real estate levied upon was situated; that for this reason the judgment was not a lien upon the land, and he had no power to sell under the execution issued thereon from the Leon county circuit court. Respondent further alleges that he had offered to proceed with the sale if relator would give an indemnity bond, which the relator had declined to do. Relator moves to quash the return, and to issue the peremptory writ against respondent, upon the ground that the return does not set forth sufficient facts to justify respondent's refusal to sell under the writ of execution.

In *State v. Craft*, 17 Fla. 722, it was said, in a case somewhat similar to the present one, that "the proceeding by mandamus can only be resorted to where there is no other adequate legal remedy to accomplish the purpose. The plaintiff wants to make his money; he has nothing else in view. If a sheriff refuses to execute the writ, when it is his duty to execute it, the plaintiff may have his action at law against the sheriff. We have not found any case decided by the courts allowing a mandamus to compel a sheriff to make a levy under an execution in his hands. The court has such control over its officer, and the plaintiff has such right of action for willful neglect of duty, that it seems hardly possible that a mandamus should be resorted to, though *Mos. Mand. p. 60*, suggests that such writ may lie when other remedies prove to be inadequate. But that point has not been reached in this case." In that case the sheriff of Hillsboro county declined to levy an execution in favor of relator against one Kennedy upon certain real estate pointed out to him by relator as the property of Kennedy, basing his refusal upon the ground that the property was recorded in the name of Kennedy's wife. This court affirmed a ruling of the circuit court of Hillsboro county, dismissing an alternative writ of mandamus against the sheriff requiring him to make the levy or show cause to the contrary. The remarks quoted from that case are quite applicable to, and we think decisive of, the present one. The writ of mandamus was never intended as a substitute for other remedies, but rather to afford relief in cases of clear legal right, where other remedies do not exist

or are inadequate. There are unquestionably ministerial duties of a sheriff that can be enforced by mandamus, as where he refuses to execute a writ of possession for specific property (*Fremont v. Crippen*, 10 Cal. 211), but cases of this kind are clearly distinguishable from the one at bar. In the former, the plaintiff in the writ is entitled to possession of specific property, and in such case no form of action, at law or in equity, against the sheriff can give him adequate relief; that is, possession of the property. In this case, however, the relator is entitled to nothing but the money on his judgment, and, if the sheriff declines to collect it when it is his duty to do so, the relator has adequate remedies at law to recover damages for the respondent's refusal or neglect to perform his duties (*Love v. Williams*, 4 Fla. 126); and in such case mandamus will not lie to compel the sheriff to levy or sell (*Habersham v. Sears*, 11 Or. 431, 5 Pac. 208).

Without determining whether the return of the respondent discloses a valid excuse for his failure to sell the property levied upon, we are of opinion that the alternative writ fails to show a case entitling relator to the peremptory writ. The motion to quash is therefore refused, and the peremptory writ denied, with costs against the relator.

(40 Fla. 432)

Ex parte SIMMS.

(Supreme Court of Florida. Dec. 17, 1898.)

MUNICIPAL CORPORATIONS—DELEGATED POWERS— PRIVILEGE TAXES—INTOXICATING LIQUORS —CONSTRUCTION OF STATUTE.

1. The municipality of Jacksonville has no power, either by special charter or by any general law, to segregate the several elements of right that accrue to its citizens under one taxable privilege, as recognized, defined, and declared by the general revenue laws of the state, and to impose by ordinance a license tax upon such segregated element of the one privilege, as a separate and distinct privilege of its own creation.

2. The general revenue laws of the state, in imposing license taxes upon dealers in liquors, group the various intoxicants, therein designated as "spirituous, vinous, and malt liquors," into one general class of merchandise, and provide that the dealer in any one or all of such several intoxicants shall be subject to the one license tax therein imposed, and declare in express terms that dealers paying the same, and receiving a license therefor, shall be authorized to sell spirituous, vinous, or malt liquors, or any such liquors. The city of Jacksonville, under the special authority of its charter to "license and tax privileges," and under the power conferred upon municipalities generally by the general revenue laws of the state to "impose taxes on any business, profession or occupation not mentioned" in said general revenue acts, has no authority to enact an ordinance that imposes one license tax, that, when paid, gives to the licensee the right to sell spirituous and vinous liquors, either at wholesale or retail, and malt liquors at retail only, and that imposes upon the wholesale dealer in malt liquor alone another separate and distinct license tax. The licensed liquor dealer, whether at wholesale or retail, has the right, as elements of a single taxable privilege, to deal in,

at wholesale or retail, as the case may be, all three of the general classes of liquors known as "spirituous, vinous, and malt"; and such an ordinance as the one mentioned is unauthorized and void, wherein it undertakes to except wholesale dealers in malt liquors from the license it grants to wholesale dealers in spirituous and vinous liquors, and wherein it undertakes to impose a separate license tax upon such wholesale dealers in malt liquors alone.

3. Statutes conferring authority to impose taxes must be construed strictly, and delegated corporate powers to municipalities—particularly grants of powers that are out of the usual range, and that may result in public burdens, or which in their exercise touch the right to liberty or property, or any common-law right of the citizen—must likewise be strictly construed; and when, in such construction, there is any ambiguity or doubt as to the extent of the power, it is to be determined in favor of the state or general public, and against the state's grantee.

(Syllabus by the Court.)

Error to circuit court, Duval county; Rhydon M. Call, Judge.

Petition by Robert W. Simms for a writ of habeas corpus. The writ was denied, and petitioner brings error. Reversed.

D. O. Campbell, for plaintiff in error. J. M. Barra, for defendant in error.

TAYLOR, C. J. On September 27, 1898, the city council of the city of Jacksonville adopted an ordinance entitled "An ordinance providing for and regulating the registration of all persons, firms and corporations engaged in a business, profession or occupation in the city of Jacksonville, fixing the license taxes for the year October 1, 1898, to October 1, 1899, and regulating the doing of business under such licenses." Such ordinance, among other things, provided as follows:

"Sec. 2. That from and after the first day of October, 1898, and until the first of October, 1899, no person shall engage in or manage the business, profession or occupation or occupations hereinafter mentioned and required to be licensed by the city without first having paid the amount of license tax required therefor to the city treasurer for the use of the city, and obtained a license therefor. The license shall be made out by the recorder on production of the treasurer's receipt for the amount, which receipt shall be countersigned by the comptroller."

"Sec. 4. No person, firm, corporation or association shall engage in or manage any business, profession or occupation, in this section mentioned, without first obtaining from the city a license therefor, and the assessments of such taxes are hereby affixed, as follows:

Liquors, dealers in spirituous, vinous or malt liquors, other than wholesale dealers in beer, for each place of business. . . \$ 400
Wholesale dealers in beer, including brewers' agents, all persons storing beer in the city for delivery, and all dealers selling beer by the keg, quarter-keg or cask to retail dealers, shall pay for each place of business or agency, a special license tax of. 1,000

No license other than the special license for wholesale dealers in beer shall cover the sell-

ing of beer by the keg, quarter-keg or cask to retail dealers."

"Sec. 6. That any person violating any provision of this ordinance shall, upon conviction, be punished by fine not exceeding \$500, or imprisonment not exceeding ninety days."

For an alleged violation of that feature of this ordinance that requires the payment of a special license tax of \$1,000 by any person selling "beer" at wholesale, the plaintiff in error was tried and convicted by the judge of the municipal court of said city, and sentenced to pay a fine of \$500, or stand committed to the city jail for the full term of 90 days.

On the 18th day of November, 1898, after such conviction and sentence, the plaintiff in error filed his petition for a writ of habeas corpus in the circuit court of Duval county, alleging therein that he was a resident of said city of Jacksonville, Fla., and engaged in business as a dealer in spirituous, vinous, and malt liquors; that he has three places of business within the corporate limits of the municipality of Jacksonville, located about the central business part of the city, for all of which places he has duly obtained a permit from the board of county commissioners of Duval county, Fla., paid the state license tax of \$1,500, paid the county license tax of \$750, and the city license of \$1,200, securing the state, county, and city license for each place of business; that in one of said places of business he stores and sells to retail dealers beer in kegs, half kegs, and casks, for which place of business the said municipality demands an additional license tax of \$1,000, claiming that the license that he had already paid for and secured does not permit him to sell to dealers beer in kegs, half kegs, and casks, and that, in order to sell beer in said quantities to dealers, he must pay an additional license tax of \$1,000, and secure an additional license. The said petition then alleges the petitioner's neglect and refusal to pay said additional special license tax of \$1,000, his arrest, conviction, and sentence by the city authorities under the ordinance above quoted, and that he will be kept in custody and deprived of his liberty under such sentence; that the beer that he so sells at one of his said places of business is a malt liquor, is the least intoxicating of any liquors, and is the same as he has always sold, and in the same quantities, under his state and county licenses and under his municipal license, all of which he has already paid and secured, except the license for which a tax of \$1,000 has been demanded as aforesaid; that the said provision of said ordinance is excessive and unreasonable; that the said city has exceeded the bounds of the law in its adoption and enforcement, and that the same is absolutely void, and that he is not liable for the said special license tax of \$1,000; and that his detention in custody for said alleged violation of said ordinance is unlawful. Said petition prayed for the writ of

habeas corpus, and that petitioner might be discharged from custody.

The circuit judge, after argument by counsel for the petitioner and the municipality, denied the prayer of the petition, and this decision the petitioner seeks a reversal of by writ of error from this court.

The municipality of Jacksonville seeks to justify and uphold the ordinance in question upon the following provisions of law:

(1) The following provision in section 9 of chapter 4115, approved June 2, 1893, the same being a general state law for the assessment and collection of revenue, viz.: "Counties and incorporated cities and towns may impose such further taxes of the same kind upon the same subjects as they may deem proper, when the business, profession or occupation shall be engaged in within such county, city or town. * * * But such city, town or county may impose taxes on any business, profession or occupation not mentioned in this section, when engaged in or managed within such city, town or county;" the same provisions of law being re-enacted in the same language in section 9 of the subsequent general revenue act (chapter 4322), approved June 1, 1895.

(2) The following proviso from section 57 of said chapter 4115, viz.: "Nothing in this act shall be construed as in any way abridging or limiting powers to assess, levy or collect taxes, licenses or assessments which have been or may be granted to any municipal corporation by special act or charter act, or as limiting such municipal corporations in the method of assessing, levying or collecting the same to the methods established by this act;" the same provision being re-enacted in the same language in section 56 of the subsequent general revenue act (chapter 4322), approved June 1, 1895.

(3) The following provision in section 1 of chapter 4300, approved June 2, 1893, the same being a supplementary act to a former act establishing and providing for the government of the city of Jacksonville, viz.: "Privileges may be licensed and taxed, and the amounts of such taxes shall be fixed by city ordinance."

It is claimed that this last-quoted provision in the supplement to the charter act of the city, construed in connection with the other provisions quoted from general revenue acts, gives to the city full power to pass the ordinance in question.

The real inquiry, upon whose solution the ordinance must stand or fall, is, can the city of Jacksonville, by ordinance, under the delegated general power to tax privileges, segregate the several elements of right that accrue to the citizen under one taxable privilege, as recognized, defined, and declared by the general statute law of the state, and tax each of such elements, as a separate and distinct privilege of its own creation? All of the general revenue acts, since and including that passed in 1887, in making provision for the

licensing and taxing of dealers in liquors, group the various intoxicants, designated therein as "spirituous, vinous, and malt liquors," into one general class of merchandise, and declare that the dealer in any one or all of such several intoxicants shall be subject to the one license tax therein imposed upon the privilege known as "dealers in spirituous, vinous or malt liquors," and all of such general statutes declare in express terms that "dealers paying the same and receiving a license therefor shall be authorized to sell spirituous, vinous or malt liquors, or any such liquors"; thus declaring that the one licensed privilege to deal in liquors or intoxicants generally shall carry with it to the licensee the right, as elements of such single privilege, to deal in either one, or all combined, of the three general classes of intoxicants generally known as "spirituous, vinous, and malt liquors"; each of the three general classes embracing a long list of intoxicants, that, while severally distinguishable from each other by their constituent elements as well as by name, all fall within one or the other of said three general classes, the right to deal in which constitutes but a single taxable privilege.

We are not now called upon to determine the extent of the city's power to fix the amount of licenses, or to create, classify, or graduate licenses upon those occupations not specifically taxed by the state, for the privilege here sought to be taxed is one created and taxed by the state; and in *City of Jacksonville v. Ledwith*, 26 Fla. 163, 7 South. 885, it was held that under the city's charter act, as amended in 1889, the word "privileges" meant those occupations and businesses of the same kind as those specially mentioned in the charter, and that are taxable by law for state purposes, and that the city had no power to select the subjects of occupational taxes for raising revenue, but was limited to the occupations named in its charter act, or the revenue laws of the state. There has been no subsequent amendment to the city's charter that can change this construction, as applied to privileges taxed by the state. The city claims that it has the power to classify and graduate the tax to be paid by its licensees of privileges taxed by the state, and that this ordinance does no more than that. Assuming, but not deciding, that the power exists as claimed, we are of opinion that this ordinance does not classify and graduate the applicants for the privilege, but that it divides one privilege into two, and discriminates between venders of articles necessarily belonging to the one privilege by requiring a separate license tax to sell that special article.

The effect of the city ordinance under discussion, when it imposes a license tax of \$400 upon dealers in "spirituous, vinous and malt liquors, other than wholesale dealers in beer," without making any distinction between the wholesale and retail dealer in the two classes known as "spirituous and vinous liquors," is to permit the sale either at wholesale or retail

of the two classes known as "spirituous and vinous," and the retailing, only, of the third class, known as "malt liquor" or "beer," for the one tax of \$400, while it singles out the dealer in beer alone, and imposes upon him a separate and special tax of \$1,000 when he sells that particular commodity in wholesale quantities; and this under a delegated general power to "license and tax privileges," and to "impose such further taxes of the same kind upon the same subjects" as the state by her general revenue laws has imposed license taxes upon, and in the face of the general state law that declares, in effect, that the licensed privilege to deal in liquors shall carry with it to the licensee the "authority to sell spirituous, vinous or malt liquors, or any such liquors." When, as in this ordinance, the city undertakes to curtail the privilege by constructing out of its constituent elements two separate taxable privileges, and imposes one tax, to cover the wholesaling and retailing of spirituous and vinous liquors and the retailing of beer, and another special and independent tax for the wholesaling of beer alone, it has transcended the authority delegated to it, and the provisions of such ordinance imposing such independent special tax upon the one element of the privilege are unauthorized and void; being inconsistent with, and in conflict with, the general provisions of law, and not authorized by any charter act. The provisions of said ordinance excepting wholesale dealers in beer from the general license to sell spirituous, vinous, and malt liquors, and imposing a separate tax upon wholesale dealers in beer, are therefore void.

The general rule is that statutes conferring authority to impose taxes must be construed strictly. *Moseley v. Tift*, 4 Fla. 402. Another general rule universally recognized is that delegated corporate powers to municipalities—particularly grants of power that are out of the usual range, and that may result in public burdens, or which, in their exercise, touch the right to liberty or property, or any common-law right of the citizen—must be strictly construed; and when, in such construction, there is any ambiguity or doubt as to the extent of the power, it is to be determined in favor of the state or general public, and against the state's grantee. 1 Dill. Mun. Corp. §§ 89-91; *Ex parte Mayor*, etc., of Town of Florence (In re Jones) 78 Ala. 419; *City of Canton v. Nist*, 9 Ohio St. 439; *Kniper v. City of Louisville*, 7 Bush, 599; *City of Brenham v. Water Co.*, 67 Tex. 542, 4 S. W. 143; *Hanger v. City of Des Moines*, 52 Iowa, 193, 2 N. W. 1105; *City of Corvallis v. Carlile*, 10 Or. 139; *Minturn v. Larue*, 23 How. 435; *Williams v. Davidson*, 43 Tex. 1; *Kirkham v. Russell*, 76 Va. 956.

Two cases analogous in facts to the one under consideration, and in which the attempted exercise of the taxing power were declared to be void, are *Hotelling v. City of Chicago*, 66 Ill. App. 239; *Vosse v. City of Memphis*, 9 Lea, 204.

The judgment of the circuit court under review is reversed, with directions to grant the writ as prayed, and for such further proceedings as may be consistent with law and this opinion.

(41 Fla. 138)

CATOR et al. v. BLOUNT.

(Supreme Court of Florida. Jan. 24, 1899.)

ASSIGNMENT FOR CREDITORS—PROOF OF CLAIM—PROPERTY NOT ASSIGNED—EXEMPTIONS.

1. A creditor, by filing with an assignee for creditors his debt against the assignor, and accepting from such assignee a pro rata dividend upon such debt, in accordance with the terms of a general assignment for creditors made under the statutes of this state, does not thereby affect his right to subject to his debt personal property reserved by the assignor from his assignment as exempt, but which in law is not exempt from such creditor's debt, because the debt was contracted for the purchase money of the property.

2. Under section 1, art. 10, Const. 1885, "no property shall be exempt from sale * * * for the payment of obligations contracted for the purchase of said property," and a debtor cannot, by selecting certain personal property as a part of his exemption, and excepting same from the operation of a general assignment made by him, clothe such property with an exemption from sale for the payment of obligations contracted for the purchase thereof.

(Syllabus by the Court.)

Error to circuit court, Escambia county; William D. Barnes, Judge.

Action by Robinson W. Cator and others against A. O. Blount, Jr. Judgment for defendant, and plaintiffs bring error. Reversed.

S. R. Mallory and Maxwell & Maxwell, for plaintiffs in error. Blount & Blount, for defendant in error.

CARTER, J. John E. Muller began merchandising in the city of Pensacola in March, 1893. On the 10th day of that month he purchased from plaintiffs in error various items of merchandise on credit. In the early part of October, 1893, he executed a general assignment for the benefit of creditors, excepting therefrom and reserving as his exemption \$1,000 worth of personal property, of which about \$600 consisted in articles purchased from plaintiffs in error on March 10, 1893. This exempt property never went into the hands of the assignee, but was by Muller turned over to defendant in error; for what purpose is immaterial to the only question presented in this court. On October 6, 1893, plaintiffs in error sued Muller in the circuit court of Escambia county to recover the purchase price of the goods sold him on March 10, 1893, and a writ of garnishment was issued to defendant in error. Judgment was recovered in the principal suit, and the issues involved in the garnishment were submitted to a jury, who found for the garnishee, in whose favor judgment was entered, from which this writ of error was taken.

Upon the trial of the garnishment, the court instructed the jury: "If you find from the

evidence that the goods in the hands of the garnishee had been included in his exemptions by the defendant, Muller, duly and legally set apart, in making a general assignment, then they are exempt from garnishment, whether the debt now sued for was for the purchase price thereof or not, and you will find for the garnishee." The only error assigned for consideration by this court is the giving of this instruction.

After the case was submitted on brief in this court by plaintiffs in error, the defendant in error moved to dismiss upon the ground that, since the rendition of judgment from which the writ of error was sued out, the plaintiffs in error had filed with Muller's assignee a sworn statement of their account, and received from the assignee their pro rata share of the proceeds of the assigned property. As the motion seemed to involve a consideration of the merits, we continued it, to be taken up when the case should be reached on regular call of the docket.

I. In support of the motion to dismiss, defendant in error argues that by filing their claim with, and accepting a dividend from, Muller's assignee, plaintiffs in error thereby accepted a benefit from, and ratified and confirmed every clause in, the assignment; that they will not be permitted to accept a benefit from the assignment, and at the same time repudiate a reservation to Muller secured by the same instrument. In support of this contention, we are referred to authorities which hold that creditors who file claims or accept dividends under a voluntary assignment thereby elect to accept its provisions, and will be held to acquiesce in its validity, and in the disposition of the proceeds arising under it, according to its terms; that a creditor will not be permitted to accept a benefit from, and at the same time repudiate any provision in, a voluntary assignment. But these authorities do not cover the question here involved. The contest here is not over property included in, but over property expressly excluded from, the terms of the instrument under which a dividend was paid to plaintiffs in error. This contest began before plaintiffs in error accepted any benefit from the assignment. The assignment did not purport to convey the property now sought to be subjected by the garnishment. Under our statute regulating voluntary assignments, Muller was required to assign all of his property, real, personal, and mixed, except such as was by law exempt. It provided no method by which any exemption might be set apart to him out of property assigned. It simply authorized him to except from his conveyance so much of his property as was by law exempt, but it did not constitute him sole judge as to what was exempt. His right to hold exempt property from his creditors springs from, and is regulated by, the law, and not by his contract with the assignee. As to his personal exemption, the law does not require him to omit it from his assignment. It authorizes him to do so if he

chooses. If he conveys it to the assignee for the purpose of distribution among creditors, his right to hold it as exempt ceases, because by his conveyance he has waived that right. If he chooses to convey that which is exempt, and to reserve that which is not exempt, it is his own fault. He has made his election, and must stand by it. The statute permits the assignor to leave out of his assignment—to except from its granting clause—that property only which, as a matter of law, is exempt; and there is nothing in the statute, nothing in the nature of an assignment, nothing in the act of a creditor who accepts a dividend from the assignee, which precludes the creditor from enforcing his demand at law against any property retained by the assignor which in fact is not exempt from the debt, although claimed by the assignor so to be. *Creager v. Creager*, 87 Ky. 449, 9 S. W. 380. The assignment does not convey any property to the assignor as exempt. It gives him no new title to any property reserved from its operation. The constitution, and not the assignment, determines whether property reserved from the assignment is exempt or not. The property reserved in this case was exempt from every debt due by the assignor, except those specifically mentioned in the constitution. The property reserved by the assignor is none the less his exemption because it may be subject to forced sale for a particular debt. If the debtor reserves property which the constitution does not relieve from liability for the debt of plaintiffs in error, they cannot be debarred from subjecting it to their debt by the acceptance of a dividend from a general assignment which excepts from its operation this specific property. The creditors in this case make no attack upon the assignment from which they have accepted a benefit. They concede that the assignment is valid; that the property claimed to be exempt was properly reserved from the assignment; and that it is exempt from every debt not excepted by the constitution. There is therefore no inconsistency in their acts; no election to accept, as applicable to their debt, their pro rata share of the assigned property only; no waiver of their right to subject other property owned by the debtor to their demand; no estoppel to deny that the reserved property is exempt from their debt for purchase money.

II. From what has been said, it is apparent that the instruction given by the court above quoted was erroneous. The constitution (article 10, § 1) expressly provides that "no property shall be exempt from sale * * * for the payment of obligations contracted for the purchase of said property." If the debt due plaintiffs in error was an obligation contracted for the purchase of property in the hands of the garnishee, the property was not exempt from a garnishment issued in aid of the collection of that debt, unless the creditors had waived their right to subject it. If the creditors, by accepting a dividend un-

der the assignment, did not waive their right to proceed against the property reserved as exempt, it certainly will not be pretended that their rights are taken away by an act of the debtor alone,—that of reserving from his assignment property claimed by him to be, but which in fact is not, exempt from sale to pay the creditors' debt. The debtor cannot, by selecting this property as a part of his exemption, and excepting same from the operation of his general assignment, clothe it with an exemption from sale for its purchase money, when by the constitution no property is exempt from sale for that class of debts.

The motion to dismiss is denied; the judgment of the court below is reversed; and a new trial granted.

(41 Fla. 115)

DURHAM v. STEPHENSON et al.

(Supreme Court of Florida. Jan. 28, 1899.)

EQUITY—DEMURRER TO BILL—MORTGAGES—FORECLOSURE—ATTORNEY'S FEE—ACKNOWLEDGMENT BY MARRIED WOMAN—AMENDMENT—DISMISSAL OF BILL.

1. A demurrer to a bill in equity seeking to make available, as against the whole bill, supposed defects relating to a part only of the case made and relief prayed, should be overruled.

2. Where written obligations are given for the purchase money of certain property, containing stipulations to pay reasonable attorney's fees, should it become necessary to collect them through an attorney, and a mortgage is executed purporting to secure the payment of the purchase money for said property in the manner evidenced by said written obligations, which are fully described in the mortgage, such mortgage, after maturity and nonpayment of said written obligations, can be enforced as a security for the attorney's fees, as well as for the principal and interest due upon the notes.

3. A married woman's acknowledgment to a mortgage embracing real estate constituting her separate statutory property, to the effect "that she signed the same freely, and relinquishes all dower and right of dower," is insufficient to render such mortgage effectual to pass her estate or right in such property.

4. Where a plea not purporting to constitute a defense to the whole bill is sustained, it is error to dismiss the entire bill; but the court should retain it for appropriate relief as to matters not covered by the plea.

5. When an officer has taken an acknowledgment, and made his certificate thereof, which has been delivered to and accepted by the grantee in the conveyance as the evidence of such acknowledgment, his power over the subject-matter ceases; and he cannot subsequently amend his certificate, or make a new one, in the absence of a reacknowledgment, or that which is equivalent thereto, on the part of the grantor.

(Syllabus by the Court.)

Appeal from circuit court, Hillsborough county; Barron Phillips, Judge.

Appeal of Lucien Durham against Herbert F. Stephenson and others. Decree for defendants, and plaintiff appeals. Reversed.

On December 15, 1894, appellant filed his bill against appellees in the circuit court of Hillsborough county, seeking foreclosure of a mortgage, reading as follows:

"This indenture, made this the 17th day of July, A. D. 1893, between Thomas Stephenson, Herbert F. Stephenson, and Mary A. Stephenson, wife of Thomas Stephenson, of Tampa, Florida, parties of the first part, and L. E. Durham, of Tampa, Florida, party of the second, witnesseth: That the said parties of the first part, for and in consideration of the sum of two thousand dollars (\$2,000.00), grants, bargains, sells and confirms unto the said party of the second part, and to his heirs and assigns, an undivided two-thirds interest in the mill property known as the 'South Florida Planing Mills,' the same being and situate on the reservation, near the Florida Central & Peninsular Railroad; and also that certain parcel, tract, or piece of land known as lots one, four, five, eleven, fourteen, nineteen, and twenty of block one, and lots two and twenty-two of block two, and lots two and three of block three, and lots three, four, twelve, and fifteen of block four, of a certain subdivision known as 'El Cerro,' according to map or plan of said subdivisions of record in the circuit clerk's office of Hillsborough county, Florida, together with all and singular the hereditaments and appurtenances thereunto belonging. This instrument is given to secure the payment of the purchase money of the above-named mills, and it is to be paid in the following manner, to wit: Two promissory notes of five hundred dollars (\$500.00) each, payable and due on the 17th day of January, 1894, and two promissory notes due the 17th day of July, 1894. A true copy of said notes is hereby set out: '\$500.00. Tampa, Fla., July 17th, 1893. Six months after date, we promise to pay to the order of L. E. Durham five hundred dollars, at the First National Bank of Tampa, Florida, for value received, with interest from date at the rate of ten per cent. per annum until paid. Now, should it become necessary to collect this note through an attorney, either of us, whether maker, security, or indorsee on this note, hereby agrees to pay all costs of such collection, including a reasonable attorney's fee. Herbert F. Stephenson. Thomas Stephenson.'

"The condition of this agreement is such that whereas the said parties of the first part, being indebted as above set forth, now, therefore, if the said notes shall be paid according to this agreement at maturity, principal and interest, then this deed shall be null and void; otherwise, to remain in full force and effect. Herbert F. Stephenson. Thomas Stephenson. Mary A. Stephenson.

"Signed, sealed, and delivered in presence of William Hunter, R. W. Easley.

"State of Florida, Hillsborough County: I hereby certify that on this, the 17th day of July, 1893, before me, R. W. Easley, a notary public, personally appeared Thomas Stephenson, Herbert Stephenson, and Mary A. Stephenson, wife of the said Thomas Stephenson, and acknowledged that they signed the foregoing instrument for the uses and purposes therein set out; and the said Mary A. Ste-

phenson, on an examination taken separate and apart from her said husband, acknowledged that she signed the same freely, and relinquishes all dower and right of dower. Witness my hand and seal of office, at Tampa, date aforesaid. R. W. Easley, Notary Public, Hillsborough County, Florida. [Seal.]"

This mortgage was filed for record, and recorded, in the office of the clerk of the circuit court of Hillsborough county on July 28, 1893. The four notes mentioned in the mortgage were attached to the bill as exhibits; and it was alleged that they were past due and unpaid, except the sum of \$1,580.58. The bill prayed an accounting of the amount due upon the notes for principal, interest, and attorney's fees; that the mortgaged premises be sold to pay same; and that defendants be barred of their right and equity of redemption in such premises. Herbert F. Stephenson demurred to the bill upon various grounds, the first alleging that there was no equity in the bill, and the fourth that "the complainant, in and by his said bill, seeks to recover attorney's fees from this defendant, as well as from his co-defendants, for the foreclosure proceedings in this suit, when the so-called 'mortgage,' attached as one of the exhibits to said bill, does not provide for the payment of attorney's fees by any of said defendants."

Thomas Stephenson and Mary A. Stephenson, his wife, filed a plea "that all the parcels of real estate described in the said bill of complaint, to wit, lots 1, 4, 5, 11, 14, 19, and 20 of block 1, and lots 2 and 22 of block 2, and lots 2 and 3 of block 3, and lots 3, 4, 12, and 15 of block 4, of a certain subdivision known as 'El Cerro,' according to a map thereof duly recorded, were at the time of the execution of the alleged deed or mortgage, and still are, the separate statutory property of the defendant Mary A. Stephenson, wife of the said Thomas Stephenson, the title thereto being vested in the said Mary A. Stephenson, and that the said Mary A. Stephenson has never legally conveyed the same to the complainant, either by mortgage, deed, or otherwise; and therefore the complainant has no mortgage lien thereon, and the same is not subject to foreclosure and sale, as the complainant seeks to have done in and by his said bill." Issue was joined on this plea; and on February 12, 1895, a decree was entered reciting that the case was submitted to the court upon the issue joined on the plea, and an agreed statement of facts, together with the original mortgage as matters of evidence; that thereupon, after argument of counsel, the court sustained the plea, and directed that the bill be dismissed; but, before entry of a formal order to that effect, complainant asked leave to amend his bill, by filing with and as a part thereof an amended certificate of the officer who took the acknowledgment of the mortgage sought to be foreclosed, the proposed amended certificate being in the following language: "State of Florida, County of Hillsborough. I hereby certify: That on the 17th day of July, A.

D. 1893, Mary A. Stephenson, wife of Thomas Stephenson, appeared before me, and on a private examination, separate and apart from her said husband, acknowledged that on the 17th day of July, A. D. 1893, she executed a certain deed of mortgage to L. E. Durham on the following property, to wit: An undivided two-thirds interest in the mill property known as the 'South Florida Planing Mills,' the same being situate on the reservation near the Florida Central & Peninsular Railroad, and also that certain tract, parcel, or piece of land known and described as follows: Lots 1, 4, 5, 11, 14, 19, and 20 of block 1, and lots 2 and 22 of block 2, and lots 2 and 3 of block 3, and lots 3, 4, 12, and 15 of block 4, of a certain subdivision known as 'El Cerro,' according to the map or plan of said subdivision on record in the circuit clerk's office of Hillsborough county, Florida. That she executed said mortgage with intent thereby to renounce and relinquish all her right, title, property, and estate at law, in equity, of, in, and to the said lands. And that the relinquishment and renunciation was made freely and voluntarily, without compulsion, constraint, fear, or apprehension of or from her said husband. Witness my hand and official seal, this the 9th day of February, A. D. 1895. R. W. Easley, Notary Public Hillsborough County. [Seal.]

The court denied this motion to amend, and sustained the plea.

On the same day, complainant having amended the bill so as to obviate the defects pointed out by the demurrer of Herbert F. Stephenson, except the first and fourth grounds thereof, the court overruled the first ground of demurrer, and sustained the fourth; and, complainant declining to further amend his bill, a decree was entered dismissing the bill, from which this appeal was taken to our June term, 1895. The agreed statement of facts submitted at the hearing is not incorporated into the record on appeal.

Wall & Stevens, for appellant.

CARTER, J. (after stating the facts). I. The bill was an ordinary one for foreclosure of a mortgage, and we perceive no defect which renders it subject to demurrer for want of equity. The first ground of the demurrer filed by Herbert F. Stephenson was therefore properly overruled. The fourth ground of demurrer should have been overruled, because it was too broad. It sought to make available, in bar of the whole bill, supposed defects relating to a part only of the relief prayed, viz. the recovery of attorney's fees for foreclosure of the mortgage. Aside from this, we think the mortgage does provide for the payment of attorney's fees by Herbert F. Stephenson. He executed the notes secured by this mortgage, and they each contain a clause binding the makers for the payment of a reasonable attorney's fee should it become necessary to collect the note through an attorney. The mortgage was made to secure the pay-

ment of purchase money for the planing mills in the manner evidenced by the four notes. If paid at maturity, nothing but principal and interest would be collectible; but if paid thereafter, and after it became necessary to collect through an attorney, reasonable attorney's fees would become a part of the amount due upon the notes, and secured by the terms of the mortgage.

II. We think the court's ruling upon the plea of Thomas Stephenson and Mary A. Stephenson was correct. The real estate attempted to be conveyed by the mortgage was the separate statutory property of Mary A. Stephenson, in whom the title was vested. The certificate of the officer attached to the mortgage showed that Mary A. Stephenson, on a separate examination, acknowledged that she signed the instrument freely, and relinquished all dower and right of dower in the property attempted to be conveyed. This certificate was obviously defective, because it failed to show that Mrs. Stephenson acknowledged that she "executed the same freely and voluntarily and without compulsion, constraint, apprehension, or fear of or from her husband," as required by section 1958, Rev. St. By the express terms of this section such acknowledgment is necessary "to render such * * * mortgage, * * * whether of separate estate or of dower, effectual to pass a married woman's estate or right." This plea did not purport to be a defense to the whole bill. The mortgage embraced other property not covered by the plea. Upon sustaining the plea, the court should not have dismissed the bill, but ought to have retained it for relief as to property not embraced in the plea.

III. The court below properly refused to permit the proposed amendment to the bill offered by the complainant. The officer's certificate, submitted as a part of such amendment, was made nearly 19 months after the execution, delivery, and record of the mortgage. At the time of the execution of the mortgage, he had given a certificate of the acknowledgment taken by him, which certificate had been accepted by complainant as a part of and recorded with the mortgage. Under these circumstances, the officer's powers with respect to such acknowledgment had ceased long before the execution of the amended certificate, and his subsequent certificate without a re-examination was a nullity. We are referred to several cases from Indiana, Mississippi, and Missouri which, it is claimed, sustain the proposition that an acknowledgment is a matter in pais, and the officer's certificate the evidence thereof, and that the certificate may be amended by the officer at any time while he remains in office so as to speak the truth. We hold that, upon principle, when an officer has taken an acknowledgment, and made his certificate thereof, which has been delivered to and accepted by the grantee as the evidence of such acknowledgment, his power over the subject-matter ceases;

and he cannot subsequently amend his certificate, or make a new one, in the absence of a reacknowledgment, or what is equivalent thereto, on the part of the grantor. The following authorities sustain this view, and the opposing decisions we think are unsound: 1 Devl. Deeds, § 542 et seq.; Bours v. Zachariah, 11 Cal. 281; Griffith v. Ventress, 91 Ala. 366, 8 South. 312; Transit Co. v. Sheedy, 103 Pa. St. 492; McMullan v. Eagan, 21 W. Va. 233; Elliott v. Peirsol, 1 Pet. 328; Merritt v. Yates, 71 Ill. 636.

As a result of the views herein expressed, the decree of the court below sustaining the plea of the defendants Thomas Stephenson and Mary A. Stephenson, and refusing to permit the amendment proposed to the bill by complainant, is affirmed. The decree sustaining the fourth ground of the demurrer of Herbert F. Stephenson, and dismissing the bill of complaint, is reversed, with directions to the circuit court to enter an order overruling the demurrer, and for further proceedings consistent with equity practice and this opinion.

(41 Fla. 77)

BISHOP v. TAYLOR.

(Supreme Court of Florida. Feb. 7, 1899.)

APPEAL—REVIEW—NEW TRIAL—BILL OF EXCEPTIONS—MONEY HAD AND RECEIVED—EVIDENCE.

1. Motions for new trials are addressed to the sound judicial discretion of trial courts, and, where such courts grant motions of this character, their decisions are presumed to be in accordance with the justice and merits of the cause, unless the contrary appears by the record; and an order granting a new trial should not be disturbed by an appellate court unless it appears affirmatively from the record that there has been an abuse of a sound judicial discretion, or that some settled principle of law has been violated.

2. Where the burden of proof is upon a plaintiff, and the evidence before the jury is legally insufficient to support a verdict in his favor, and the jury find a verdict for defendant, the trial court is not justified in setting aside such verdict upon the ground that it is contrary to the evidence and the weight of evidence.

3. Where the record shows that a bill of exceptions was presented to the circuit judge for settlement on a certain day; that he declined to settle and sign it on that day because there were some "inaccuracies" in same; that it was signed on a subsequent day; and the bill, as signed, purports to give in full the direct and cross examination of witnesses, the evidence which plaintiff and defendant introduced to maintain the issues on their respective parts, and states that "plaintiff rested his case" at the conclusion of certain testimony, and purports to give the testimony of plaintiff in rebuttal,—the appellate court will assume that the bill of exceptions contains all the evidence adduced at the trial.

4. A count for money had and received may be proved by any legal evidence showing that defendant has possession of the money of plaintiff, which in equity and good conscience he ought to pay over, but plaintiff cannot recover upon such a count unless he proves title to the fund sought to be recovered.

5. In an action for money had and received, any evidence is admissible on behalf of defendant which tends to show that he in good faith received the fund sought to be recovered as money due to himself, and not to the plaintiff.

6. Where evidence is received without ob-

jection, and no motion to strike it out is made, the reception of such evidence constitutes no ground for granting a new trial.

(Syllabus by the Court.)

Error to circuit court, Marion county; William A. Hocker, Judge.

Assumpsit by Charles E. Taylor against John A. Bishop. There was a verdict for defendant, and the court granted a new trial, and defendant brings error. Reversed.

The defendant in error began an action of assumpsit against the plaintiff in error, in the circuit court of Marion county, the declaration filed December 5, 1892, containing only common counts for money received, money lent, and accounts stated, in the sum of \$2,000. The defendant filed his plea, "Never was indebted," and, issue being joined thereon, the cause was tried before a jury on October 11, 1893, resulting in a verdict for defendant. Thereupon plaintiff filed his motion to set aside the verdict, and grant a new trial, upon the following grounds, viz.:

"(1) The verdict of the jury is contrary to the evidence and the weight of evidence.

"(2) Also that the court erred in admitting evidence of defendant to show another and different contract, which was inadmissible under the pleadings.

"(3) Also upon additional ground that the court erred in allowing evidence to be introduced in relation to the drawing of checks for money paid by defendant to L. M. Thayer and the plaintiff, which evidence was incompetent, and tended to prejudice the minds of the jury.

On October 21, 1893, the court granted the motion, and the defendant sued out this writ of error to review that ruling. The first error assigned, and the only one considered, is that "the court erred in granting the plaintiff's motion to set aside the verdict of the jury and grant a new trial."

The plaintiff's evidence in chief was as follows:

Charles E. Taylor: "I am the plaintiff. I know the defendant, and have known him many years. The defendant is indebted to me in the sum of \$2,000 and interest for an agreement between us. In 1891,—in June, I think it was,—Mr. Bishop was in Ocala getting up phosphate land to sell the French Company. One day I was talking with Capt. L. M. Thayer, the general manager of the Peninsular Phosphate Company, on the front porch of the Ocala House. We saw Mr. Bishop pass, and I suggested to Capt. Thayer to sell him his company. Capt. Thayer said that, if I would introduce him to Mr. Bishop, and the company was sold, he would pay me a commission of \$5,000, if it sold for \$125,000; and I said, 'If you do, I will give you half.' Capt. Thayer did not know Bishop. We went to Mr. Bishop's room, in the Ocala House. He was lying on the bed. I introduced Capt. Thayer as the manager of the Peninsular Company, and he asked Bishop if he wanted its property. Mr. Bishop asked the price. Capt.

Thayer asked Bishop if he expected a commission, and Mr. Bishop answered, 'No;' that he got his commission from the other side. Then Capt. Thayer said the price of the Peninsular Company was \$125,000. A few days after I met Mr. Bishop, and I said to him: 'You are a good friend of mine. I will be busy, and not have time. Run this through for me, and I will give you \$500.' Later on I made up my mind I would give him \$1,000, because I thought Bishop was going to take advantage of my confidence in him. On November 12, 1891, Bishop paid \$2,000; \$1,000 to Capt. Thayer, and \$1,000 to me, by check. That leaves a balance of \$2,000, which is the amount I sue for in this case. Bishop received \$5,000 from the Peninsular Phosphate Company." Cross-examination: "I don't know whether commission was paid by the company to Bishop for my account. We made our agreement on the street of the public square in Ocala. Nobody was present. Don't remember whether it was on the west side or north side. It was one side or the other; don't remember which. Was not on Ocala House porch. The \$2,000 was paid in two checks. Was not to either my order or to Capt. Thayer's order. The checks were drawn to order of Mr. Bishop, and indorsed by him, and delivered to us. The checks were drawn in that way, and not to order, for private reasons. I never instructed the Peninsular Company to pay Mr. Bishop this commission for me. I never demanded the commission from the company. Don't believe they knew I was to get a commission. Q. What did you do to earn this commission? Ans. I was to receive this commission for introducing Capt. Thayer to Mr. Bishop, and also for getting Capt. Thayer to write Bishop a letter offering to give Bishop \$5,000 to refuse to buy the company under the contract."

Richard McConathy: "I was secretary and treasurer of the Peninsular Phosphate Company. The company sold its property to John A. Bishop for \$125,000, but a commission was paid to him of \$5,000. The \$5,000 was paid to Bishop in two amounts,—\$2,500 by check when first money was paid, in November, 1891, and the other \$2,500 credited on Mr. Bishop's note due the company in May, 1892." Cross-examination: "The company did not pay this money to Mr. Bishop for Mr. Taylor. We did not know Mr. Taylor in the transaction. I don't remember the exact time I first learned that a commission was to be paid, but it was some time after our first contract with Mr. Bishop. The first time I learned of the commission was when Capt. Thayer came to my office, and informed me that a commission was to be paid to Bishop. Think Mr. Bishop and Mr. Anthony were present. I was surprised to learn that a commission was to be paid, as nothing had ever been said about a commission. I always thought there was something wrong. We did not know anybody else in the matter but Bishop. The company did not know Mr. Taylor was interested in the

\$5,000. Capt. Thayer did not tell us that he promised Mr. Taylor a commission, but said that it did not make any difference who got it, as the company was getting a good price."

L. M. Thayer: "I was the general manager of the Peninsular Phosphate Company. I know the plaintiff and defendant. I promised Mr. Taylor a commission of \$5,000 if he would sell our company. He went to Mr. Bishop's room, in the Ocala House. Taylor introduced me to Bishop. I asked Mr. Bishop if he wanted to buy the company, and he asked me the price. I asked him if he expected a commission, and Mr. Bishop answered that he got his commission out of the French Company. Then I told him the price was \$125,000. Mr. Bishop said he would contract with the company. If it proved satisfactory, would take it. When I left Mr. Bishop, I came direct to the office of Judge McConathy, in the court house, and told him that I had sold the company for \$125,000. Afterwards I told the directors I could sell for \$125,000, \$5,000 commission, but did not tell to whom the commission was to be paid. We entered into a contract with Mr. Bishop that day or the next day; don't remember which. Afterwards the company sold its property to Mr. Bishop for \$125,000, but me and Mr. Bishop were to share the expenses of examining the property, but he has never paid his share. The company never agreed to pay any commission to Mr. Bishop. Mr. Taylor informed me that he had arranged with Mr. Bishop to collect his commission." Cross-examination: "I had authority to sell the company, and was to pay a commission. I agreed to pay Mr. Taylor \$5,000 for selling the company. Mr. Taylor told me that he had arranged with Mr. Bishop to collect for him the \$5,000. Nobody was present when he told me. I was not told in Mr. Bishop's presence. Mr. Bishop never told me that he was collecting for Taylor. I never talked with Bishop about it. I never heard anything about the \$500 Taylor promised to give Bishop for collecting the commission, except what Taylor told me, nor about increasing it to \$1,000, except what Taylor told me. As Mr. Taylor testified, I was interested in the \$5,000 commission. He agreed to give me half. I received from Mr. Bishop, about the time of the second payment to the company, \$1,000. The same was paid by check. It was not made payable to my order. It was made to the order of Mr. Bishop, and he indorsed it, and gave it to me. It was drawn so for private reasons. The private reason was I did not want to be known in the transaction. Mr. Taylor, later in the same day, received \$1,000 from Mr. Bishop. Was not present. Nothing was said at the time about any balance, except the \$1,000, to be paid to Taylor."

The defendant's evidence was as follows:

John A. Bishop: "I never at any time agreed with Mr. Taylor to collect any commission for him or to pay him any commission whatever. Part of what Mr. Taylor and Mr.

Thayer have stated is true, but they didn't tell it all. The circumstances are these: About the 1st of August, as near as I can recollect, Mr. Thayer and Mr. Taylor came to my room at the Ocala House, and Mr. Thayer asked me if I did not want to buy the Peninsular Phosphate Company's property. After some statements by Mr. Thayer as to the condition and amount of phosphate on its property, I asked him what price the company wanted for its property. He asked me if I wanted a price to include a commission for myself or not. I answered that I wanted the lowest price; that I neither paid any commission, nor did I expect any; that I would get my commission from other parties. He then informed me that the company wanted \$125,000 for its property. I agreed to contract with them, and examine the property, provided they would furnish hands to do the pitting, under the direction of our expert examiner, which he agreed to do. That day or the next, as near as I remember, in the office of the company, Judge McConathy, who drew the contract between the company and myself, we entered into a contract and proceeded to examine the property. Later, about the 1st of September, 1891, I informed the company that I would take the property, and to get their deeds and abstracts ready for examination. A day or two after I had agreed to take the property, Capt. Thayer met me on the street by the south gate to the court-house yard, and said: 'Bishop, I think you ought to pay me something for my assistance to you in the contract.' I said to him: 'Capt. Thayer, you know that I told you that I neither paid or expected any commission, and I can't see where you have been of benefit to me, as you acted for the company.' Q. By plaintiff's counsel: Was Mr. Taylor present at this conversation? Ans. No. (Thereupon counsel for plaintiff objects to the evidence upon the ground that same is inadmissible against plaintiff, and not binding on him, which objection was overruled, and plaintiff excepts. Plaintiff's counsel objects to evidence of witness upon further ground that the attempt is to introduce and establish a new contract, to which plaintiff was not a party, and that was not pleaded, and therefore such evidence was immaterial and improper. Objection overruled. Plaintiff excepts.) I remarked that I was paying a big price for the company, and that unless he could do something that would save me some money I did not see why I should give him any. I said, 'If you can get the company to reduce the price of the land, I would be willing to pay you some part of whatever you saved me.' After thinking awhile, he said that he thought that he could get the company to allow me \$5,000 as a commission or rebate. I then told him that he could agree to have them allow me the \$5,000 commission, and so report it to the company, and, if the company allowed it, I would pay him \$2,000 of the same. He said he would do it. I said, 'The sooner the better, and if

they object you can tell them that I will not take the property without.' He said, 'Come, and I will tell Judge McConathy now,' and we went to Judge McConathy's office, and he said to Judge McConathy that 'it is understood and agreed between Mr. Bishop and myself, and I promised him, that I would pay and he get \$5,000 as a commission on the sale of the company's property.' Judge McConathy asked me if that was the understanding, and I answered that Capt. Thayer had promised me to get the company to allow me \$5,000. Judge McConathy seemed very much surprised. That was all the commission I promised to pay anybody. The company subsequently paid me \$5,000 as commission, on Capt. Thayer's statement. I paid Capt. Thayer, as I agreed to do, \$2,000 on or about the 12th day of November, 1891; and, at Capt. Thayer's request and order, I paid \$1,000 of the \$2,000 to Mr. Taylor, and the other \$1,000 I paid to Capt. Thayer in person. So, by the transaction I saved myself \$3,000. It is evident to you, gentlemen of the jury, that Capt. Thayer, after getting \$2,000, seeing that I had made \$3,000, became dissatisfied after he got his money, and spent it, and thinking that the circumstances surrounding the transaction were such that he could force me to pay another \$2,000, but knowing that he could not bring the suit himself and collect, he now seeks to collect through his friend, who is to get half. I never had any agreement with Mr. Taylor, as he testified. I never agreed to collect any money for him. I never had any conversation with Mr. Taylor about any commission until I paid him the \$1,000 at Capt. Thayer's request. I paid Capt. Thayer \$2,000, in two checks of \$1,000 each. (Witness shown checks.) These are the checks. One of the checks was drawn by H. A. Bishop, my brother,—the first that was given to Capt. Thayer. He came to my office, and asked me for the money. I asked my brother to draw him a check for \$2,000, and then Capt. Thayer said, 'No; to pay him \$1,000, and to pay the other \$1,000 to Mr. Taylor when he came.' He asked if I wouldn't draw the checks payable to myself, as he did not want to be known in the transaction. We discussed how it could be done, and that is how the checks were drawn in that way. Later, Mr. E. W. Agnew, president of the First National Bank of Ocala, came to me, and said there were two checks for a thousand dollars presented at the bank for payment, and that he had refused to pay them until he had seen me, as he considered it something unusual; that he didn't understand it; that it looked queer. I stated to him that they were for commission to Capt. Thayer, and that he did not want to be known. In regard to the letter mentioned by Mr. Taylor, I never knew until now that Mr. Taylor had any knowledge of that letter. Mr. Thayer did write me a letter, or such a letter, offering me, in the name of the company, \$5,000 to let them withdraw from their contract with me. Whether the company ever author-

ized him to write such a letter or not I don't know. A few days prior to the date of the letter received from Capt. Thayer making that proposition, which was about the time of our finishing our examination of the property, Capt. Thayer asked me if the French people were satisfied with the lands. I informed him that he had stated to me that the lands of the company did contain not less than 600 acres of mining land, and that the company estimated that they had about 5,000,000 tons of phosphate of a high grade; that so far the examination of the lands only showed something less than 200 acres of mining land, and less than 1,000,000 tons of phosphate, and that naturally they felt disappointed at so little when so much had been promised. He remarked that he did not believe such a report, and that the company was very much astonished at the developments, and that, if they had known they had such good property, they would not have contracted to sell at that price. I remarked that the company would probably have an opportunity to sell to somebody else. A few days after I received this letter, submitting the proposition. That is all I know about the writing of the letter. I never had any conversation on the streets of Ocala or elsewhere with Mr. Taylor about any commissions. When Mr. Taylor got the check from me he did not say anything about any balance. I had only a slight acquaintance with Mr. Taylor; barely knew him, and was only on speaking terms, never having had any business transactions with him." Cross-examination: "I never had any agreement with Mr. Taylor. I did receive \$5,000 from the Peninsular Company. I paid \$1,000 to Mr. Taylor because Mr. Thayer requested me to. I paid the \$2,000 because I promised to. The reason Mr. Thayer got only \$2,000 and I \$3,000 was because I took the lion's share."

Samuel P. Anthony: "I was the vice president of the Peninsular Phosphate Company. The company sold its property to John A. Bishop for \$125,000, and agreed to pay him a commission of \$5,000. The company never agreed to pay Taylor any commission. Capt. Thayer never had any authority to promise anybody a commission. The first time I heard about the commission was in McConathy's office. Thayer said that \$5,000 was to be paid to Bishop. I had understood that none was to be paid, and asked who was to get it, and Thayer said to pay it to Bishop, and not to say anything about who was to get it; that it didn't make any difference who was to get it. When the last payment was made to the company, Mr. Bishop brought a suit against the company, and tied up the money in bank; and, in conversation with Mr. Bishop about the \$5,000, he informed me that he had paid Capt. Thayer \$2,000 of it. Capt. Thayer told me later, on the corner over there (pointing), that Bishop was to pay him \$2,000 and Taylor \$2,000. Bishop never told me that he agreed to pay Thayer \$2,000 and Taylor \$2,000."

Herbert A. Bishop: "I am the brother of the defendant. I was present in my brother's office on November 12, 1891, when Capt. Thayer called, and got a check for \$1,000. (Witness shown checks identified by defendant.) This (indicating one) was filled out by me. Capt. Thayer said that he did not want to be known in the matter, and requested the check drawn to my brother's order, which was done, and my brother indorsed it and gave it to Thayer. Nothing was said by Thayer about any balance."

The two checks were here received in evidence without objection. They were each dated, "Ocala, Fla., Nov. 12, 1891," signed by John A. Bishop, addressed to "First National Bank," each for \$1,000, one payable to the "order of John A. Bishop or order," the other "to the order of self." Each was indorsed, "John A. Bishop," and stamped on back, "First National Bank, Ocala, Florida. Paid Nov. 12, 1891."

E. W. Agnew: "I am president of the First National Bank of Ocala. (Witness shown checks in evidence.) I saw this before, when they were presented for payment. I refused to pay them until I could ask Mr. Bishop about them, and he said that they were all right; that they were for commission to Mr. Thayer, who did not want to be known."

Plaintiff's evidence in rebuttal was as follows:

L. M. Thayer: "I told McConathy that a commission of \$5,000 was to be paid to Mr. Bishop. Later, I told McConathy that Taylor had made arrangements with Bishop to collect commission. I deny what Mr. Bishop has testified as to any understanding between us."

Other facts are stated in the opinion.

J. H. Burchell, for plaintiff in error.

CARTER, J. (after stating the facts). The writ of error is from an order granting a new trial, and is authorized by section 1267, Rev. St., which reads as follows: "Upon the entry of an order granting a new trial at law, the party aggrieved by such order may, without waiting for a final judgment in the cause, prosecute a writ of error to the proper appellate court, which shall review the said order, and if the cause be reversed, shall direct final judgment to be entered in the court below, for the party who had obtained the verdict in the court below, unless a motion in arrest of judgment or for judgment non obstante veredicto shall be made and prevail." In passing upon the propriety of this order under the first assignment of error, we shall consider each ground of the motion for the new trial in the order stated in such motion.

I. There is nothing in the evidence tending to prove a cause of action under the counts for money lent and account stated; nor do we see anything in the evidence which could have justified a verdict for plaintiff upon the count for money received. The defendant pleaded

the general issue, which placed the burden of proof upon the plaintiff, and, in the absence of evidence which if true would have sustained a verdict for plaintiff, the jury were not only authorized, but imperatively required by law, to find for the defendant. It is true that motions for new trials are addressed to the sound judicial discretion of trial courts, and that, where such courts grant motions of this character, their decisions are presumed to be in accordance with the justice and merits of the case, unless the contrary appears by the record, and that an order of the trial court granting a new trial should not be disturbed by an appellate court, unless it appears affirmatively from the record that there has been an abuse of a sound judicial discretion, or that some settled principle of law has been violated. *Reddick v. Joseph*, 35 Fla. 65, 16 South. 781. But where the burden of proof is upon a plaintiff, and the evidence before the jury is legally insufficient to support a verdict in his favor, and the jury find a verdict for the defendant, the trial court is not justified in setting aside the verdict upon the ground that it is contrary to the evidence and the weight of evidence. Such a ruling not only shows a clear abuse of discretion, but violates settled principles of law.

There are some expressions in the testimony of John A. Bishop which would seem to indicate that Taylor had testified to some agreement between them not shown by the report of Taylor's testimony, but the bill of exceptions purports to give in full the direct and cross examination of the witnesses; the evidence which the plaintiff and defendant introduced to maintain the issues on their respective parts; it states that plaintiff "rested his case" at the conclusion of the testimony of L. M. Taylor; and purports to give the testimony of plaintiff in rebuttal. In addition to these facts, it appears from a statement of the judge, indorsed on the bill of exceptions, that it was presented to him for settlement on January 1, 1894, and was objected to by plaintiff as inaccurate and incomplete, and, "as there are some inaccuracies, the same is not settled to-day." On the following day the judge signed it, and it does not purport to be partial or incomplete. With these facts before us, we must assume that the bill contains the whole evidence adduced at the trial. *Robinson v. Hartridge*, 13 Fla. 501.

In *Gordon v. Camp*, 2 Fla. 422, it is said that a count for money had and received may be proved by any legal evidence showing that the defendant has possession of the money of the plaintiff, which in equity and good conscience he ought to pay over. It was therefore necessary that plaintiff should in this case prove title to the fund sought to be recovered, and that, in equity and good conscience, defendant ought to pay same over to him. 2 Chit. Cont. pp. 898-908. The evidence did show that Thayer promised plaintiff \$5,000 commission on the sale made to Bishop, and that he and

plaintiff were to divide this commission between them. It also showed that Bishop received from Thayer's company a commission of \$5,000, although by the original agreement he was to receive none, and that he paid Thayer and plaintiff \$1,000 each of the sum received by him as such commission, but there is no evidence that the commission actually paid to Bishop was the identical commission that plaintiff had been promised by Thayer. There is no evidence that Bishop ever knew that Thayer had promised plaintiff a commission, or that he had ever agreed to collect a commission for plaintiff, or that the \$5,000 was paid to him for plaintiff, or that when he received it he knew or supposed that it belonged to plaintiff. It is true that Thayer testified that Taylor told him he had arranged with Bishop to collect his commission, but that was mere hearsay, and, although Taylor was himself a witness, he testified to no such arrangement. He says, in a general way, "The defendant is indebted to me in the sum of \$2,000 and interest, for an agreement between us;" but the nature of that agreement is not stated, and we cannot know that the supposed agreement would sustain a common count for money received, or that it related to the \$5,000 commission. He also says that, a few days after his introduction of Bishop to Thayer, "I met Mr. Bishop, and I said to him: 'You are a good friend of mine. I will be busy, and not have time. Run this through for me, and I will give you \$500.'" But it nowhere appears what was meant by, "Run this through for me," or that it had the slightest reference to the commission transaction, or that Bishop then knew that plaintiff was to get a commission, or that he assented to plaintiff's request to, "Run this through." He also says he afterwards made up his mind to give \$1,000 instead of \$500, but this mental state does not appear to have ever been known to Bishop. The Peninsular Company never knew that Taylor was to get a commission, and they paid the commission to Bishop, not for Taylor, but for himself, upon Thayer's statement that he had promised it to him, and that it made no difference who got it. Thayer, it is true, denies Bishop's statement as to the understanding between them that the \$5,000 was to be paid Bishop as a commission, and he was to give Thayer \$2,000 of it. If this testimony of Bishop's be entirely eliminated, it will still appear that, though Bishop originally was to receive no commission, yet that subsequently the Peninsular Company did pay him \$5,000 as a commission to himself, upon Thayer's statement that he was entitled to it, and that Bishop thereupon, at Thayer's request, paid him \$1,000 and plaintiff \$1,000 of the amount, and there will still be no testimony to show that the commission received by Bishop was the commission promised by Thayer to plaintiff. Without stopping to point out other deficiencies in the evidence, we think that upon no view of it could a verdict have been properly found for plaintiff, and

that, therefore, the new trial could not legally have been granted upon the first ground of the motion.

II. The evidence complained of by the second ground of the motion for a new trial was evidently the testimony of Bishop, to which an objection was interposed and overruled, as will be seen by reference to the statement of facts. This testimony was properly admitted, as bearing upon the material question as to whether defendant received the \$5,000 commissions as money due to himself or for the use of the plaintiff. Although, by the original agreement for the purchase of the Peninsular Phosphate Company property, Bishop was not entitled to a commission, yet, if the company afterwards allowed and paid him one, he had a perfect right to receive it. There was nothing in the evidence showing any relation between him and plaintiff or Thayer which debarred him from accepting a commission, if Thayer or the company was willing to pay it. And if he received the commission for himself and Thayer under an agreement with Thayer, having no knowledge that plaintiff was entitled to it, he cannot be said to have received it for the use of plaintiff. There was therefore nothing in the second ground of the motion to authorize a new trial.

III. The evidence referred to in the third ground of the motion was all received without objection, and its admission, under those circumstances, constitutes no ground for a new trial.

The order granting the new trial is reversed, with directions to the circuit court to enter final judgment for defendant upon the verdict, unless a motion in arrest of judgment or for judgment non obstante veredicto shall be made and prevail.

(76 Miss. 641)

BOARD OF LEVEE COM'RS FOR YAZOO-MISSISSIPPI DELTA v. DILLARD et al.

(Supreme Court of Mississippi. March 20, 1899.)

CONDEMNATION PROCEEDINGS—FORMATION OF ISSUE—JUROR—DISQUALIFICATION—EVIDENCE—WITNESSES AS TO VALUE—OPINIONS—COMPETENCY—CROSS-EXAMINATION.

1. The statutory requirement that the court, in condemnation proceedings, shall cause an issue to be made up, is complied with when its rulings on the pleadings result in an issue, and it need not otherwise direct the jury what the issue is.

2. A juror in condemnation proceedings is not disqualified by service at the same term in other cases of condemnation for like purposes.

3. Opinions of witnesses as to the value of land are admissible only when they are acquainted therewith and have knowledge of its value.

4. To disparage a witness' opinion of the value of land, he may be cross-examined as to sales of similar land, in the vicinity of that in question, made about the same time, for sums less than that given in his opinion.

5. A farmer who had lived for 30 years in the vicinity of certain land on which he was camped, and had worked on it, and who testi-

fied that it was productive, was competent to testify as to its value.

6. That a witness who testified to the value of land stated, on cross-examination, that he did not know how to value land, except by considering its revenue producing qualities, did not warrant the exclusion of his opinion, since it did not affect his competency.

7. A witness as to the value of land said that he was a landowner; that he knew the land in question; that it was fertile, and would produce from three-fourths to one bale of cotton, or fifty or sixty bushels of corn, per acre; that it was well located, highly improved, and convenient to market. *Held*, that he was competent.

8. A witness as to the value of land said that he was the county assessor, and was familiar with land values, and knew the land in question; that it was fertile, well improved, and accessible to river and railroad. *Held*, that he was competent.

9. A witness as to the value of land said that he was acquainted with the land in question, and had surveyed and mapped it; that it was fertile, and would produce forty bushels of corn, or about one bale of cotton, per acre. *Held*, that he was competent.

Appeal from circuit court, Coahoma county; F. A. Montgomery, Judge.

Petition by the board of levee commissioners for the Yazoo-Mississippi Delta for an appraisal of land taken by the board belonging to Dillard, Coffin, & Mays. From an award of the appraisers, the owners petitioned, by way of appeal, to the circuit court. From a judgment for plaintiffs, defendants, the commissioners, appeal. Reversed.

Cooper & Waddell, for appellants. D. A. Scott, for appellees.

TERRAL, J. On the 2d of November, 1897, the board of levee commissioners for the Yazoo-Mississippi Delta, holding the power of eminent domain, applied, by petition to the clerk of the circuit court of Coahoma county, to have the appraisers, appointed to assess levee damages, to be required to view, ascertain, and determine the value of certain lands in sections 25 and 36 of township 30, range 4 W., and in sections 30 and 31 of township 30, range 3 W., minutely and specifically described in their petition in that behalf, aggregating 34 acres of land, lying in said county, and belonging to Dillard, Coffin & Mays, which they alleged it to be necessary to be taken and used in the construction and enlargement of the levee maintained by said board. A warrant having been issued to said appraisers, two of them (being a majority) assembled, on the 16th of November, 1897, and, pursuant to said authority, they duly assessed and awarded against said levee board, for the taking of said 34 acres of land of said Dillard, Coffin & Mays, the sum of \$1,902.30, being \$55.95 per acre, to be paid to said Dillard, Coffin & Mays. The said Dillard, Coffin & Mays, being dissatisfied with the smallness of said assessment, in due time filed with the clerk of the circuit court their petition, by way of appeal to said court, in which they alleged that said appraisers should have assessed the value of

said 34 acres of land taken by said board for levee purposes at the sum of \$3,400, being \$100 per acre, which said sum of \$3,400 they alleged to be the reasonable cash market value of said 34 acres of land taken and appropriated by said defendant levee board; to which said declaration, or statement of law and fact, the said defendant levee board pleaded that the sum awarded by said appraisers to said plaintiffs for said 34 acres of land "was not unjust and inadequate, but that said award was more than the actual cash market value of said lands, so taken, at the time of the taking, considered as a part of the entire tract from which it was taken, and that said appraisers should not have awarded a total of \$3,400 therefor, and that the plaintiffs are not entitled to have and recover for the same the said sum of \$3,400, and all of which defendants ask may be inquired of by the country." The plaintiffs, for a replication to said plea, averred that it is not true, as pleaded, that said \$1,902.30, awarded them by said appraisers, "is more than the actual cash market value of the land taken and occupied by the said board of levee commissioners for levee purposes, either considered as a part of the entire tract from which it was taken or otherwise, nor is it true that said plaintiffs are not entitled to have and recover, of and from the said board of levee commissioners, said sum of \$1,902.30, and an additional amount as shown in their statement of law and fact; and of this the said plaintiffs put themselves upon the country."

The case being called for trial, one Berry, being accepted as a juror by the plaintiffs, was tendered to the defendants, when Berry, on his voir dire, stated that he had sat at the then current term of the circuit court as a juror in a levee board case for the assessment of damages for lands taken for the construction and enlargement of the public levee, and on that account said Berry was challenged for cause by said defendants; but their challenge for cause was disallowed by the court, when they challenged said Berry peremptorily. A like action, on like grounds, was had in reference to Mullens and Blackwell, except as to the juror Blackwell, the defendants' peremptory challenges being exhausted, they were compelled to take him upon the panel to try said cause; and the action of the court, in overruling the defendants' several challenges for cause of said Blackwell, Mullens, and Berry, constitute the appellants' first alleged ground of error.

A jury being taken, and the trial ordered to proceed, the said parties laid before the court and jury their respective grounds of complaint and defense hereinbefore recited; when the defendants moved the court to direct the jury that the only issue submitted to them in this case is the cash market value of the land taken, at the time of the taking, considered as a part of the entire tract from which it was taken. The court declined to sustain the motion, considering the issue

made by the pleadings sufficiently concise and comprehensive for the understanding and judgment of the court, jury, and parties. The denial of this motion is the second ground of exception by the defendants.

The case having been submitted to a jury, they returned a verdict for the plaintiffs, and assessed their damages at \$72.50 per acre, aggregating \$2,465, for which amount a judgment was entered, and, a new trial being denied, the defendants appeal to this court.

Upon the trial the plaintiffs introduced, along with the other evidence, the opinions of the witnesses Fontaine, Palmore, and McKenzie as to the value of said 34 acres of land sought to be condemned, which opinion evidence was objected to by the defendants; and the defendants sought to overcome the evidential value of the opinion of said witnesses by showing, on cross-examination of them, sales of similar land in the vicinity, and about that time, for sums less than that given in their opinions, from which they were precluded, and to which they excepted. The defendants offered in evidence the opinion of Stovall as to the value of first-class cleared land in said county, well located and accessible, and his opinion was excluded. Stovall had resided many years in the county, but was not acquainted with the plantation of Dillard, Coffin & Mays. Aderholdt, a farmer who had lived in the county 30 years, and who knew the plaintiffs' place, who had worked on it, was then camped on it, and who testified it was productive, was permitted to give his opinion as to the value of said 34 acres of land on his examination in chief, but on cross-examination said that he did not know how to value land except from a consideration of its revenue producing qualities, when his evidence was excluded, to which ruling the levee board excepted.

The testimony bearing on the question whether the witnesses McKenzie, Palmore, and Fontaine were qualified to give their opinions as to the value of said 34 acres of land in evidence is as follows: McKenzie said he was a landowner; knew the land in question; that it was fertile, and would produce from three-fourths to one bale of cotton, or 50 or 60 bushels of corn, per acre; that it was well located, highly improved, and convenient to market. Palmore said that he was the assessor of the county; was familiar with land values; knew the Dillard, Coffin & Mays plantation; that it was very fertile, well improved, and accessible to river and railroad. Fontaine testified that he was acquainted with the land; had surveyed and mapped it; that it was fertile, and would produce 40 bushels of corn, or about one bale of cotton per acre. On cross-examination, he was asked by the levee board the following questions, which the court overruled: "Did you know the price at which such lands [similar to the lands in question] have been generally dealt with by sale and purchase in the locality of these lands or in adjacent terri-

tory?" "Do you know the market value of lands in the locality in which these lands are located, except by recurring to particular sales?"

Three questions arise on the record: First, on the pleadings; second, on the qualifications of the jurors; and, third, on the evidence admissible to prove the value of land.

1. The object of the pleadings is to produce an issue,—a single, certain, and material point,—affirmed on one side and denied on the other; and we concur in the ruling of the learned court below in holding that the issue made in this case by the pleadings of the parties was certain and concise, and one easily to be understood. Undoubtedly it is the duty of the court, in all cases, to cause an issue to be made up for trial; and the requirement of the statute, "that the court shall cause the issue to be made up" in condemnation proceedings, as well as in the trial of the right of property levied on by execution, wherein a like requirement is found in Ann. Code, § 4427, is duly complied with when the rulings of the court on the pleadings in the case shall have resulted in such issue. The practice of the courts at common law was for the parties to formulate the pleadings, and the issue resulted logically from the rulings of the court thereon. If the statement of law and fact made by the plaintiff was not in such concise language as to state, with precision, a good cause of action, and expressed in such manner as permitted the defendant levee board, by their plea, to make a certain and material issue thereon, a demurrer thereto, or a motion, under section 704, Ann. Code, would have rectified the mispleading; and if, by the bad pleading of the defendant, the issue is not sharply and distinctly presented, the defendants may not complain of their own fault. The replication of the plaintiffs is perhaps useless, but "Utile per inutile non vitiatur," is a maxim of law.

2. That the juror Blackwell had served as a jurymen at that term of the court in a case for the assessment of damages between the board of levee commissioners and other parties in reference to the condemnation of other lands, was not, in our judgment, a disqualification of said Blackwell as a juror in this cause. The exception to him for cause was properly denied.

3. It is obvious, to all attentive observers of the market reports published in the daily press, that land has no market value, in the sense that stocks, bonds, and other public securities have a market value, or even as the common and ordinary articles of commerce have such market value; and because thereof the rules of evidence for the proof of the value of the land are modified to meet the circumstances of the situation. On some subjects the opinion of any competent witness is admissible in evidence, in order to assist, but not control, the judgment of the jury (1 Greenl. Ev. § 440); and, as proof of the ele-

ments of the value of land may not always certainly direct the jury to a proper verdict, the opinions of witnesses on this subject have been admitted by courts of high authority (10 Am. & Eng. Enc. Law [2d Ed.] 1157); but such opinions should be admitted only when given by persons acquainted with the particular land and who have knowledge of the value thereof. To test the weight of the opinion of value as given by the witness, it is proper to require such witness, on cross-examination, to disclose his knowledge of the sales of land, made about the time and in the vicinity, in order to disparage his opinion. We think the questions propounded to Fontaine should have been sustained. The witness Aderholdt showed himself competent to give his opinion of the value of the land, and it should not have been excluded; for, if the reason given for it affected it at all, it went merely to its disparagement, and not to its competency. We think Fontaine, Palmore and McKenzie were competent witnesses to give their opinions of value, and that Stovall's evidence was properly excluded. The other exceptions are without merit. Reversed and remanded.

FORSDICK et al. v. BOARD OF SUP'RS OF QUITMAN COUNTY.

(Supreme Court of Mississippi. March 18, 1899.)

TAXATION—ASSESSMENTS—REDUCTION—OVERVALUATION—CASUALTY.

1. A landowner alleged that he had repeatedly offered his land for sale at one-half the assessed valuation, but did not allege that the lands were overassessed, by accident or otherwise, nor did he show that he had made a timely objection to the assessment. *Held*, that he was not entitled to the reduction authorized by Ann. Code 1892, § 3799, "in case of overvaluation known to be such."

2. Deterioration in the value of land caused by the usual overflow of the Mississippi is not a deterioration "by any casualty," within Ann. Code 1892, § 3799, authorizing a reduction of an assessment for taxation for such cause.

Appeal from circuit court, Quitman county; F. A. Montgomery, Judge.

Application by H. J. Forsdick and another against the board of supervisors of Quitman county to reduce an assessment. From an order affirming the action of the board denying the relief asked, petitioners appeal. Affirmed.

Cooper & Waddell, for appellants. J. W. Cutrer, for appellee.

TERRAL, J. Forsdick & Taylor applied to the board of supervisors of Quitman county to reduce the assessment of several thousand acres of land owned by them in said county. The grounds for a reduction of the assessment relied on are: (1) An overassessment, known to be such; (2) a deterioration of their value by reason of the inadequacy of the public levees to protect them from overflow,—the application being made under section 3799, Ann.

Code 1892. The lands were assessed as of the value of \$3 per acre, and the petitioners alleged that they had repeatedly offered said lands for sale at one-half their assessed value. The petitioners allege they acquired title to said lands from the state, as lands forfeited to the state for taxes; but there is no claim made that, at the time of the assessment, the lands were overassessed, by accident or otherwise, nor is any casualty alleged beyond the usual overflow of the Mississippi river. It is evident that the lands were assessed in due process of law, and, if overassessed, they were so assessed by the owners, or by the public authorities on the default of the owners in making their assessment, and without any timely objection on the part of the owners. The board of supervisors denied the relief asked, the circuit court affirmed the action of the board, and the judgment of the circuit court is here affirmed.

(76 Miss. 582)

YAZOO & M. V. R. CO. v. ANDERSON.
(Supreme Court of Mississippi. March 18, 1899.)

RAILROADS—CROSSINGS—FENCES.

A railroad company, having its track fenced where it passes through a farm, separating the buildings from a stock pasture, sufficiently complies with the statute requiring it to construct a crossing for a plantation road, by offering to make a crossing by constructing gates in its fences, where the offer is declined.

Appeal from circuit court, Franklin county; W. P. Cassedy, Judge.

Action by V. A. Anderson against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Mayes & Harris, for appellant. Cassedy & Cassedy, for appellee.

WOODS, C. J. The appellee brought this action to recover from the appellant the statutory penalty of \$250 for an alleged failure, on appellant's part, to make a convenient and suitable crossing over its track for a necessary plantation road. The case was heard by the court, a jury having been waived, on an agreed statement of the facts, and judgment rendered for plaintiff below, the appellee here, and from this judgment the railroad company appeals.

We are informed by this agreed statement of facts that the railroad company acquired title to its right of way in June, 1883; that its right of way, on both sides, is inclosed by a wire fence; that the public highway runs on the west side of the appellant's right of way, and that his house is also on that side of the right of way; that there is no road over or across the right of way and track of the railroad company at the point where appellee demanded the crossing to be made, and that there has never been; that the track of appellant's road runs through the farm of appellee, dividing his house and its buildings, and his cultivated land, from the woodland,

which is used as a pasture, lying on the other side of the track; and that, to pass from one side of his farm to the other, appellee is compelled to leave his own premises, and use a crossing on a neighbor's land. There are two grounds which are urged by appellant's counsel for a reversal: (1) That the railroad company acquired its right of way before the enactment of our statute requiring railroads to make and maintain crossings over its track for necessary plantation roads, and that its attempted application in the present instance would be unconstitutional, in that it would be depriving the railroad company of its property without due process of law; (2) that the railroad company offered, on appellee's demand, to make the desired crossing by erecting gates through its fences, which appellee declined, and that, therefore, the judgment was erroneous.

With the first proposition it is unnecessary for us to deal, in view of our opinion on the second proposition. There is nothing to show that the crossing, through gates, would not be convenient and sufficient for the appellee's uses and purposes. The railroad is not required by law to fence its tracks, but it surely has the right to do so. That safety of the traveling public, as well as that of the employés and trains of the railroad company, would be increased by fencing its track, is self-evident. The demand of the appellee is that the railroad company shall tear down its fences, and give appellee an open lane, at the place where the crossing is desired, with stock gaps and cattle guards, at the expense of the company. This would be burdensome to the company, and would, moreover, increase danger to passengers, employés, and trains, by leaving an open space, on which live stock might congregate. The statute under which suit was brought is a highly penal one, and should be strictly construed; and when the railroad company has offered to give the way over its track, with a crossing convenient and suitable, it has met the requirement imposed by law. Reversed and remanded.

(76 Miss. 410)

HAMLIN et al. v. SOUTHERN RY. CO.

(Supreme Court of Mississippi. Feb. 13, 1899.)

RAILROADS—STATUTORY REGULATIONS—CROSSING STREETS.

Code 1892, § 3555, requiring a railroad company to make easy grades over a "highway" which its road crosses, and to keep such crossing in good order, applies to city streets as well as roads in the country.

Appeal from circuit court, Clay county; W. F. Stevens, Judge.

Action by C. M. Hamlin and others against the Southern Railway Company. Judgment for defendant, and plaintiffs appeal. Reversed.

The declaration alleges that the Georgia Pacific Railway Company was authorized by its charter to cross and occupy and use any public road in the state with its railroad, and to

change such public road, but in all such cases it shall place such road or highway in a condition as good as that occupied or changed; that, under said charter, said Georgia Pacific Railway Company built its railroad through West Point in 1888, and in building it across a certain public road in said city, called "Division Street," it raised the grade of the street at the intersection about 10 feet above the former and normal level, and that said street was a much-used street; that the defendant company was the successor of the Georgia Pacific Railway Company, and owned the property, and it was its duty to put and keep same in repair, but it had negligently allowed it to be out of repair; and that it had been notified by the city of West Point that said crossing and bridge over it was out of repair and dangerous, but had knowingly, willfully, and negligently failed to repair said crossing and bridge; and that such failure and refusal to repair them was the direct, sole, and only cause of the injury and death of said Hamlin. There were four counts in the declaration, but the above were the allegations common to each count. The defendant demurred to each count separately, and a general demurrer was interposed to the declaration as a whole. Each demurrer assigned substantially the following reasons for demurrer: (1) Because there is no law requiring railway companies to keep crossings or bridges or approaches in cities and towns in repair in Mississippi, and the charter does not require it; (2) on its face it shows that there is no liability; (3) the declaration shows contributory negligence on the part of Hamlin. The demurrers were sustained. Plaintiffs declined to amend. Judgment final was rendered for defendant. Plaintiffs appealed.

Critz, Beckett & Kimbrough, for appellants.

The following are the cases cited in the brief and referred to in the opinion: *City of Newton v. Chicago, R. L. & P. Ry. Co.*, 66 Iowa, 422, 23 N. W. 906; *People v. Chicago & A. R. Co.*, 67 Ill. 118; *Retan v. Railroad Co.*, 94 Mich. 146, 53 N. W. 1094; *Caldwell v. Railroad Co.*, 41 La. Ann. 624, 6 South. 217; *Cooke v. Railroad Corp.*, 133 Mass. 185; *Titcomb v. Railroad Co.*, 12 Allen, 254; *Carter v. Railroad Corp.*, 139 Mass. 525, 2 N. E. 101; *Village of Wayzata v. Great Northern R. Co.*, 50 Minn. 438, 52 N. W. 913; *Railroad Co. v. Brady*, 39 Neb. 27, 57 N. W. 767; *Railroad Co. v. Ryburn*, 40 Neb. 87, 58 N. W. 541; *Wasmer v. Railroad Co.*, 80 N. Y. 212; *City of Moundsville v. Ohio R. R. Co.*, 37 W. Va. 92, 16 S. E. 514; *White v. Inhabitants of Quincy*, 97 Mass. 430; *Parker v. Railroad Co.*, 3 Cush. 116; *State v. St. Paul, M. & M. Ry. Co.*, 38 Minn. 246, 36 N. W. 870; *Louisville & N. R. Co. v. State*, 3 Head, 523; *Railroad Co. v. Matula*, 79 Tex. 577, 15 S. W. 573.

S. M. Roane, for appellee.

WOODS, C. J. By section 3555, Code 1892, it is made the duty of a railroad company,

where its road is constructed so as to cross a highway, and it becomes necessary to raise or lower the highway, to make proper and easy grades in the highway, so that the railroad may be conveniently crossed, and to keep such crossing in good order; and it shall be the duty of the company to erect and keep in order all bridges on any highway at such points as bridges may be necessary to cross the railroad. This same duty, in identically the same terms, was imposed on railroad companies by section 1063, Code 1880, and was in force when the Georgia Pacific Railway Company, whose assignee and successor the defendant is, was chartered and organized, and when its railroad was constructed through the city of West Point, and the grade of Division street raised by the Georgia Pacific Railway Company. In addition, the act of incorporation of said railway company, in its second section and third paragraph (Acts 1882, p. 826), confers upon the railway company the right to "cross, occupy and use any public road in this state with its railroad and to change the public road; but in all such cases it shall place such road or highway in a condition as that so used, occupied or changed." The principal question raised by the demurrer of the defendant is: Does the term "highway," in the statute and charter of the Georgia Pacific Railway Company, include streets in cities and towns, as well as public roads in the country districts? The contention of counsel for the defendant railway company is that the word "highway," in the connections used in the statute and charter, is to be confined to public roads in the country; and this contention is made to rest on the construction placed by this court upon the word "highway" in other sections of the chapter of our Code touching the rights, duties, and liabilities of railroad corporations.

In the case of *Mobile & O. R. Co. v. State*, 51 Miss. 137, section 2424, Code 1871 (which is found brought forward in section 1050, Code 1880, and in section 3552, Code 1892), was held not to embrace streets in towns and cities. These sections required railroad companies to erect and keep up on a post or frame sufficiently high, at every place where the railroad may cross a highway, a board with the inscription "Look out for the locomotive!" But this construction of the statute was not placed upon the ground that the word "highway" did not include a street in a town or city, but upon the distinctly stated ground that the legislature had, in section 2421, Code 1871, sufficiently and otherwise than by section 2424, provided for the security and protection of life at crossings in towns and cities. In other words, the court was of opinion that section 2424, in its use of the term "highway," had no reference to streets, because, by another and independent section (2421), security at crossings in cities and towns was sufficiently provided for. In *Railway Co. v. French*, 69 Miss. 121, 12 South. 338, the word "highway," in section 1048, Code 1880, was held not to embrace streets in a town; but the reason assigned for confining

that section to roads in the country was precisely that upon which the court proceeded in the case of *Mobile & O. R. Co. v. State*, 51 Miss. 137, viz. that section 1047, Code 1880, which is section 2421, Code 1871, was a sufficient safeguard for towns. In both of the cases named, the low rate of speed at which trains are required to run through towns and cities, with the penalty imposed for violation of the low-speed requirement, was held to afford all the protection necessary in cities and towns, while the unlimited rate of speed in the country demanded the lookout sign and the ringing of the bell or sounding of the whistle in road crossings in the country. The other case referred to and relied upon by the defendant railway's counsel (*Illinois Cent. R. Co. v. State*, 71 Miss. 253, 14 South. 459) gives no support to his contention. That case was decided under section 3551, Code 1892, which denounced a penalty against every railroad company which, upon stopping a train at a place where such railroad shall cross a highway, shall not uncouple its cars so as not to obstruct travel on such highway for more than five minutes; and then declares, further: "And it [the railroad company] shall, upon stopping a train at a place where the railroad is crossed by a street, so uncouple its cars as not to obstruct travel thereon for a longer period than shall be prescribed by ordinance of the city, town, or village." Here are separate and distinct provisions governing the stoppage of trains in the country and in towns. The court held, of course, that the word "highway," in the first provision of the section, related alone to country highways, and that as the town of Batesville, for the obstruction of one of whose streets the prosecution was made, had no ordinance prescribing the period within which cars should be uncoupled so as not to obstruct travel on the street, the railroad company was not liable, under the second clause of the section.

It will thus be seen that none of our former adjudications touch the question now presented. The reasoning of the court in none of these cases has or can have application here. Sections 1053, Code 1880, and 3555, Code 1892, stand unaffected by any other section of either Code touching the duty of railroad companies to properly construct their roads over streets in towns and cities. These sections are the only statutes having any sort of relation to highways in town or city or country. Can it be seriously doubted that the word "highway" is comprehensive enough to embrace streets in towns, as well as roads in the country? And can it be doubtful at all that in densely populated towns and cities the reason of the statute requiring railroad companies to make proper and easy grades in the streets crossed by their railroads, so that the same may be conveniently crossed, is infinitely more needful than in sparsely populated country districts, where the roads are used only at longer or shorter intervals of time? It is most unreasonable to place such construction on the statute as will require

railroad companies to make and keep in order proper and easy grades over infrequently used country roads, but permit them to tear up and practically destroy the streets of cities or towns, where the travel is constant. We must give the statute such interpretation as will effectuate the legislative purpose in its enactment, if we can do so without violence to its letter and spirit; and we do neither in declaring that streets in towns and cities, as well as public roads in the country, are within the terms of the statute. If we look beyond our own reports, we shall find very many decisions of courts of last resort in other states construing statutes similar to our own, and they all speak with one voice, so far as we have been able to ascertain. A large number of these cases, holding to the view we have taken, are collected in the brief of counsel for appellants, and, for the sake of brevity, we refer to them generally, as therein gathered together. It is not contended before us that any contributory negligence of the deceased is shown by the declaration, nor, in our opinion, is there any shown. Reversed and remanded.

(76 Miss. 536)

CARBOLINEUM WOOD-PRESERVING & MANUFACTURING CO. v. MEYER.

(Supreme Court of Mississippi. March 6, 1899.)

PLEA IN ABATEMENT—ANOTHER SUIT PENDING—JURY—INSTRUCTIONS.

1. A plea in abatement in attachment is bad which sets up another suit, pending in the chancery court, but does not show that the chancery court had jurisdiction, or that plaintiff's remedy is as ample there as at bar.

2. A charge that the jury can find such damages "as they think proper" is not erroneous as not confining the jury to such sum as the evidence shows the party to be entitled to.

Appeal from circuit court, Harrison county; T. A. Wood, Judge.

Action by Edward Meyer against the Carbolineum Wood-Preserving & Manufacturing Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Appellee's declaration was upon an open account for \$320 for services claimed to have been rendered as a sawmill manager. The defendant filed the following plea in abatement: "Comes the defendant, and for plea in abatement of the writ of attachment herein says that at the time of the suing out of the same there was, and still is, pending in the chancery court of said county, which had then, and still has, full jurisdiction in the premises, a suit numbered —, on the docket of said chancery court, wherein the said plaintiff sought by his bill of complaint to recover of this defendant the identical sum of money for which said writ of attachment was sued out herein; that said defendant was duly summoned to appear and answer said suit in said chancery court, and did make answer long before this suit was commenced, denying any and all liability to said plaintiff in the premises." Plaintiff's replication to this plea set

up that the suit in the chancery court referred to in the plea was a distinct and independent suit from the attachment suit here, and denied that the chancery court had jurisdiction. A demurrer to this replication was overruled. The opinion contains a further statement of the facts. From a verdict and judgment for plaintiff, defendant appealed.

T. M. Miller, for appellant.

TERRAL, J. The appellee brought suit by attachment against the appellant for 3½ months' services as manager of a sawmill at \$100 per month (\$320), and for money paid to the defendant at its request, being \$183.48, aggregating \$503.48. The only amount in dispute was the \$320 for 3½ months' services, or wages. The writ was levied upon certain property of the defendant which was bonded by it. The suit was in assumpsit for a purely and technically legal cause of action. The appellant pleaded a pending suit in the chancery court of the same county for the same identical cause of action. The plea in abatement alleges that the chancery court had jurisdiction of the case, but the allegations of the plea do not allege such a state of facts as would give the chancery court jurisdiction of the case. It is true that under section 147 of the state constitution, if the chancery court had assumed jurisdiction, and had made a decree in the case, it would not have been reversed merely because the cause of action was not of equitable jurisdiction; but the chancellor, of his own motion, could have dismissed the suit, and the plaintiff would have been without remedy. A plea in abatement is looked upon with disfavor, and the failure of the pleader to allege that the remedy in the suit pending in the chancery court was as ample and efficient as the suit in the circuit court rendered the plea ill. In the suit in the circuit court the plaintiff had a lien on the property seized out of which to collect any debt recovered by him against the defendant, and it does not appear by the plea in abatement that his remedy in the chancery court would have been as effective. The plea, we think, was bad. *Black v. Lackey*, 2 B. Mon. 257; *Hatch v. Spofford*, 22 Conn. 485; *Blanchard v. Stone*, 16 Vt. 234; *Griswold v. Bacheller*, 77 Fed. 857; *Story*, Eq. Pl. § 742.

An instruction for the plaintiff declared "that, if the plaintiff performed the services mentioned in the account sued on, and the defendant accepted said services, the jury can find for the plaintiff such an amount for said services as they think proper, unless they believe he was to receive no compensation therefor." The words italicized are claimed to be error, and for them should have been substituted the words, "such sum as the evidence showed the plaintiff was entitled to recover." The instruction was, perhaps, not technically correct, but the jury were hardly misled by its want of technical accuracy. They doubtless understood that their decision should be made

so as to effect the understanding of the parties to the contract; i. e. to find according to right and justice, and not according to the personal wishes or ideas of propriety. Affirmed.

(76 Miss. 578)

BARBER v. CITY OF BILOXI.

(Supreme Court of Mississippi. March 13, 1899.)

AMENDMENT OF JUDGMENT.

The court cannot, after term, enlarge its judgment to include a recovery against bondsmen not originally included therein.

Appeal from circuit court, Harrison county; T. A. Wood, Judge.

One Livings was convicted of violating a city ordinance, and from a judgment adjudging a recovery of fine and costs against his bondsmen, E. M. Barber, one of the bondsmen, appeals. Reversed.

A. Y. Harper and E. M. Barber, for appellant. White & Neville, for appellee.

TERRAL, J. Before Hon. T. H. Gleason, police justice of the city of Biloxi, on the 18th day of June, 1896, John W. F. Livings was tried and convicted of violating ordinance No. 81 of said city, forbidding, between daylight and 9 o'clock a. m. of each day, the carrying on of a market for the sale of fresh meats at any place within said city other than the public market of said city of Biloxi, and was fined therefor \$50. The defendant believing said ordinance 81, restricting the sale of fresh meats within the city of Biloxi to one place,—when Biloxi was confessedly a city 3½ miles wide, with a permanent population of 5,000 people, and increased in the summer months by from 5,000 to 8,000 visitors,—was invalid, on the rule of Lord Coke that whatever was inconvenient was against law, and being supported in such view by counsel, he suffered himself to be placed in the city prison in order to seek liberation through the medium of a writ of habeas corpus, but, failing therein, with a view of reaching the supreme court in the best possible shape, he appealed his aforesaid conviction to the circuit court; and thereupon said Livings, with E. M. Barber and W. H. Maybin as sureties, gave bond for such appeal, which said bond was conditioned "to pay the city of Biloxi \$100, unless said Livings should appear at the next term of the circuit court of Harrison county to answer the city of Biloxi upon a charge of the violation of ordinance No. 81." At the November term, 1896, of the circuit court of said Harrison county, the said charge against the said Livings was tried by the court, a jury being waived, and the presence of the defendant being also waived, as appears by the record of the case, when a verdict of guilty was given against the defendant, and he was adjudged to pay a fine of \$25, and to be imprisoned upon arrest until said fine and all costs, amounting in the aggregate to \$94.50, should be paid, for which

a *capias pro fine* was ordered. Process having been issued upon said judgment of the circuit court, the fear of Livings got the better of his judgment, and, notwithstanding the alleged invalidity of the proceedings, he fled the jurisdiction of the court, and neither the body nor the goods of the defendant could be found by the sheriff of which to satisfy said judgment; whereupon, at the May term, 1897, of the circuit court of said Harrison county, the attorneys of said city insisted upon and obtained a judgment nisi against said Livings and his said sureties, Barber and Maybin, wherein it was recited "that said Livings, being solemnly called to come into court, came not, and E. M. Barber and W. H. Maybin, his sureties, being solemnly called to bring with them the body of said Livings, came not," and thereupon it was adjudged that the said "state of Mississippi, for the use of the city of Biloxi, do have and recover, of and from the said John W. F. Livings, and E. M. Barber and W. H. Maybin, his sureties on said recognizance, the sum of one hundred dollars, unless," etc. Upon the service of the writ of *scire facias*, E. M. Barber appeared, and at the May term, 1898, of said court, pleaded the facts of record in bar of the proceedings. The city demurred to the plea or answer. The court sustained the demurrer, when the writ was dismissed as to Livings, who was not served with notice, and the judgment nisi against Barber and Maybin was made final. E. M. Barber appeals.

It is to be noted that while the appeal bond of Livings did not stipulate that he and his sureties should pay the fine of the circuit court and the costs of the circuit and justice courts, if costs therein, yet such should have been its stipulation; and under Code, § 946, it was the duty of the court, upon pronouncing judgment against Livings upon his conviction, to have adjudged a recovery against said Livings and his sureties of said fine, and of all costs in both courts, as though such stipulation had been written in said appeal bond; and the city of Biloxi at the May term, 1898, of the circuit court of Harrison county, was seeking to take the judgment against Livings and his sureties which the court might and should have pronounced at the November (trial) term, 1896. The presence of the defendant being expressly waived on the record at the trial term, no forfeiture for nonappearance could thereafter be taken thereon, but at the November term, 1896, when the case was tried and the defendant convicted, it was then proper for the court to have made it a part of its judgment that the city of Biloxi should recover of Livings and of Barber and Maybin the fine imposed upon Livings and the costs of both courts. Doubtless it was then the duty of the court to have so pronounced its judgment, and to have seen that it was so entered by the clerk; but, by mistake or inadvertence of the judge, the judgment was not so ren-

dered, or, at least, it is not insisted that such was the fact. It is too late, after the expiration of the term at which a judgment is rendered, to make it what it should have been, and what the judge would have made it, if it had then come to his attentive consideration. A judgment is final and conclusive after the term at which it was rendered. If anything has been omitted from it which is properly a part of it, and which was intended and understood to be a part of it, but failed to be incorporated in it, through the negligence or inadvertence of the court or the clerk, the omission may be supplied by amendment after the term; but amendments ought never to be the means of modifying or enlarging the judgment, so that it shall express something which the court did not pronounce, even though the proposed amendment embraces matter which ought clearly to have been pronounced; and a court cannot, at a subsequent term, change its judgment to one which it neither rendered, nor intended to render, nor supply an order which it might or ought to have made, but wholly omitted to make. Black, Judgm. §§ 14, 132, 156, 158. The judgment against the appellant is reversed, and the proceeding is dismissed, at the costs of the appellee.

(77 Miss. 127)

STAUFFER et al. v. BRITISH & AMERICAN MORTG. CO., Limited, et al.

(Supreme Court of Mississippi. March 13, 1899.)

LIMITATIONS—INFANT HEIRS.

Where the holder of notes secured by a vendor's lien died, leaving a widow and infant children, and no administration was had on his estate, limitations commenced to run against the rights of the widow and the children to enforce the lien simultaneously, because their interest was joint.

Appeal from chancery court, Tallahatchie county; A. H. Longino, Chancellor.

Suit by Robert E. Stauffer and others against the British & American Mortgage Company, Limited, and others. There was a judgment for defendants, and plaintiffs appeal. Affirmed.

John Bailey and C. H. Broome, for appellants. Wm. C. McLean and W. S. Eskridge, for appellees.

TERRAL, J. Emile Stauffer on the 6th of December, 1883, sold and conveyed to I. and E. Blackwell a valuable tract of land in Tallahatchie county, reserving a vendor's lien for \$2,017.50, due and owing by their promissory notes, and payable, the first note, for \$517.50, on the 15th of November, 1884, and the other three notes, for \$500 each, on the 15th of November, 1885, 1886, and 1887, and each of these notes was payable to Emile Stauffer, or his order or assigns. Emile Stauffer died March 7, 1884, intestate, and without having assigned these notes; leaving, as his heirs

and distributees, his wife, Mary Stauffer, of full age, and four minor children, of tender years. No administration was ever had on the estate of Emile Stauffer, but Mary Stauffer obtained the legal title to the lands sold, from the Blackwells, though without collecting the notes given for the purchase money; one of the notes, however, being canceled, or attempted so to be, by Mary Stauffer, when she gave a mortgage to the defendant mortgage company, which became the legal owner of the land, through a sale under said mortgage. Long after six years had expired from the date of payment fixed by the last note, but before said four minors, or any one of them, became of age, they, by Manly, their next friend, brought this suit to recover the sum of said notes from the defendant mortgage company, and to enforce the vendor's lien thereon. The statute of limitation was interposed by demurrer.

That no person, except an administrator, could collect by suit at law the debts due the estate of the intestate, is well settled; but it is held by a line of decisions in this state that, where the intestate owes no debts, the distributees may sue in equity to recover the debts due to the estate of the intestate, and that in such cases the statute of limitations will run against such debts, though no administration is granted. *Traweck v. Kelly*, 60 Miss. 654.

It is insisted by the learned counsel for the appellants that the rights and interests of the appellants are several and distinct from the right and interest of their mother, Mary Stauffer, and that the rights are in no sense joint. However, we think the interest of the distributees of Emile Stauffer in these notes was a joint interest. Certainly no one of these distributees could have sued for the recovery of the one-fifth part of these four notes, or of one of them. To have had a recovery on all or on any of these notes, all of the distributees must have been before the court. It is obvious, in our apprehension of the matter, that the interest of the distributees of Emile Stauffer in the notes sued on is a joint interest, and that those minor distributees are barred of any suit, because their mother, Mary Stauffer, is barred, upon the familiar rule that, where one of the parties to a joint action is of age when the cause of action accrues, the statute of limitation runs against all, and when one is barred all are barred. **Affirmed.**

(120 Ala. 293)

COMPTON et al. v. SMITH.¹

(Supreme Court of Alabama. Aug. 15, 1898.)

PARTNERSHIP—NOTES—INDIVIDUAL LIABILITY—SURETYSHIP—EVIDENCE—HUSBAND AND WIFE—INSTRUCTIONS.

1. Action was against "A. and B., partners doing business under the style of A. and B." The notes sued on were signed by defendants

individually, and there was nothing on their face to indicate a partnership. The summons followed the complaint. *Held*, that the action was against defendants as individuals.

2. Statement of a maker, as to whether he signed a note as surety, is not a conclusion.

3. Where, in an action on notes signed by husband and wife, there was evidence that they were partners, a charge that a wife cannot become surety for her husband, and was not liable unless she was a partner, was proper, though they were sued as individuals.

4. A charge that mortgages in evidence, securing notes, did not of themselves show a partnership, was not faulty as singling out and laying stress on a part of the evidence without reference to other parts.

Appeal from circuit court, Marengo county; James J. Banks, Judge.

Action by John W. Smith against D. O. Compton and F. M. Compton. There was a judgment for plaintiff, and defendants appeal. **Reversed.**

This action was brought by the appellee, J. W. Smith, against "D. O. Compton and F. M. Compton, partners doing business under the style of D. O. Compton and F. M. Compton." The complaint counted upon promissory notes executed by the defendants. The defendants filed a plea of the general issue and a special plea denying the indebtedness as set forth in the complaint, and the defendant F. M. Compton filed a plea of coverture, which is set out in the opinion. The principal facts of the case, which show the rulings presented and reviewed on the present appeal, are sufficiently stated in the opinion.

Upon the introduction of all the evidence, the defendants requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "I charge you, gentlemen, that a wife cannot become surety for the husband's debt, either directly or indirectly, and unless you believe that D. O. Compton and F. M. Compton are partners, your verdict must be for the defendant F. M. Compton." (2) "I charge you, gentlemen, that the several mortgages introduced in evidence by the plaintiff do not show absolutely that the defendants were partners." (3) "If you believe the evidence, your verdict must be for the defendant F. M. Compton."

There were verdict and judgment for the plaintiff. The defendants appeal, and assign as error the several rulings of the trial court to which exceptions were reserved.

Miller & Kirven, for appellants. Abrahams & Canterbury, for appellee.

HARALSON, J. The complaint in the suit was by John W. Smith, the appellee, against the appellants, D. O. Compton and F. M. Compton, partners doing business under the style of D. O. Compton & F. M. Compton. The summons follows the complaint, the notes sued on were signed by the defendants individually, and there is nothing on their face to indicate a partnership between them. This, as we have held, made it a suit against these parties as

¹ Rehearing denied November 5, 1898.

individuals and not against them as partners. *Baldrige v. Eason*, 99 Ala. 516, 13 South. 74.

1. The real issue in the case, under the plea on which it was tried, was whether or not the defendant, F. M. Compton, the wife of the other defendant, D. C. Compton, signed the notes sued on as security for her husband. The contention on the part of the appellee, resisted by the appellants, was, that Mrs. Compton and her said husband were partners, and signed the notes together as such, and, therefore, she was with him equally bound. Mrs. F. M. Compton filed a plea of coverture and suretyship,—“that at the time of the execution of the instruments sued on, she was a married woman, the wife of D. C. Compton, and that the only consideration for the execution by her of said instruments was to secure a debt contracted by her husband.” Under the statute, it is provided, that “the wife shall not, directly or indirectly, become the surety of the husband” (Code 1896, § 2529 [2349]); and if she signed these obligations as surety, she is not bound on them. If she signed them, together with her husband, and they were partners, she is bound. *Belser v. Banking Co.*, 105 Ala. 514, 17 South. 40; *O’Neil v. Brewing Co.*, 101 Ala. 383, 389, 13 South. 576; *Lumber Co. v. Lewis*, 94 Ala. 626, 10 South. 333; *Schlapback v. Long*, 90 Ala. 525, 8 South. 113.

On the examination of Mrs. Compton for defendants, she was requested by their counsel, to “state whether or not she signed the notes as her husband’s security.” The plaintiff objected on the ground that the question called for a conclusion of the witness, and the objection was sustained. In this the court erred. Whether one signed a note as surety or not,—especially when the fact of suretyship does not appear on the face of the obligation,—is a fact which may be shown by extrinsic parol proof. *Bruce v. Edwards*, 1 Stew. (Ala.) 11; *Bank v. James*, 9 Ala. 949; *Summerhill v. Tapp*, 52 Ala. 227; *Howle v. Edwards*, 113 Ala. 187, 20 South. 956; 1 *Brandt*, Sur. § 29. And it has been held, when a promissory note is held by the payee, and it does not on its face show the fact of suretyship, but it is proved that one of the makers was only a surety, that it will be presumed the creditors knew of the suretyship. *Ward v. Stout*, 32 Ill. 399; *Cummings v. Little*, 45 Me. 183; 1 *Brandt*, Sur. § 33. We need not for the purposes of this case, commit ourselves to this last proposition, but simply hold, that under the facts of this case, Mrs. Compton should have been allowed to prove that she was a mere surety on the notes. She and her husband both swore that they were not, and had never been, partners.

2. The plaintiff’s proof tending to show that there was a partnership between the said parties, was in substance, that D. C. Compton, the husband, had been procuring advances from plaintiff for a long time and he refused to make further advances to him, and just prior to the time of advancing to the defendants jointly, D. C. Compton came to him for

further advances, and he declined to furnish them, and Compton stated to him that he and his wife were going to farm jointly, and they would execute joint mortgage; that subsequently, when the notes and mortgages were executed, both defendants being present, he stated to Mrs. Compton what had passed between him and her husband, and that he, the plaintiff, would not advance further unless they executed joint notes and mortgages to secure the same. Whereupon they signed the notes sued on and mortgages on personal property to secure them. Two of the three notes sued on were dated April 27, 1894, and the other, June 20, 1895. It was shown, that until the latter part of that year, 1895, the account for advances had been kept on the books of plaintiff against D. C. Compton alone, when plaintiff added to his name the words, “and Wife,” so as to make the caption of the account to appear as charged against “D. C. Compton and Wife,” and that he did not know why he had made this change, but it was probably done upon the advice of an attorney. The mortgages executed to secure the notes bore the same date of the notes, and purport to have been made for advances in necessary provisions for the mortgagors and children, and for mules, etc., obtained bona fide for the purpose of making a crop. They were made in the joint names of the defendants, signed by them respectively, do not on their face indicate that they were made by a partnership, and were introduced without objection.

3. There was no error in charge 1 requested by defendants and refused. The defendants were sued as individuals, but it was on proof of the fact of partnership that plaintiff relied for recovery against the defendant Mrs. Compton. There was proof on the part of plaintiff that there was, and on the part of the defendants that there was not, a partnership, and the real issue on which plaintiff relied for recovery against Mrs. Compton was the existence vel non of a partnership between her husband and herself, and that the notes sued on were executed by the partnership. The first part of said charge contains an undisputed proposition of law, as introductory to the real instruction contained in the charge, viz. that unless the jury believed that a partnership existed between defendants, the verdict should be in favor of Mrs. Compton.

The mortgages were written instruments, which, on their face, it was the province of the court to construe. The second charge was no more than a request that the court should charge, that these mortgages, of themselves, did not show a partnership, which under the authority of *Levy v. Alexander*, 95 Ala. 101, 10 South. 394, we apprehend was a correct instruction. It is not subject, as contended by appellee, to the vice of singling out and laying stress on a part of the evidence, without reference to other parts of it.

We scarcely need to add that the general charge, No. 3, was properly refused.

Reversed and remanded.

(50 La. Ann. 1889)

FULLILOVE et al. v. POLICE JURY OF BOSSIER PARISH et al. (No. 13,013.)

(Supreme Court of Louisiana. Feb. 20, 1899.)

CONSTITUTIONAL LAW — TAXATION — MUNICIPAL CORPORATIONS AND PARISHES—RAILROAD AID—PARISH TAX—ELECTIONS—STATUTES—TITLE OF ACT.

1. The taxing power referred to in article 202 of the constitution of 1879, as to be exercised by parishes and municipal corporations under legislative authority, but solely for "parish" and "municipal" purposes, has no reference to the special taxes authorized to be levied in aid of works of public improvement and railway enterprises, under the provisions of article 242 of the constitution. Taxes of that character were made the subject of separate consideration by the framers of the constitution. They were affirmatively taken beyond and withdrawn from within the scope of legislative, parish, or corporate action, by article 242 of the constitution, and made to be governed and dealt with as independently provided for therein.

2. A tax consented to under the provisions of article 242 of the constitution by the owners of taxable property is not a "parish" tax, and does not bind the parish as such, but is levied upon the theory of local and special benefits, under the actual or presumed direct, individual consent of the parties concerned. The taxes collected, though in the custody of and disbursed by the parish authorities, are not parish moneys.

3. The parish authorities, in ordering the elections provided for in Acts No. 35 of 1886 and No. 153 of 1894, announcing the results thereof, and levying taxes consented to at such elections, do not act as representatives of the respective parishes. They are selected merely as ministerial, public agencies, resorted to for the purpose of ascertaining and making effective the will of the people of particular localities, in respect to special taxes of the character referred to in article 242 of the constitution. When taxes are levied under such elections, the taxing power is exercised by the owners of the property to be taxed under the constitutional authority of article 242 of the constitution, and not by the parishes or under legislative authority.

4. A tax levied by the parochial authorities of a parish upon all the taxable property of one of the wards of the parish, upon the petition of property taxpayers of the ward, as provided for in Act No. 153 of 1894, is legal and constitutional.

5. Acts No. 35 of 1886 and No. 153 of 1894 are not unconstitutional, as not fully and fairly expressing their objects in their title. The former act clearly expresses that it is an enforcement of the provisions of article 242 of the constitution of 1879, and the second act, amendatory of the first, merely widens the extent of the enforcement.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Bossier; J. T. Watkins, Judge.

Action by J. H. Fullilove and others against the police jury of Bossier parish and another. From the judgment, defendants appealed. Reversed.

The plaintiffs represented, in a petition filed by them in the district court for Bossier parish, in November, 1898, that they were property taxpayers of ward 1 of said parish; that the police jury of Bossier parish, at its session of the 11th of August, 1897, ordered a special election to be held in said ward 1,

to take the sense of the property taxpayers of said ward in regard to voting a special tax of five mills on the dollar of all the taxable property in said ward, and fixing a term of 10 years, beginning with the 1st day of January, 1898, in aid of the Shreveport & Red River Valley Railroad Company; that the police jury acted in said matter by virtue of the provisions of Act No. 35 of 1886, as amended by Act No. 153 of 1894; and said police jury acted without any valid authority in law, and all of their acts in reference to said special tax were unconstitutional, null, and void, and without effect. In view of the premises, alleging that they had property in said ward subject to said tax, that they had a common interest in having the said tax declared unconstitutional, and that their interest in the same exceeded \$2,000, they prayed that the parish of Bossier and the Shreveport & Red River Valley Railroad Company be cited, and that Act No. 153 of 1894, amending Act No. 35 of 1886, be declared unconstitutional, null, and void; that all acts of the police jury, under and by virtue of it, in so far as it levied a tax against the property of petitioners, be decreed to be null and void and of no effect. The police jury answered, pleading, first, a general denial; further answering, it averred that the election was ordered, and was held and carried in favor of said tax, and that the tax of five mills was levied over all the property of said ward No. 1, in accordance with the will of the people, and according to law, for 10 years, in favor of the Shreveport & Red River Valley Railroad Company. It averred that the acts of the legislature mentioned in plaintiffs' petition were constitutional, and all of its own acts legal. It averred that it was only a nominal party to the suit, and prayed to be dismissed, with costs. The railroad company answered, pleading, first, the general issue. It pleaded the prescription of three months against the plaintiffs, and averred that they were estopped from bringing the suit, as they had participated in the election. It averred that, during the year 1897, the police jury of Bossier, pursuant to law, and after more than one-third of the property taxpayers of ward 1 of said parish had petitioned therefor, and after a legal election, participated in by the property taxpayers of said ward, at which a majority in number and amount voted in favor thereof, levied, according to law, a tax on said property, in ward No. 1, in aid of respondent, of five mills on the dollar for 10 years, beginning with 1898; that, in consideration of said tax or subsidy, respondent had built, completed, and was then operating its said railroad through said ward 1, and that the tax collector of Bossier parish was then collecting said tax, to which respondent had a vested right. It averred that the acts of the legislature referred to were legal and constitutional, and were full warrant for the acts of the police jury, and that all the police jury's acts were legal. Before the case was tried, the parties to the

sult signed an agreement and statement of facts, by which it was admitted that the plaintiffs voted against the tax as alleged; that their joint interest exceeded \$2,000; that the railroad had been built as alleged in the company's answer; that all the proceedings of the police jury, and the petition of property holders, and vote and proclamation, and levy of tax of five mills for 10 years, were in due form, and regular; that the only contest between plaintiffs and defendants was the constitutionality and legality vel non of Act No. 35 of 1886 of the general assembly of Louisiana, as amended by Act No. 153 of 1894, and the constitutionality vel non of said legislation, and the legal questions raised by pleas. Citation in the case was served on the police jury on November 11, 1893, and upon the railway company on November 14, 1893. The court rendered judgment in favor of plaintiffs, and against defendants, decreeing that Act No. 153 of 1894, and the act of the police jury of Bossier thereunder, in so far as it levied a tax against the property of the petitioners, were unconstitutional, null, and void, and of no effect. Defendants appealed.

Act No. 35 of 1886, referred to in the pleadings, is entitled "An act to prescribe the manner in which special elections shall be held in the parishes, cities, and incorporated towns of this state, for the purpose of levying special taxes in aid of railway enterprises, and providing for their enforcement and collection, and to carry into effect article 242 of the constitution of 1879."

Act No. 153 of 1894, to which reference is made in the pleadings, is entitled: "An act to amend and re-enact sections 1, 4, and 6 of Act No. 35, approved June 28th, 1886, entitled 'An act to prescribe the manner in which special elections shall be held in the parishes, cities and incorporated towns of this state, for the purpose of levying special taxes in aid of railway enterprises, and providing for their enforcement and collection, and to carry into effect article 242 of the constitution of 1879.'" The body of the act reads as follows:

"Section 1. Be it enacted by the general assembly of the state of Louisiana, that section 1 of Act No. 35, approved June 28th, 1886, be amended, and re-enacted, to read as follows: 'Section 1. That, whenever one-third of the property tax-payers of any parish, parish ward, city or incorporated town, in this state shall petition the police jury of said parish or the municipal authorities of such city or incorporated town, to levy a special tax in aid of any railway company or corporation organized under the laws of this state, the said police jury, municipal or town authorities shall order a special election for that purpose, and submit to the property tax-payers of such parish, parish ward, city or incorporated town, the rate of taxation and the purpose for which it is intended: provided, that said election be held under the general election laws of this state, at that time in force and at

the polling places at which the last preceding general election was held, and not sooner than thirty days after the official publication of the petition and the ordinance requiring the election; both of which shall be made in the same manner as provided by law for judicial advertisements.'

"Sec. 2. Be it further enacted, etc., that section 4 of Act 35, approved June 28th, 1886, be amended and re-enacted, to read as follows: 'Sec. 4. That if a majority in number and in value of the property tax-payers of such parish, parish ward, city or incorporated town shall vote in favor of such levy of said special tax, then the police jury, for and on behalf of such parish or ward thereof or the municipal authorities for and on behalf of such city, or incorporated town, shall immediately pass an ordinance levying such tax for such time, as may have been specified in the petition, and shall designate the year in which such taxes shall be first levied and collected.'

"Sec. 3. Be it further enacted, etc., that section 6 of Act 35, approved June 28th, 1886, be amended and re-enacted to read as follows: 'Sec. 6. That the police jury of any parish or the municipal authorities of any city or incorporated town, shall, when the vote is in favor of the levy of such taxes, levy and collect annually in addition to other taxes, a tax upon all taxable property, within such parish, parish ward, city, or incorporated town, sufficient to pay the amount specified to be paid in such petition; and such police jury and municipal authorities shall have the same power to enforce and collect any special tax that may be authorized by such election, as is, or may be conferred by law upon them for the collection of other taxes; which taxes so collected shall from time to time, as the same are collected, be paid to the railway company or corporation named in such petition, or to any person, partnership, or other company or corporation to which the same may have been assigned.'

Leonard & Randolph and John D. Wilkinson, for appellant railway. A. J. Murff, for appellant parish. Wise & Herndon and Solomon Wolff, for appellees.

NICHOLLS, C. J. (after stating the facts). A comparison of Act No. 35 of 1886 with Act No. 153 of 1894 will show that provision is made in the latter for the submission by the parochial authorities, under certain circumstances, to the property taxpayers of wards in the different parishes, through elections to be ordered by police juries, whether or not a special tax should be levied on the taxable property in said wards in aid of railway enterprises, for the canvassing and announcement by them of the result of said election, and for the levying by them (in the event that said tax should have been consented to) of the tax voted; for whereas Act No. 153 of 1894 provided simply for such elections being held in parishes, cities, and incorporated towns, and

did not include wards. The plaintiffs in this suit attack the proceedings of the police jury of the parish of Bossier, as being illegal and unconstitutional from beginning to end. Assuming that the source of the power of the parish of Bossier to act in this matter rests upon the Act of 1894, they contend the legislature of the state was without authority itself to confer such a power upon the parochial authorities. They maintain that "statute" authority to parishes to levy taxes is limited by article 202 of the constitution to taxation for "parish" purposes; and they assert that a tax levied in aid of a railroad enterprise is not a tax for a "parish purpose." Their position is that the authority of the parochial authorities in respect to a tax to be levied in aid of a railroad rests exclusively upon the provisions of article 242 of the constitution itself, and that that article conferred power and authority upon the police juries to deal with parishes in their entirety as single units, and not with wards which are subordinate local subdivisions of parishes.

Article 202 of the constitution of 1879 declares that "the taxing power may be exercised by the general assembly for state purposes, and by parishes and municipal corporations under authority granted to them by the general assembly for parish and municipal purposes"; and article 209, that "no parish or municipal tax for all purposes whatsoever shall exceed ten mills on the dollar of valuation: provided, that for the purpose of erecting and constructing public buildings, bridges and works of public improvement in parishes and municipalities, the rate of taxation herein limited may be increased, when the rate of such increase, and the purpose for which it was intended shall have been submitted to a vote of the property tax-payers of such parish or municipality entitled to a vote under the election laws of the state, and majority of same voting at such election shall have voted thereon." These two articles of the constitution are found in that instrument, under the heading of "Revenue and Taxation." Article 242 of the constitution of 1879, as amended, reads as follows: "The general assembly shall have power to enact general laws authorizing the parochial or municipal authorities of the state, under certain circumstances by a vote of a majority of the tax-payers in number and amount, voting at the election to levy special taxes in aid of public improvements or railway enterprises: provided, such tax shall not exceed the rate of five mills per annum nor extend for a longer period than ten years." This article is found in the constitution, under the heading of "Corporations and Corporate Rights."

It may be conceded that the right of the general assembly to authorize "parishes" and "municipal corporations" to exercise the "taxing power," and the right of the parishes and municipal corporations to exercise such power by virtue of legislative grant, is limited to taxation for "parish and municipal purposes,"

and that any attempt to pass beyond the limited object declared would be ultra vires and unconstitutional; but the question is: Do parochial authorities act as representatives of their respective "parishes," when, under legislative provisions, they submit to a vote of the property taxpayers, either of the entire parish, or of a defined subdivision thereof, the question as to whether they shall be specially taxed in aid of a railway enterprise? Is such action and that which may incidentally and consequentially flow out of it "corporate" action of the parish as a political body, and is a tax consented to at such an election a "parish tax"? An examination of the language of article 202 will show that the taxation therein referred to is taxation by the "parishes." The "parochial authorities" are not mentioned. It is only in so far as they are called on to act as representatives of the parishes, in respect to matters binding the corporation, and as to which they may, in one sense, be said to be the parish itself, that they become connected with the subject-matter therein referred to. Article 242 of the constitution, on the other hand, does not mention the "parishes" themselves, but does mention the "parochial authorities," and constitutes them public ministerial agencies, "to levy special taxes in aid of public improvements or railway enterprises, when consent to such taxes within the limitations fixed has been given as directed by that article by the owners of the property to be subjected to the tax. The designation of the parochial authorities as the public agency resorted to for the purpose of ascertaining and making effective the will of the people of a particular locality in respect to special taxes of the character referred to is simply as a matter of convenience. A special person or officer or board might have been charged with the performance of these duties. The purpose of such taxes is not in aid of matters falling generally and properly under the control of and within the scope of the legislative action of the parochial authorities, as representing parishes, but partially withdrawn from such control by force of affirmative limitations (subject to be reinstated to a certain extent by a vote of the people of the parish); but it is in aid of matters outside of, and never brought at all within the range of, legislative corporate action. A tax consented to under the provisions of article 242 of the constitution by the owners of taxable property is not a "parish" tax, and does not bind the parish as such, but is levied upon the theory of local and special benefits received under the actual or presumed direct, individual consent of the parties concerned. The taxes collected, though in the custody of and disbursed by the parish authorities, are not parish moneys. We are of the opinion that the taxing power referred to in article 242 of the constitution as to be exercised by "parishes" and "municipal corporations" under legislative authority, but solely for "parish" and "municipal purposes," has no reference to the special taxes authorized to be levied in aid

of works of public improvement and railway enterprises, under the provisions of article 242 of the constitution; that taxes of that character are made the subject of separate consideration by the framers of the constitution; that they are affirmatively taken beyond and withdrawn from within the scope of legislative parish corporate action by article 242 of the constitution, and are made to be governed and dealt with as independently provided for therein.

Plaintiffs argue that article 242 of the constitution *per se* goes no further in the way of granting authority to parochial authorities to levy taxes in aid of railway enterprises, under a vote of the people, than to authorize them to do so upon a vote of the owners of property throughout the entire parish consenting to a tax upon all the taxable property in the parish; that it would be essentially necessary for a legislative act supplementary to article 242 of the constitution to be enacted to authorize "ward" taxation, and bring it under the duties and control of the parish authorities; that this legislative act would therefore be, in reality, the source of the power of such taxation, and of the duty of the parochial authorities in regard thereto, and that this added power it was beyond the legislature to give. We do not give to article 242 of the constitution the limited scope that plaintiffs contend for. The article fixes a limit to the rate of taxation, fixes the length of time during which the tax should be levied, and the character and the number of the voters who shall determine whether the tax shall be levied or not; but it is significantly silent as to the extent of the territory in which the property is to be taxed, and it nowhere declares that the property tax holders who shall vote at the special elections authorized to be held shall be the property tax owners of the entire parish. The wording of the article on this latter point, as well as to the territory in which the tax is to be levied, seems to have been designedly left uncertain, to be fixed by the power either given to or left with the general assembly to determine the "certain circumstances" under which those special elections should be held, and regulate and define the duty cast upon the parochial authorities of ordering the same, announcing their result, and levying the special taxes voted for. There was not an absence of power in the people in the wards in the different parishes, prior to the passage of Act No. 153 of 1894, to have the property therein taxed in the aid of railway enterprises, under elections authorized to be held by article 242 of the constitution; but the provisions of that article were not in all respects self-operative. The people of the different wards had, prior to the enactment of the act of 1894, the same powers which they have now; but they were latent, requiring legislative action to enable them to be called into action. The legislature was not called upon to grant powers, but to direct and regu-

late the "certain circumstances" under which they should be called into action, the manner of their exercise, the time, place, and instrumentalities necessary for holding the elections contemplated. Plaintiffs are in error in referring to Act 153 of 1894 as the source of a power of ward taxation to be exercised either by the "parishes" or by "the parochial authorities" for special taxes in aid of railway enterprises. That statute is simply a general statute, making effective powers already granted or reserved to the people of different localities, and imposing duties upon parochial authorities, under article 242 of the constitution. *State v. Caffery*, 49 La. Ann. 1748, 22 South. 756, 1008. The "taxing power" itself is exercised by the owners of the property to be taxed, and neither by the "parochial authorities" nor by the "parishes."

When this question was presented to us, we were considerably impressed at first by difficulties and complications which suggested themselves to us as likely to arise in the enforcement of article 242 of the constitution, in the event the property owners of a particular ward of a parish should have exercised the right of taxing their property to the full permitted limit of five mills, and the people of the entire parish or of the remaining wards should thereafter seek to have other special taxes levied under the same article. Reflection recalled to us that, while consideration of the difficulties which might arise in the enforcement of a law might be proper in attempting to reach conclusions as to the intent of the lawmaker, it would not be so for the purpose of testing the constitutionality of the law itself. That consideration of the difficulties which may be encountered in the enforcement of a law under a certain construction of its provisions does not always justify a conclusion adverse to the legislature having had an intention in enacting it, which would lead to such results, is illustrated by the existing situation in respect to the very matter we are now discussing. The convention of 1898, with the evident intention of placing this matter beyond the pale of controversy, intentionally inserted in article 270 of the constitution of that year (the article which replaced article 242 of the constitution of 1879) the word "wards," leaving untouched a limit of five mills as the extent of the power of taxation. It has thus deliberately placed matters in a situation from which the difficulties and complications to which we have alluded must inevitably arise, and be forced upon us for decision. Besides this, instances are not wanting where municipal corporations, with limited powers of general taxation, have been sustained and justified in independently levying special taxes in particular localities, by reason of special benefits, under statutes authorizing them to do so upon the petition of a specified number or proportion of the inhabitants of those localities.

It is contended that Act No. 35 of 1886 is

unconstitutional, in not complying in its title with article 29 of the constitution of 1879, by expressing fully and fairly the object of the act. The constitutionality of the original act was not contested in the court below. Plaintiffs questioned the constitutionality of that act as amended; in other words, the constitutionality of the amending act. Strictly speaking, we would be called on to consider only the questions raised by plaintiffs' pleadings. Being of the opinion, however, that Act No. 35 of 1886 is constitutional, we have no objection to so declaring. That act was clearly in enforcement of, and to make operative, article 242 of the constitution of 1879. Act No. 153 of 1894 merely widens the range of this enforcement. Under the view we have taken of the original act, and of the article of the constitution itself, the attack upon the amending act is not well founded.

For the reasons herein assigned, it is ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, annulled, avoided, and reversed, and plaintiffs' demand be, and the same is hereby, rejected, at their cost in both courts.

(51 La. Ann. 618)

DUNNING v. WEST. (No. 12,925.)

(Supreme Court of Louisiana. Jan. 23, 1899.)

WITNESSES — COMPETENCY OF WIFE — STATUTE — TIME OF TAKING EFFECT.

1. All persons not expressly disqualified may testify. Effect may be given to a statute repealing a disqualifying statute, immediately after it becomes a law.

2. When the law abolishing the disqualification of certain witnesses was enacted (Acts 1898, No. 190), it went into effect, and applied to pending cases. 1 Hen. Dig. p. 789, § 5.

3. Justice between the parties demands that the case be remanded.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frederick D. King, Judge.

Action by W. Y. Dunning against Walter O. West. Judgment for defendant. Plaintiff appeals. Reversed.

D. M. Sholars (Benjamin Rice Forman, of counsel), for appellant. Horace E. Upton and Robert J. Maloney, for appellee.

BREAUX, J. Plaintiff sued the defendant for damages in the sum of \$25,000, caused by the negligence and want of skill of defendant's employé, who, as a dentist, extracted two teeth of plaintiff's wife. Plaintiff's petition sets forth that, on calling at defendant's office, she was received by him. She complained of an aching tooth. The defendant, without having examined her teeth, placed her under the care of an assistant. Thereupon, he (plaintiff) avers, the assistant, without any examination or diagnosis to make certain that the pulling of a tooth was necessary, extracted two of the teeth of her lower jaw. It was charged that it was willful negligence and malpractice; that the pulling of her teeth was un-

necessary, and that they were pulled in an awkward and unskillful manner; that a few minutes after, believing her jawbone was fractured, she returned to his office, and earnestly complained of her affliction, but that the assistant to whom she complained assured her that she was mistaken; that from the time the teeth were extracted she suffered pain in the bone from which the teeth had been extracted, and, 12 days after the piece of the jawbone had been detached in extracting the teeth, spicula worked through her gums, and were taken from her mouth by her; that this detached bone in the gums, which defendant's assistant had failed to take out, caused inflammation of the periosteum, which inflammation extended to the remaining teeth of the lower jaw; that other teeth were extracted, under the advice of a skillful dentist and physicians, without affording her any relief. It is contended by plaintiff that the injury was occasioned by the unskillfulness of defendant's assistant, which he alleges resulted in necrosis or decay of the lower jaw, for which she had to undergo a most painful operation, which resulted, he avers, in disclosing, not only periostitis, but also the presence of a lower portion of the detached jawbone, brought about by the unskillful extraction of a tooth; that a piece of the jawbone had to be removed, and that it broke near the center, and to preserve its continuity the ends were tied with silver wire, and the pain and suffering have undermined her health; and he avers she is a physical wreck, and has a permanent scar on her face. The testimony elicited on the part of the defense shows that she was riding a bicycle on St. Charles street about two weeks later, and that a piece of tooth, or spicula of the bone, came out of her gum. Two weeks after this first ride, she fell from her bicycle while again riding. The defendant pleaded a general denial.

The evidence shows that previous to the 16th of October, 1896, Mrs. Dunning's health was very good, and that she has never been in a healthy condition since, and still suffers. The physicians found, a short time after the teeth had been extracted, that she was suffering from disease of the jawbone, shown by the signs of inflammatory disturbance about the jaw. One of the witnesses, who had been the physician of plaintiff's wife, testified that he found no other cause for the trouble, except the extraction of the teeth, and added that he did not know whether they were pulled unskillfully or skillfully; and another of plaintiff's witnesses (a physician, also) testified that it was a possibility that her illness was exclusively the result of unskillful extraction of the teeth. The defendant also examined witnesses, among them a well-known dentist, with an experience of 50 years, who said that all dentists who extract many teeth know that it sometimes happens that in extracting a tooth, a portion of the alveolar process is broken, especially in pulling, that a little fracture is of no importance; that it is a common occurrence;

that it would be impossible for a physician, even a dentist, to tell, three or four months after teeth had been extracted, whether they have been skillfully or improperly extracted; that under ordinary conditions a skillful dentist will not fracture the jawbone in pulling a tooth, with the exception of possibly a small fracture of the socket or alveolus at the curvical part of the tooth; that, if such an accident should happen as the breaking off of a part of the jawbone, ordinary prudence would suggest that the bone should be immediately removed, but that he had never heard of any dentist breaking a jawbone in extracting an inferior bicuspid. The two lower bicuspids were the teeth extracted. In answer to a question, this witness testified that, if the lower bicuspids had been extracted with the roots attached, it would be very good evidence of a careful and skillful extraction of those teeth. Another dentist, an expert witness, testified that it is impossible, almost, to extract a tooth without some slight fracture of the alveolar process. He expressed the opinion that, even sometimes after teeth have been extracted, it is possible to tell whether they have been properly or improperly extracted. The dentist by whom the teeth were extracted, and the defendant, both testified, denying the charge brought by plaintiff. The former was a graduate of a dental college. He is a dentist since 1890, and has pulled many teeth as an employé of the defendant, and prior to his employment by him he was engaged in work of that profession. In matter of the facts, we note that the teeth were pulled out October 16, 1896. Some 10 or 15 days after, she called on another dentist, and had teeth extracted. She consulted her physician on the 1st of November, 1896. She consulted a specialist first in the latter part of October, and again in January following. About the 9th of February, 1897, a surgical operation was performed. The district court rejected plaintiff's demand. From the judgment the plaintiff prosecutes the appeal.

The first objection now before us for determination comes on a bill of exceptions to the court's ruling excluding the evidence of Mrs. Dunning for the reason that the suit was brought in the name of the husband alone, and that, if any damages should be recovered, they would fall into the community. The bill sets forth that the witness was offered to prove her agency; that she made the contract, as the representative of her husband, for services to herself personally; and that, she being alone cognizant of what she did and what she suffered, she is a necessary witness, within the rule of competency of witnesses where they are the only persons having knowledge of the fact. We will later refer to the grounds of the bill of exceptions which are urged by plaintiff in support of his application to have the case remanded.

On the Merits.

The testimony shows that plaintiff's wife, who was suffering with toothache, called upon defendant to extract the teeth. He placed

her in charge of his assistant. The latter testified that he made the usual examination, and found the teeth that he afterwards extracted inflamed. He also, as a witness, stated that he administered an anæsthetic, — i. e. that he applied nitrous oxide or gas, — and took them out as teeth are usually extracted; they were not broken in extracting them; no accident happened. A short time (a few moments) after the operation, plaintiff's wife returned to defendant's office, and complained to the assistant by whom her teeth had been extracted of a piece of bone of the jawbone, or of the tooth, she said was left in her mouth. His reply was, after examination, that the little bone that she felt would disappear. She subsequently suffered great pain, from which she sought relief by having the teeth extracted, but this did not afford relief. The dentist who pulled her teeth, after the two bicuspids had been pulled, noticed nothing unusual about the gums of the teeth that had already been extracted. The gum was healing. The operations by the physicians revealed that there was enlargement of the jaw, in all probability depending upon a necrosis or dead portion of the jaw. At this point we conclude that justice demands that the case be remanded for a new trial. The evidence, in our view, is not absolutely sufficient to do justice between the parties. Although the testimony before us leaves scarcely a doubt upon the merits, yet we are unwilling to deny a hearing to witnesses who may, under the present law, be heard. We have not found it possible to concur in the decree, in the present condition of the case. It is doubtful whether we should affirm the judgment. We think, under the circumstances, the proper course is to remand the case. It may be — indeed, it is — possible that the result will be the same as if we were to finally decide at this time; yet, in our judgment, further testimony should be heard. The admitted testimony will remain as admitted, without the necessity of reoffering it, so that only new evidence need be offered. There is no question here of a new fact or of newly-discovered evidence. The only question really is whether the law enacted after the ruling in the court below should be considered as now applying. We think it does apply. The law is entirely remedial, and affects none of the vested rights of any one. This court said in *Baldwin v. Bennett*, 6 Rob. (La.) 309: "Under the constitutional provisions relied on, no acquired rights and pre-existing contracts can be affected by subsequent legislation. But it is otherwise with regard to remedies and forms of proceeding. Whatever relates to the manner of conducting and trying a suit (*litis ordinatio*) is always within the control of the legislature, who can at any time make any change or modification they may think conducive to the public good and a proper administration of justice in our courts." It is ordered, adjudged, and decreed that the judgment appealed

from be annulled, avoided, and reversed, and that this case be remanded to hear any other testimony admissible at this time, and for a decision by the district court after the testimony shall have been heard, and altogether to be proceeded with according to law in such cases; the costs to abide the final determination of the case.

On Application for Rehearing.

(March 7, 1899.)

WATKINS, J. Our decree reversed the judgment rejecting the plaintiff's demand for damages, and remanded the cause to the lower court, with directions that it admit and consider the evidence of the plaintiff's wife, which had been rejected on the ground that same was inadmissible, in view of the fact that the suit was brought by the husband,—the wife having been the one for injury to whom the suit was instituted. The point of objection made and sustained in the district court was that under Rev. Civ. Code, art. 2281, the wife was not competent to testify for or against her husband. But the legislature of 1898 so amended that article as to make it conclude as follows, viz.: "Provided further, that in all civil suits for damages instituted by the husband, for, or on account of personal injuries sustained or suffered by his wife, the wife shall be a competent witness." Act 1898, No. 190, § 1. Our opinion held that that "law is entirely remedial, and affects none of the vested rights of any one," citing *Baldwin v. Bennett*, 6 Rob. (La.) 309. This conclusion was not hastily reached, but after the most mature deliberation. The present contention of defendant's counsel is that, as the statute was enacted subsequent to the rendition of judgment in his favor in the district court, the interpretation now given it has the effect of divesting a vested right of property he acquired therein. But the accepted canon of construction of retroactive laws, or those to which a retrospective effect is given, is that "whatever relates to the manner of conducting and trying a suit is always within the control of the legislature, who can at any time make any change or modification they may think conducive to the public good and a proper administration of justice in our courts," etc. In our opinion, this statute furnishes an apt illustration of that rule, and our decree was a proper one. Rehearing refused.

(51 La. Ann. 630)

LINZAY v. LINZAY. (No. 13,045.)

(Supreme Court of Louisiana. March 7, 1899.)

DIVORCE—EVIDENCE—CUSTODY OF CHILDREN.

1. Wife sues for separation from bed and board on the ground of harsh and cruel treatment, and conspiracy against her life. Husband denies her averments, and reconvenes, asking judgment against her for separation; averring the same grounds, and, in addition, her public defamation of him.

2. Case is one of fact. Evidence not sustaining judgment below in favor of wife, same is reversed, and the decree here awards husband the separation, with custody of the children.

3. Even with the judgment as here pronounced, the case has not gone so far as to destroy the belief and hope that a reconciliation may yet be effected, and the spouses brought together upon a basis of mutual forgiveness, forgetfulness, and forbearance, and of common interest in their children of tender years.

4. The law wisely and humanely holds the door still ajar for them.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Rapides; Edwin G. Hunter, Judge.

Suit by Minnie Linzay against Charles Linzay. Judgment for plaintiff. Defendant appeals. Reversed in part, and judgment entered for defendant.

Andrews & Hakenyos, for appellant. Robert P. Hunter, for appellee.

BLANCHARD, J. This is a suit by a wife for separation from bed and board, for custody of the two children of the marriage, for dissolution of the community of acquets and gains, and for judgment for one-half of the community property. The grounds of the action are harsh and cruel treatment by the husband, of such a nature as to render their living together insupportable; and the allegation is made that the husband had threatened her life, and conspired with others to kill her, and as the result of this conspiracy she was enticed to the barn on the premises where the couple lived, and there shot with a pistol, and wounded in the arm, by a concealed assassin, who endeavored to take her life, and that because of this attempt on her life she had been forced to leave the matrimonial domicile and seek shelter elsewhere. The husband denies all this, represents that the wife is not a fit person to have custody of the children, and contests her right to them. Becoming plaintiff in reconvention, he avers that the conduct of the wife entitles him to a judgment of separation from bed and board; that she herself had been unkind, cruel, harsh, and abusive, disregardful of his rights, had set his will and authority at defiance, had destroyed his peace of mind and the happiness of his home, and rendered their living together insupportable; that she had defamed his character by charging him before a magistrate as being accessory to the crime of attempting to murder her; that she had purposely shot herself on the occasion averred by her, in order to lay the basis for the slanderous charge against him; that she had previously brought two suits against him for divorce, both of which she had abandoned without trial; and that, instead of the community being indebted to her, he was its creditor to the extent of \$1,000 for money and property owned by him at the time of the marriage, and which went into the community. He prayed for judgment in accordance with the averments of his answer. The decision below was in favor of the plaintiff, granting her a decree of separation from bed and

board; dissolving, in her favor, the community of acquets and gains; giving her custody of the children of the marriage; and directing that she recover of the husband \$1,271.60, as her share of the community property. Defendant appeals.

The case is one of fact. We may class the complaint of the wife under two heads: (1) Harsh and cruel treatment; (2) an attempt by the husband upon her life, through a hired assassin lying in wait in the barn. Both these charges are serious enough, but the enormity of the latter, if true, makes it an atrocious crime, for which the infliction even of the severest penalty known to the law upon the guilty culprit would be a punishment too light. We have gone over the evidence found in the record with care and pains, and over the discussion of it in the briefs of counsel with close attention; but in this opinion, intended more as a statement of facts and of the conclusions arrived at, we decline to go into any lengthy discussion of the nauseous details of this narrative of marital infelicity. There is a proneness on the part of masculine human nature, from which even judges are perhaps not entirely exempt, to lean in sympathy to the side of the wife and mother in these cases of domestic trouble and controversy. But, even with this "coign of vantage" in her favor, we have been unable to reach the conclusion that this wife has made out her case, or is entitled to the judgment entered up in her favor below. With regard to the alleged attempt upon her life by the husband in conjunction with a hired assassin, we reject the story in toto. There is neither any direct proof of it, nor yet any showing of a chain of circumstances warranting a moment's belief in its verity. Not only that, but we regard it as disproven. We acquit the husband of any participation in it. The conviction, most unwillingly, is forced upon us that she shot herself, and that her motive was to manufacture a case against her husband, to the end of bringing him to punishment, and enabling her to succeed in a purpose long formed, and twice before attempted by proceedings in court,—of securing a legal separation from him. The wound was a slight flesh wound in the left forearm, and shown, by the evidence of a physician attending her, to have been possible of self-infliction. The shooting occurred at the barn, some 60 yards from, and towards the front of, the house occupied by the family. It was 3 o'clock in the afternoon. Miss Somers (a young lady friend of the wife, who was visiting her) and the two children were in the house at the time. The husband was in the field near by, engaged in the work of hauling his cane to the sugar refinery. The railroad ran near and in front of the house, and nearer still to the barn. Neighbors lived opposite, across the railroad,—not more than 250 yards away. Others (colored people) lived within 150 yards of the barn. The pistol from which the shot was fired was so close to the lady when fired that the sleeve covering the arm was powder-burned. She

claimed she was shot while in the barn or crib, looking for chickens, and that it was at the instance of the husband she had gone there looking for chickens. This barn had but one door. After the shooting she came out of this door, crying "Murder!" No one else was seen to come out of that door. She went over to the railroad, and to the house of John Brogdan, just beyond. A physician and her husband were sent for. Both came. She accused the husband of conspiring to have her shot, and wanted to go at once to a magistrate, to sue out a warrant against him. She told Brogdan and others she had been shot by a negro named Tom Allen, who wore a green shirt, that he was concealed in the barn, and that, after shooting her, he ran out under the crib. Brogdan and her brother, who had also come to where his sister was, repaired to the barn to investigate. They found no tracks leading in or out of the barn, or around it, except those of the lady. Sugarcane grew near the barn. They went to this, taking row by row, searching for tracks, but found none. Inside of the barn they found much corn, but no place where an assassin could have been concealed. At one spot, where there was a little or no corn, they found a small hole, caused by one or two planks being prized up; but this is shown to have been done some days before, and the hole was entirely too small to conceal a man, or for a man to get into; and from the floor of the crib to the ground the space was only six or eight inches,—entirely insufficient to enable a man either to effect an entrance into, or make his exit from, the crib through it. Before going to the barn, Brogdan and the brother had been told by the wounded lady that two pistols were kept in her bedroom,—one on the mantel, and another on a near-by shelf. She said one of these pistols was charged with five cartridges, and the other with three. They went to the house, searched for these pistols, found the one with five chambers loaded, but did not find the other. They repaired then, a second time, to the barn; and Brogdan, making a closer inspection of the hole in the floor, getting down and looking well into it, discovered a pistol lying back under one of the sleepers of the floor. He called to the brother. The pistol was taken out, and examined. One shot was found to have been recently fired from it, and it was identified as the "other" pistol missing from the house. The brother thereupon declared his belief that his sister had shot herself; and on going back to Brogdan's house, which he and Brogdan immediately did, he told her she had shot herself, adding, "We don't think you shot yourself with murderous intent, but you undoubtedly shot yourself." This is the testimony of Brogdan, and, while the brother does not commit himself so broadly in his testimony, he admits he thought she had shot herself. Tom Allen, the colored man, was produced as a witness. He testified that he did not do the shooting; that he was at work all that afternoon cutting cane, some 600 yards distant,

with a number of other men, one of whom was Mr. Sessions, a white man, his employer. Sessions and others were called as witnesses, and proved conclusively that Allen was with them all that afternoon from 1 o'clock until 6 o'clock. Other facts might be detailed, supporting the husband's contention in regard to this shooting, but the foregoing will suffice. The attempt on part of the wife to make it appear that it was he who had taken the pistol from the house and given it to the assassin fails entirely.

With regard to the alleged harsh and cruel treatment of the wife by the husband, and of excesses on his part rendering their living together insupportable, the wife's case rests upon the testimony of Miss O'Q——. But her evidence is discredited in so many ways that we can give little or no effect to it, and regard it altogether insufficient to support the judgment appealed from. This lady is a distant relative of the defendant husband. She appears to have resided at the home of the Linzays for some five or six months, or until requested by him to leave. When she did leave, she continued in the neighborhood, though her residence was in another parish. The wife, having also left the matrimonial domicile after the shooting at the barn, Miss O'Q—— remained with her; was her close, intimate friend and ally; went with her to town to institute these legal proceedings; and it is plain that she was a witness greatly biased in favor of the wife, and with strong prejudices against the husband. This, standing alone, would not render her testimony nugatory, though it would weaken its effect. But it does not stand alone. We find her, in various and important particulars of her evidence, contradicted by Mrs. John Brogdan, by John Brogdan, by the two Barkers, by Miss Gertie Linzay, and by James Linzay, all of whom testified in the case. It amounts to an impeachment of her testimony. "Falsus in uno, falsus in omnibus." Leaving it out, or giving it but scant consideration, the case of the wife falls.

We would the case could end here, and, by a denial of the demands of each, leave this husband and wife where they have placed themselves; trusting to the mellowing influences of time to soften the asperities and allay the bitterness engendered between them, and pave the way to an ultimate reconciliation, always the more desirable where there are, as here, small children to rear, to train, and to educate. But the husband's claim to a judgment of separation remains to be considered, and, if well-founded, we have no option, and must sustain it. In considering the wife's case, we have been obliged to hold, as to that branch of it relating to the attempt upon her life, that not only was there no attempt against her life by the husband, or any one acting with or for him, but that no attempt whatever by any one had been made against her life, and, further, that the shooting, as the result of which she was slightly wounded in the forearm, was her own intentional act, inspired by

the motive to denounce her husband, to bring him to punishment, and to make a case against him for the dissolution of her marriage, with the resultant effect of awarding her the custody of the children and a part of the community property. We find that, following this shooting of herself, she did denounce her husband to the officers of the law, made affidavit charging him with the crime, and caused his arrest. This was not only an unfounded charge, but she knew it to be unfounded; and it constitutes public defamation of the husband, and is legal ground on his part for a judgment of separation. Rev. Civ. Code, art. 138; *Cass v. Cass*, 34 La. Ann. 611. His case is therefore made out. Separation from bed and board carries with it separation of goods and effects. Rev. Civ. Code, art. 155. This means that there must be between these spouses a settlement of community affairs, as well as a dissolution of the community. We will not disturb that portion of the judgment below which awards the wife \$1,271.60 as her share of the community property; and we think she is entitled to 5 per cent. interest thereon from the rendition of that judgment, as decreed by the court a qua.

The children of the marriage must be placed under the care of the husband, in whose favor the judgment of separation is awarded. Such is the mandate of the law. Rev. Civ. Code, art. 157.

Even with the judgment as herein pronounced, the case has not gone so far as to preclude the belief and hope that a reconciliation may yet be effected, and these spouses brought together upon a basis of mutual forgiveness, forgetfulness, and forbearance, and of common interest in their children of tender years. The law wisely and humanely holds the door still ajar for them.

For the reasons assigned, it is ordered, adjudged, and decreed that the judgment appealed from, except as hereinafter stated, be annulled, avoided, and reversed; and it is now ordered and decreed that the demand of the plaintiff herein for separation from bed and board from her husband, defendant herein, and for custody of the children of the marriage, be rejected. It is further ordered, etc., that there be judgment in favor of Charles Linzay, husband, and against Minnie Linzay, wife, of separation from bed and board, and of separation of goods and effects, and dissolving the community of acquets and gains existing between them, and placing under his care the two children, issue of their marriage. It is further ordered, etc., that the wife, Minnie Linzay, be permitted to see the children, and have such access to them as may be reasonable and advisable, under such regulations as to time, place, frequency, duration, etc., as may be made therefor by the court a qua, to which the case is remanded for that purpose, and for the execution of this judgment. It is further ordered, etc., that so much of the judgment appealed from as awards to the plaintiff herein a decree to recover from defendant \$1,271.-

60, with legal interest from December 3, 1898, until paid, as her share of the community property, be affirmed; costs of both courts to be taxed against plaintiff and appellee.

(1 La. Ann. 335)

CRESCENT CITY R. CO. v. BOARD OF ASSESSORS et al. (three cases). (No. 12,512.)

(Supreme Court of Louisiana. Dec. 13, 1897.)

TAXATION OF FRANCHISE—BASIS OF ESTIMATION.

1. In determining value of a corporate franchise, the earning capacity forms a basis of estimation. Acts 1890, No. 106, § 28.

2. But it is not the sole basis. Starting with the earning capacity as a basis, it is competent for the assessor to consider other matters having a bearing upon the value of the franchise, —other facts and circumstances tending to augment such value, on the one hand, or diminish it, on the other.

Miller, J., dissenting.

(Syllabus by the Court.)

Appeals from civil district court, parish of Orleans; George H. Théard, Judge.

Three actions by the Crescent City Railroad Company against the board of assessors and others. The suits were consolidated for the purposes of trial. Judgments for defendants, and plaintiff appeals. Affirmed.

Farrar, Jonas, Kruttschnitt & Gurley, for appellant. Francis C. Zacharie, for appellees board of assessors and tax collectors. Samuel L. Gilmore, City Atty., and James J. McLoughlin, Asst. City. Atty., for appellee City of New Orleans.

BLANCHARD, J. These cases present the question of the assessment of the street-railway franchise of plaintiff company for the years 1894, 1895, and 1896. A reduction of assessment for each year is demanded. The gravamen of plaintiff's complaint is that the board of assessors did not assess its franchise at a valuation ascertained by its earning capacity, but adopted another and a different method of valuation, and thereby violated section 28 of Act No. 106 of 1890. There is no allegation of relative overassessment, and none of discrimination to its prejudice in the assessment made of the franchises of other corporations, as compared with the assessment of its own franchise; and testimony offered on behalf of the plaintiff to show such discrimination was objected to, and properly ruled out. The inquiry is therefore limited to the question of actual overassessment, as the result of an alleged erroneous method adopted for the ascertainment of the value of the franchise. Defendants' evidence shows how the valuation adopted was arrived at. Restated from the testimony, it is as follows: As to the year 1896, the board of assessors found the stock issue of plaintiff company to be \$2,000,000, upon which a dividend of 6 per cent. had been declared. They found further an issue of \$50,000 of 6 per cent. bonds, an issue of \$40,000 of 6 per cent. bonds, and an issue of \$3,000,000 of 5 per

cent. bonds, upon all of which the interest had been paid. These several amounts, figured to a basis of 6 per cent. earning capacity, they found aggregated a total of \$4,590,000, as representing the value of the property. Plaintiff company had made a return to the board of its tangible property, realty, rolling stock, roadbed, etc., amounting to \$784,733, which the board accepted as correct. This property being assessed direct in the several taxing districts in which located, the board deducted its value from the \$4,590,000 above stated, and this left a net result of \$3,509,267 as the value of the franchise. Concluding, after discussion and consideration, that the property, under existing conditions, would hardly liquidate for that sum, it was decided to make the total assessment of the plaintiff company's property, corporeal and incorporeal, \$2,000,000. From this sum was deducted the value of its tangible property as aforesaid, \$784,733, and this left \$1,215,267 as the assessable value of its franchise. Accordingly, that sum was decided on as the proper valuation. As to the years 1894 and 1895, the same method was adopted in reaching the valuation at which the franchise was assessed for those years. That valuation for 1894 was \$649,650, and for 1895 \$1,408,050. Plaintiff's contention is that the assessment of its franchise for 1894 should be reduced to \$149,650, and to \$400,000 for each of the years 1895 and 1896.

This company's system of street railway aggregates 51 miles. The company was organized in 1866, with franchises extending — years from that date, and has acquired an extension of existing franchises and new franchises to run 50 years from the expiration of its present charter. In June, 1893, the capital stock of the company was increased to \$2,000,000, represented by 20,000 shares, of \$100 each. Early in that year the New Orleans Traction Company, Limited, became a majority stockholder of the plaintiff company. It holds 16,247 shares of the total issue of 20,000 shares. What is known as the "minority stock" represents 3,753 shares. The official quotations of the New Orleans Stock Exchange show this stock to have had in the latter part of 1894 and the early part of 1895 a market value of from \$85 to \$90.50 per share of \$100, and of \$90 per share in the early part of 1896. Semiannual dividends of 3 per cent upon the stock were declared for the years 1894, 1895, and 1896, and are guaranteed by the New Orleans Traction Company, Limited, for all the subsequent years, to the expiration of the extended franchises of plaintiff company, and even beyond that,—to "any renewals thereof for additional periods that may hereafter be obtained." Under this guaranty, should the earnings of the plaintiff company be insufficient, after payment of operating and other expenses, to pay a dividend of 6 per cent. per annum, the traction company supplies the funds to do so. The quotations of the Stock Exchange further show that

plaintiff company's issue of \$3,000,000 of 5 per cent. gold bonds were worth in the market in the latter part of 1894 and early part of 1895, from 94½ to 97, and in the early part of 1896 from 91¼ to 94.

The law declares that corporations shall be assessed directly upon all property owned by them. In making such assessments, "the sworn statement of condition made next preceding the date of listing shall be considered." This implies that such "sworn statement" is to be made and furnished by the officials of the corporation, and the act declares that a failure to do so shall subject them to penalties prescribed. Certain corporations, not required by law to make sworn statements of condition, are enjoined, under similar penalties, to furnish "a sworn statement of the cost of their property, real and personal, and of the value at which the same is carried on the books, and in determining the assessment these valuations shall be considered." There is also required to be furnished "a sworn statement of the earning capacity of the corporation, which said earning capacity shall form a basis of estimating the value of its charter or franchise." Acts 1890, No. 106, § 28. From this language it seems clear that the lawmaker did not intend a corporation's earning capacity to be the sole basis of estimating the value of its franchise. The language used is "a basis," not the basis. Starting with the earning capacity as a basis, those whose duty it is to make assessments are expected to consider other matters having a bearing upon the value of a franchise,—other facts and circumstances which may tend to augment such value, on the one hand, or diminish it, on the other. This has heretofore been recognized by this court. In *Crescent City R. Co. v. City of New Orleans*, 44 La. Ann. 1058, 11 South. 681, it was said, "The earning capacity of property, without regard to its nature, is not always a criterion of value." And the court in that case further declared that, while the statute directs the earning capacity to be taken as a basis, it does not exclude consideration of any other element of value it may possess. Under the law, and this interpretation of it, it was competent for the board of assessors, in determining the value of plaintiff's franchise, to take into consideration, and give proper weight to, the facts and circumstances hereinbefore mentioned, showing the condition and standing of this company. The obligation of the traction company is not merely to supply funds to pay a 6 per cent. dividend on certain minority stock, but to give to the whole issue of plaintiff company's stock the character and prestige which belong to shares upon which a certain dividend of 6 per cent. annually for a long period is assured. In other words, it guarantees a 6 per cent. dividend upon the whole stock, it matters not by whom held. Wherever it is, it stands assured of this dividend. *Atlantic & O. Tel. Co. v. Com.*, 66 Pa. St. 57. It matters not where the money comes from, so that it is forthcoming, is demandable on the stock, and

the demand is met. *Com. v. Pittsburg, F. W. & C. Ry. Co.*, 74 Pa. St. 83. This certainty of the dividend gives the shares their principal value, and causes them to quote high on the stock market; and it is an indisputable fact that the \$1,624,700 of this stock held by the traction company was worth in the market in the early part of 1896, in cash, 80 cents on the dollar, or \$1,299,760, had that company chosen to dispose of it. In its hands it must be considered to have had that value at that time. This stock does not lose its character or quality as dividend-paying stock merely because of the fact that it is in the hands of those who guaranty the dividend. The traction company saves the amount it might have to pay as dividends on the stock by owning the stock itself. It thus derives the benefit of a credit, the equivalent of the dividends the stock would earn in other hands. This is compensation equal to payment of the dividends. This guaranty of the traction company cannot be regarded otherwise than as an additional source of revenue enjoyed by plaintiff company. Under the contract between the two companies, no matter what shortage there may be, the traction company makes it up. If the earnings of plaintiff company fall short of meeting the operating expenses and fixed charges of its railway system, the traction company is obligated, without charge, to supply the deficit, and, in addition, to supply the funds to meet the 6 per cent. dividend on the stock. Such a contract auxiliary to plaintiff's charter greatly strengthens the latter, and gives to its franchise a value beyond what it would have if dependent alone upon its earning capacity. It is preposterous to say that this circumstance should not be taken into consideration in determining the value of this franchise. This court said in *New Orleans City & L. R. Co. v. City of New Orleans*, 44 La. Ann. 1055, 11 South. 820: "Revenue is an element of value not to be overlooked in assessing such property as that of plaintiff, even were the statute silent on the subject." It can make no difference what the source of the revenue is. It is equally revenue whether derived from fares paid by passengers on the railroad, or whether derived from the traction company, pursuant to the terms of an advantageous contract made with it by plaintiff company. In *State v. Board of Assessors*, 43 La. Ann. 1157, 20 South. 670, this court approved the addition, to the sum paid for dividends, of an amount annually set aside as a sinking fund, and used to reduce the principal of a bonded debt; this act of the assessors resulting in largely increasing the assessment upon the franchise of the railroad company. Accordingly, if plaintiff's earned revenue in the instant case is eked out by revenue from another reliable source, so that the two together suffice to pay all expenses and charges, and a 6 per cent. dividend on the stock, can there be valid objection to the board of assessors considering this fortunate circumstance, and giving effect to it, in fixing the amount of plaintiff's assessment?

Surely not. Rather was it their duty to do so.

This view renders it unnecessary to determine what expenses, charges, etc., should, and what should not, be deducted from gross earnings, in order to ascertain the true net surplus earnings of a corporation, to the end of capitalizing that sum at 6 per cent., as a basis of arriving at the value of its franchise. It also renders it unnecessary to determine the question raised by the defense in this court,—as to how far, or to what extent, the traction company has, by its contract with plaintiff company, relieved the latter of the payment of the costs, expenses, and charges incidental to the operation of its trolley lines; the ratio of plaintiff's surplus revenue, liable to be capitalized as above, being in proportion to such relief. And it likewise renders unnecessary a decision upon defendants' plea of estoppel, based upon plaintiff's declaration of dividends of 6 per cent. upon its stock.

In his answer to the suit for reduction of assessment for the year 1893, the attorney for the tax collector asks for judgment against plaintiff for 10 per cent. attorney's fees upon the aggregate amount of taxes and penalties to be collected, pursuant to section 57 of the act of 1890. In the suits for reduction of assessments for the years 1894 and 1895 no such demand is made. In the court below a motion to amend the judgment so as to include 10 per cent. attorney's fees was overruled. Counsel for defendants, in their brief filed in this court, ask that the judgment appealed from be amended so as to allow the attorney's fees. This might be done, so far as the suit on the assessment of 1896 is concerned, had a formal motion to that effect been filed in this court. But no such motion was filed. Judgment affirmed.

NICHOLLS, C. J., takes no part, on account of absence when case was argued.

On Rehearing.

(Feb. 6, 1899.)

BLANCHARD, J. A rehearing having been granted, and a reargument had, a further consideration of the case leads the court to a modification of its former decree. It is to the public interest that cases of this character be determined as speedily as possible, consistently with the ends of justice; and accordingly, without remanding the case, and thereby involving further delay and more expense, we will ourselves reduce the assessment of plaintiff's franchise for the years 1894, 1895, and 1896 to the sums we think, under the evidence in the record, will do substantial justice to the state and the taxpayer, and end this vexatious and lengthened controversy. On the basis of assessment adopted by the board of assessors, and the calculations made by them, they found \$3,509,267 as the value of plaintiff company's franchise. But after discussion and consideration, concluding that the property, under existing conditions, would not liquidate for that sum, the

board decided to make the total assessment of plaintiff's property, corporeal and incorporeal, \$2,000,000. From this sum they deducted the value of its tangible property, \$784,733, and this left \$1,215,267 as the assessed value of its franchise for 1896. We think this figure, in view of many circumstances, unnecessary to rectify, too high, and will reduce the assessment on the company's franchise to \$900,000 for that year. The assessment of the franchise for 1895 was, on the basis adopted by the board, and in view of other considerations entering into their calculations, fixed at \$1,408,050. We think this too large a sum, and will reduce the same to \$700,000. And so with the assessment of the franchise for 1894, which was fixed by the board at \$649,650. This, in the modified view we take of the case, we think excessive, and will reduce the same to \$300,000. These reductions are intended to apply only to the years named, and it is not contemplated that the board of assessors should be thereby fettered in their judgment of the proper assessments to be placed upon plaintiff's property and franchise for subsequent years, with respect to which the considerations now impelling the court to the present reductions may not exist. It is therefore ordered that the decree hereinbefore handed down be set aside, and it is now ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed, and that there be judgment in favor of plaintiff company, reducing the assessment on its franchise for the year 1894 to \$300,000, for the year 1895 to \$700,000, and for the year 1896 to \$900,000; costs of both courts to be borne by defendants and appellees.

MILLER, J., dissents.

(76 Miss. 353)

CITY-ITEM CO-OPERATIVE PRINTING
CO. v. CITY OF NEW ORLEANS et al.

(No. 13,074.)¹

(Supreme Court of Louisiana. March 7, 1899.)

MUNICIPAL CORPORATIONS—ACTION BY TAXPAYER
—TAXATION—REVISION OF ASSESSMENT.

1. The taxpayer of a municipal corporation has a standing in court to sustain averments of illegality of a corporate act.

2. The power delegated to assessing boards to revise assessments, or to reduce them, is limited as to time each year. Assessments and the revision of assessments are closed after the 20th of March each year, subject to such changes in value of property assessed as the courts may decree. After the assessment has passed out of the hands of the assessing and revising officers, they have no further power, as relates to the value of the property carried on the rolls.

3. The assessment of property, as to value, is the same for the municipality as for the state, and a decree, as relates to the latter, fixes it, also, as a basis of taxation for the former; and when revision and reduction is made as to one, it carries with it the assessment of the other at the same value.

¹ Rehearing denied March 20, 1899.

4. If a taxpayer has a standing in court in opposition to an act ultra vires, no compromise can be made to put an end to his right of action, as relates to the act attacked.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Nicholas H. Rightor, Judge.

Suit by the City-Item Co-operative Printing Company against the city of New Orleans and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Walter B. Sommerville, Asst. City Atty., for appellants city of New Orleans, mayor, comptroller, and treasurer. Denegre, Blair & Denegre, for appellant Crescent City R. Co. E. A. O'Sullivan, for appellee.

BREAUX, J. This suit was brought by plaintiff, a taxpayer, to annul and set aside two ordinances of the municipal council, as having been adopted in violation of the charter of the city, and in contravention of the constitution and laws of the state. An injunction was issued in accordance with the prayer of plaintiff's petition.

The following is a brief history leading to the compromise assailed:

The Crescent City Railroad Company, after having made application to the board of assessors and to the revision committee for reduction of its assessment, filed suit in the civil district court, and obtained writs of injunction against the board of assessors for the reduction of the assessments of its franchise for the years 1894, 1895, 1896, and 1897. Three of the suits were consolidated and decided by the court of the first instance. The fourth, for reduction of assessment for 1897, is still undecided in the civil district court. The consolidated suits, on appeal for reduction of assessments for the years 1894, 1895, and 1896, have been decided by the supreme court partly in favor of the Crescent City Railroad Company. 25 South. 311. With reference to another company named in the compromise assailed, the New Orleans City & Lake Railroad Company, the city of New Orleans had been in suit with it since 1889, and the city had finally obtained a judgment against it (the New Orleans City & Lake Railroad Company), ordering it to comply with obligations by paving and planking along the line of its road. Early in 1896 the officers of the city became apprehensive and uneasy about the city's claim against this railway, and about the city's claim against the Crescent City Railway Company for the taxes it owed the city. Regarding the former, the New Orleans City & Lake Railroad Company, the testimony disclosed that the planking ordered by the court's decree was no longer desirable, and that part of the way had been paved with other material, and, besides, it seems that the board of health had advised, on sanitary grounds, against the use of planks for paving. The city attorney had advised the chief executive officer of the city that, in his judgment, it would be impossible

to execute the judgment of the supreme court of the United States on the paving contract against the New Orleans City & Lake Railroad Company. Instead of specific performance under the judgment of the United States supreme court, the judgment debtor, the New Orleans City & Lake Railroad Company, at first offered \$40,000, which the city declined to accept. Subsequently this company offered \$45,000. Regarding the latter (the Crescent City Railway), the supreme court had granted a rehearing. If the city gained the suit, it was thought that even then further litigation and delays might arise. The city authorities then gave a hearing to terms of compromise, which resulted in a compromise between the city and the companies. The mayor of the city, after an agreement had been arrived at, was authorized by the council to settle the litigation between the city of New Orleans and the Crescent City Railway Company upon payment, within 30 days from the date of the publication of the ordinance granting the authority, of the amounts due for taxes by the Crescent City Railroad, and the \$45,000 offered by the New Orleans City & Lake Railway, as a compromise. The amounts assessed by the assessors were the following: 1894: Franchise, \$649,650; tax, \$12,993. 1895: Franchise, \$1,408,050; tax, \$28,161. 1896: Franchise, \$1,215,267; tax, \$24,305.34. 1897: Franchise, \$1,156,300; tax, \$23,126. 1898: Franchise, \$575,000; tax, \$11,500. From the foregoing we can see that the compromise entered into covered the taxes of four years, but the consolidated suits decided cover the taxes of three years, 1894, 1895, and 1896. This compromise between the city and the Crescent City Railroad Company was not to be carried out unless the New Orleans City & Lake Railroad paid to the city the \$45,000 before stated, less credits for sums previously advanced to the city by the New Orleans City & Lake Railroad on account of the judgment it owed to the city. We are informed that the two companies, the Crescent City Railroad Company and the New Orleans City & Lake Railroad Company, were about to be controlled by one corporation or board, and that, in consequence, the two companies were embraced within one act of compromise covered by one ordinance.

Plaintiff's grounds of attack are, chiefly, that the municipal council is without authority to adjust and settle suits; that the compromise was in effect a proposed donation to the Crescent City Railroad Company; and that the city council has no right to remit interest due on taxes, or postpone payments. A judgment was rendered by the judge of the district court, perpetuating the injunction, and declaring illegal Ordinances 14,658 and 14,703, as in contravention of the constitution and laws of the state, and in violation of the city charter. From that judgment the city of New Orleans and the Crescent City Railroad Company have appealed.

The foregoing is a sufficient statement of

the facts for the purpose of the decision. The right of plaintiff as a taxpayer to stand in judgment was questioned by defendants, in oral argument at bar and in the brief, on the grounds, chiefly, that it had no interest involved, as it had paid its taxes, and could have no concern about those who, like the Crescent City Railway Company, had been delinquent, and had effected a compromise, and thereunder a settlement, of their taxes. The right of a taxpayer of a municipal corporation to bring suit to test the validity of acts relating to taxation has been recognized by the courts, and the fact that he has paid his taxes does not make less his right to stand in judgment. *Handy v. City of New Orleans*, 39 La. Ann. 109, 1 South. 593, is a leading case upon the subject, citing *Crampton v. Zabriskie*, 101 U. S. 601, from which we quote: "The action is regarded as having a public character, and as being a proceeding in which the public complains." Under these and other decisions, the right of a resident taxpayer to sue, in order to prevent an illegal distribution of the money of a municipality, cannot be denied. Although the creditors of the city may have been provided for as to their claims, as stated in argument, yet there remains an interest enough in the taxpayer to enable him to oppose any illegal release of any one indebted to the treasury. The larger the amount in the treasury to the credit of its different funds, the less the liability of the taxpayer. The suit is in the nature of a public proceeding to test the validity of a corporate act.

We pass to the question of the power of the municipal council to compromise with a delinquent taxpayer, and release him from payment of part, or all, of his taxes, while a suit for a reduction of his assessment is pending before the courts. It is well settled that corporations have such powers as are given to them. There are special laws applying in matter of taxation. The constitution specially prohibits the general assembly—and, it follows, subordinate municipal corporations—from releasing or extinguishing any tax indebtedness to the state, or due to any of its municipalities. It devolves upon us to determine, in the case before us for decision, whether the tax indebtedness here of the Crescent City Railway was within the scope of the prohibition. There had been a final assessment made. While the assessing authorities have the rolls in their possession in an incomplete state, they may reduce the assessment, but not after the assessment has passed from their hands. All taxpayers have the right to appear before the board of assessors of the parish of Orleans until the 20th day of March, and in other parishes until the 1st day of November, and be heard regarding overvaluation of property, but not after those dates. The question of value of the property assessed after the filing of the taxpayer's suit passes from the assessors and revising committee to the courts. The defendants urged

that the assessment, as relates to those who appeal to the courts, is not complete; that, not being complete, a compromise may be made, as was made in the pending case. We have not found it possible to give our assent to that view. The suit brought does not have the effect of suspending the assessment. It is legal to the amount the court finds is the value of the property. Every person is taxed for the year, and the assessment dates from the day it was made, and not from the date of the final decision of the court pronouncing it legal as to value (for a part, or the whole) as carried on the roll.

We have just seen that the power of revision is limited by the statute as to time. After the date fixed by the statute is passed, in the absence of expressed delegation of power to the assessors and committee of revision, we must conclude that reduction of assessment is no longer possible, save by the decree of the court. In state and municipal taxation, the assessed value is the same. The same officer makes the assessment for both the state and the municipality, the same roll is used, and the same amount as to the value of each property assessed. "The valuation put upon property for the purpose of state taxation shall be taken as the proper valuation for purposes of local taxation in every subdivision of the state." Const. 1898, art. 203. It follows that no compromise can be made on the basis of property being of less value when the municipality is concerned than when the state is concerned.

But, conceding, for the discussion, that an agreement is possible regarding the value of property assessed, or the amount of taxation, the taxpayer still has an action to set aside a compromise, which action the compromise itself cannot put an end to and destroy. Even where, as in the case before us for decision, there was not the least intentional wrong, and all that was done is marked by the utmost good faith and to promote the city's interest, yet the taxpayer of a municipal corporation may be heard who urges that the act of the municipal authorities relating to assessment and taxation is ultra vires and increases the weight of taxation. We have read with painstaking care the two elaborate briefs filed on behalf of the defendants. The burden of their complaint is grounded upon the principle laid down by many courts in other jurisdictions in support of the proposition that municipal corporations have the power to effect a compromise of claims in which they are concerned. The question covered by the last proposition does not arise in the case before us. We have naught to do with the city's right, ordinarily, to compromise claims. We do not, for that reason, pass upon that question. This, as we think, disposes (without the necessity of any further comment regarding them) of all the decisions cited by counsel regarding the compromise of claims other than those growing out of assessments or taxation. But revenue laws are *sul generis*, and partic-

ularly those applying in the case before us for decision. In order to create an interest in local government, and to guaranty every right, the state accords to each taxpayer the right and privilege of inquiring into the questions of assessment and taxation, in which all are concerned. It results that a compromise regarding taxes, as made in this case, cannot be made to operate as a hindrance to the assertion of that right. However absolute may be the power of a city council to compromise a claim, it cannot affect such a compromise, as relates to assessment, as will prevent inquiry into its legality by a taxpayer.

Counsel for defendants urged that, from the right given to the city of New Orleans to sue and be sued, it resulted, in the absence of prohibitory legislation, that the city has the same right to compromise that an individual has. Ordinarily that may be. We are only concerned with the question before us, relating exclusively to the value of the property assessed, a question which passes, as we take it, each year, from the board of assessors and local authorities to the courts, after the date set down in the statute. We take it, also, that after an assessment has been made the value of the property cannot be changed, so that it will have less value, as relates to the city or the parishes, than the assessment for the state. Const. 1898, art. 225.

For reasons assigned, the judgment appealed from is affirmed.

(51 La. Ann. 723)

SEALY v. COOK. (No. 13,033.)¹

(Supreme Court of Louisiana. Jan. 23, 1899.)

HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE—CONVEYANCE—HUSBAND'S DEBTS—RESTITUTION—MISTAKE—FRAUD—APPEAL—AMENDMENTS.

1. Plaintiff sold land to defendant. The price went to make up the amount of her paraphernal rights, set forth in the act of restitution by her husband to her. The property conveyed by her husband to her in the act of restitution was received by the wife in part satisfaction of her paraphernal rights. *Held*, that the wife was without right to recover judgment for the land she sold to defendant; that she was precluded from recovering by the fact that the act of restitution covered the price, at least in part; that she could not hold the property sold to her by her husband, and recover property she transferred to defendant; that she did not show error or fraud in matter of the restitution to her; that the averments in the act of restitution were prima facie true and correct.

2. The supreme court, at the stage of the proceedings the question is presented, declined to make a decree enabling plaintiff to amend, in order that plaintiff may show error or marital coercion in matter of the restitution.

(Syllabus by the Court.)

Action by Mrs. M. C. Sealy against J. M. Cook. A judgment in favor of defendant was affirmed by the court of appeals. Application by plaintiff for certiorari or writ of review. Denied.

¹ Rehearing denied March 20, 1899.

W. A. Van Hook, for relator. Respondent judges, in pro. per. Graham & Pearce, for other respondents.

BREAUX, J. The question for decision is whether plaintiff was bound by her contract in transferring a tract of land to defendant. It appears from the evidence that plaintiff conveyed the land to the defendant for the stated amount of \$337.50. The defendant, vendee of plaintiff, bound himself, upon payment of the amount, to return the land to plaintiff. The 15th day of December, 1894, was fixed as the last day upon which plaintiff would have the right to redeem the property upon payment of the price. The plaintiff did not exercise her right of redemption. She, instead, sold it to her brother, who brought suit to eject the one in possession, who held under a lease of a date anterior to the date on which the plaintiff was to redeem the property. He recovered judgment, and while it was in process of execution the defendant enjoined plaintiff's brother, to whom she had conveyed the property. In these proceedings defendant recovered judgment against plaintiff's transferee, upholding defendant's right of possession. The court, however, passed only upon the right to possession, and did not pass upon the question of ownership between plaintiff and defendant. The terms of that judgment were that it was not to have any effect, as related to any right plaintiff might have. Plaintiff, transferee, after the judgment had been rendered, transferred the property back to her. She then instituted this suit for the land. Her contention is that the loan was not effected for her separate use and benefit, but, to the knowledge of defendant, to the use and benefit of her husband, and that she signed the act of sale in error, brought on by the fraud of defendant, who assured her, she alleged, that it was not a sale, but an act of mortgage. The defendant, in answer, averred that he had bought the land in good faith, and denied that he uttered a word, or did anything, to induce plaintiff in error. He specially avers "nothing was said by any one intending to mislead plaintiff; that she was an intelligent woman, and signed the act with the full knowledge of what it contained, after it had been read to her in the presence of witnesses." He also averred that he did not know that the loan was intended for plaintiff's husband's use and benefit, and that the sale was made with the right of redemption, of which right plaintiff had not availed herself, and in consequence the property became his.

The court of appeals states in the opinion, a copy of which is before us, that "there is nothing in the record that shows conclusively that the defendant knew that the sale was made and intended to pay the husband's debts; but the inferences are very strong that the defendant was aware of the nature and character of the whole transaction." The court afterwards adds, "But, under the view which we have taken of this case, we are not dis-

posed to the conclusion that this fact materially militates against the rights of the defendant," and holds that plaintiff is absolutely concluded by the recitals contained in the dation en paiement, dated May 14, 1894, made by the husband of plaintiff to the plaintiff. The court of appeals found as a fact that on the 14th May, 1894, the husband of plaintiff conveyed to his wife, en paiement, property valued at \$170. The consideration set forth in the dation en paiement was an indebtedness due by him to her of \$637, and this amount included the amount of \$337.50, the price at which the land had been conveyed by plaintiff to defendant. The wife thereby charged her husband with the price of the property, which she afterwards sought to recover on the ground that the loan was not made to her. She used that claim to give effect to the act of conveyance of property by her husband to her. Here the application states that the dation en paiement was introduced in evidence over her counsel's objection "that it was the act of her husband, and could not be taken as evidence against her. Plaintiff in the application for a writ of certiorari avers that the land is worth much more than the amount borrowed,—at least, twice more,—and prays for a reversal of the judgment, or that it be remanded in order that plaintiff's husband may testify. At the time the suit was tried and decided, the husband could not testify (the wife having died since, and her heirs having been made parties plaintiffs) as a witness, and he alone, it is urged, knows the true character of the transactions. With reference to the value of the property, the court in its decision says: "But the evidence tends to show that the property is worth little, if any, more than the amount advanced by the defendant, and we are impressed with the idea that it would not materially benefit the plaintiff to hold otherwise in this case. The only effect of such a decree would be to entail additional cost on the defendant of the seizure and sale of the property."

The foregoing summary, we think, sets forth the substantial facts needful to our decision of the issues. While the plaintiff was not absolutely concluded by her declarations contained in the act of dation en paiement made by her husband to her, having selected him for her creditor, and having received a part of the amount, she has no standing in court to sue and set aside the act of sale she made to the defendant without having first established that she was in some way imposed upon when she signed the dation en paiement. The court of appeals, in answer to the application of the plaintiff for a writ of certiorari, state that, in the absence of any charge of fraud or error practiced by the husband on the wife in making the dation, she was bound by the recitals in the act of dation; that she could not retain the property acquired by virtue of the dation, and at the same time, in a proceeding against a third person, repudiate the consideration and recitals the dation contained, and which were

made its basis, in the absence of a charge and proof of fraud or error. "There was nothing in the evidence to show that the defendant knew that the consideration of the sale was for money to pay the husband's debts. It was an ordinary sale, with the faculty of redemption, to secure the payment of loaned money. But, in view of the conduct of the parties, and, more particularly, the plaintiff, the court held that the title of the nominal vendor had become completely divested. We held the wife bound by the recitals contained in the act of dation en paiement, citing *Hyman v. Schlenker*, 44 La. Ann. 108, 10 South. 623, and *Chaffe v. Scheen*, 34 La. Ann. 688." A wife may show to be untrue or erroneous the declarations of an authentic act to which she was a party. She is not estopped by the averments of the act. She must, however, in some way attack the act. This plaintiff in this case has failed to do, and it is not reasonable to apply for a remanding before this court, and a decree setting aside the judgment of both the circuit court and the district court, in order to enable the plaintiff to amend the pleading and raise issues which should have been raised in the first instance. We must, in cases arising here under article 101 of the Code, adhere especially to the rules of practice. The rule nisi in this case is discharged, and plaintiff's application for a writ of certiorari is denied.

(61 La. Ann. 521)

GOODWILL v. ELKINS. (No. 13,092.)

(Supreme Court of Louisiana. March 7, 1899.)

CONFESSION OF JUDGMENT—WAIVER OF CITATION—PROCEDURE.

1. Since the adoption of the constitution of 1898, persons holding from their debtors waivers of citation and confessions of judgment, of the character referred to in article 91 of that instrument, are not entitled, upon simple production and proof of the waivers, and proof of the confession, to obtain judgments, though the waivers and confessions may antedate the constitution.

2. They must proceed independently of the waivers of citation, as if the same had not been written, and follow the rules governing ordinary proceedings.

(Syllabus by the Court.)

Case certified from court of appeals, First circuit.

Action by A. Goodwill against John Elkins. Judgment for defendant, and plaintiff appealed to the court of appeals, which certified the case for instructions. Affirmed.

The judges, pro se. L. K. Watkins, for A. Goodwill.

NICHOLLS, C. J. The judges of the court of appeals of the First circuit have certified to us that, in the suit of A. Goodwill against John Elkins, therein pending on appeal, "a certain question is presented for solution which they think a proper one to submit to the supreme court, to the end that they may obtain from it instructions for the proper determina-

tion of the cause." The question is submitted to us in the following language:

"On the 22d of December, 1894, the defendant gave a promissory note to the plaintiff for \$150, with 8 per cent. interest from December 31, 1888, payable one day after date. In the body of the note is a waiver of jurisdiction, citation, and copy of petition, and a confession of judgment in favor of the holder for the amount of the obligation. This obligation was presented to the judge of the Second judicial district, accompanied with a petition and proof of the waiver of citation and confession of judgment, upon which the judge declined to grant a judgment, for the reason that the obligation was not due at the time of the signing of the confession of judgment, and that, under article 91 of the constitution of 1898, the waiver of citation and confession of judgment, by document under private signature prior to the maturity of the obligation, could not form the basis of a judgment without citation, as in the ordinary form of procedure. From this ruling of the court, the plaintiff appealed to this court. It is clear that, under the law and jurisprudence as it existed prior to the adoption of the present constitution, the plaintiff, on the production of such an obligation, was entitled to judgment; and, the only question to be determined is, does the provision in article 91 of the constitution of 1898, that 'service of citation shall not be waived, nor judgment confessed by any document under private signature, executed prior to the maturity of the obligation,' have such a retrospective operation as to restrict the power of the courts in making confessions of judgment executory, without citation, or delay, or in the ordinary forms of procedure."

We are of the opinion that parties holding from their debtors waivers of citation and confessions of judgment, such as article 91 of the constitution of 1898 refers to, are not entitled, since the adoption of that instrument, to obtain judgments upon simple production of and proof of such waivers, and proof of such confession. They must proceed against their debtors independently of the waivers of citation, and as if the same had not been written, and follow the rules governing ordinary proceedings. The fact that the waivers of citation and confessions of judgment may have been given at a date anterior to the adoption of the constitution is an immaterial circumstance in that connection. Our answer is intended to refer to and cover nothing more than methods of proceeding. Matters outside of this are left open.

We avail ourselves of the present opportunity to say that our duties, already heavy, have been made greatly more onerous than they were by the provisions of the present constitution, and that our labors would be materially lessened if the courts of appeal, in certifying to us, under article 101 of the constitution, questions for answer, should give us the benefit of their own prior examination of and conclusions upon the matters submitted, and

in doing so would cite the laws and decisions bearing upon them. It would greatly facilitate us to be placed in possession of the briefs filed by counsel of the parties, and to be informed precisely as to what their contentions and arguments were.

(51 La. Ann. 426)

STATE ex rel. BURKE v. CITIZENS' BANK OF JENNINGS. (No. 12,962.)

(Supreme Court of Louisiana. Jan. 9, 1899.)

STOCKHOLDER IN BANK — INSPECTION OF BOOKS — CONSENT OF DIRECTORS — EXPENSES OF ACCOUNTANT.

1. A shareholder, or other person, with a laudable object to accomplish, or a real and actual interest upon which to predicate his request for information disclosed by the books of a bank, is given by the fundamental law the right to inspect them.

2. The claim that the right of inspection is strictly personal to the shareholder, and cannot be exercised by another for him, and in his stead, as an agent or executor, is without force; for, if that were true, the possession of the right would be futile in many instances.

3. A by-law of a corporation, which provides that no stockholder or other person shall have the right to inspect the books without special authority from the board of directors, must be subordinated to the provisions of the charter and the general and fundamental law.

On Rehearing.

While, in a proper case, an accountant or expert may be appointed by the court to assist a party in interest in the examination the law gives him the right to make of the books of a bank or other corporation, no part of the compensation to be paid such expert should be assessed against the defendant bank or corporation.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Calcasieu; S. D. Read, Judge.

Application by the state, on the relation of Rose O. Burke, executrix, for a writ of mandamus against the Citizens' Bank of Jennings. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Cline & Cline, for appellant. Schwing & Moore, for appellee.

WATKINS, J. The relatrix, as executrix of Dr. E. M. Burke, deceased, instituted suit in the district court, coupled with an application for a writ of mandamus, to compel the respondent bank to permit her to have view and to make an inspection of the books of the bank, alleging that the deceased at his death was the owner and possessor of 15 shares of the capital stock of the bank, and that the estate under her administration is still the owner thereof. She avers that under the constitution and laws of the state she has the right to inspect and examine the books of said bank for the purpose of ascertaining, among other things, the amount of capital stock subscribed, the names of the owners of stock, the amounts owned by them, respectively, the amount of stock paid up, the transfers of stock, and the dates thereof, and the amount of assets and

liabilities of the bank. She further avers "that said right is valuable, and the exercise thereof necessary to enable her to ascertain the real value of said stock, what, if any, dividends are due thereon, the condition of said estate in account with said bank, the solvency or insolvency thereof, and the best interests of said estate in connection therewith." She alleges that due demand was made upon the legal custodian of said books and assets "for permission to make an inspection and examination," and that said demand was peremptorily refused, and that said refusal was a denial of justice, and "left her without remedy by the ordinary course of law." For answer, the respondent pleads the general issue, and then specially denies that the relatrix, "in her capacity of executrix or in any other capacity, has a right to examine or inspect the books of said bank, or that the exercise of the said pretended right is necessary to subserve the interests of the succession of the said Burke, or that he ever demanded the right to examine the books of the bank." He alleges that the relatrix personally is unfriendly to the bank, and that she does all of her own business through another bank, and persistently seeks to deter her friends from patronizing the respondent bank; that she is not a stockholder of said bank, and has no interest in the conduct or management of its business; and that, being advised of her unfriendliness, it fears and has just grounds to apprehend "the damage she might be able to do respondent's business, if permitted to examine the books of the bank, where she could learn the names of its customers, their financial standing in the community, and other business secrets, the divulgence of which would be ruinous to the business interests of the respondent." The further averment is that the relatrix "persistently follows, in her business affairs, the advice of one L. M. Valdetero, who is notoriously unfriendly to the interests of the respondent bank; and that he is plaintiff in a suit now pending before your honorable court wherein he seeks to recover \$10,000 as alleged damages against the respondent"; that "the monthly sworn statements of the affairs of respondent bank contain ample information to all those interested in said bank as to its financial condition, the value of its stock, what dividends are due thereon, and as to its solvency; that, moreover, the cashier of said bank has offered, and still stands ready, to furnish plaintiff a full and complete statement of the account of the succession of E. M. Burke with the said bank." Respondent further avers that under a by-law of the bank "no stockholder or any other person shall have the right to inspect the books of the bank without special authority," and that no such authority was ever applied for, or granted by the board of directors of the bank; that said by-law is in strict accord with the custom and usage among banks, and that such application is and was a condition precedent to permission being granted for an examination by other than regular officers of the

bank; and that, if the relatrix did make demand upon the president or cashier of the bank for permission to make an examination of the books of the bank, they were wholly without authority to grant the request without the sanction of the board of directors being first obtained. The case was tried, and decided in favor of the relatrix, and the writ of mandamus was made peremptory, and from that judgment the respondent has prosecuted this appeal.

The transcript presents us with a brief statement of facts, which is herewith transcribed in part, viz.: "That at the time of his death E. M. Burke was a stockholder, and that the estate is still owner of fifteen shares (\$1,500.00) of stock, in the Citizens' Bank of Jennings, La. That Mrs. Burke, executrix, accompanied by L. M. Valdetero, called * * * at the bank, and asked to be allowed to inspect and examine the accounts of said E. M. Burke with said bank on the bank's books, etc. That the cashier states that she only asked to examine Dr. Burke's account, [though] all agree that he refused, and that he was and is the custodian of the books of the bank. That the evidence shows that an effort was made to see the president, but that he was absent from the parish. The evidence shows that L. M. Valdetero has a suit against the bank, and is unfriendly with the cashier, but friendly with the stockholders and officers of the bank." On this state of the pleadings and evidence, the question for decision is whether the relatrix is entitled to the relief she demands, and which was granted by the judge a quo.

The first and principal point taken by the counsel for respondent is that the relatrix is without interest as a stockholder, and for that reason without right to demand an inspection of the books of the bank; she being merely the executrix of a deceased stockholder, and without any personal right of examination. The constitution of 1879 made it the duty of all corporations organized or doing business in this state under the laws or authority thereof to have and maintain a public office for the transaction of its business, "and where shall be kept for public inspection books in which shall be recorded the amount of the capital stock subscribed," etc. Const. 1879, art. 245. In the recent decision of this court in *State ex rel. Bourdette v. New Orleans Gaslight Co.*, 49 La. An. 1556, 22 South. 815, it was held that the right conferred by that article secures to stockholders of a corporation the right to inspect its books, and, if the right of inspection be unreasonably denied, mandamus would lie to enforce it; but the court said that "by 'public inspection' is meant, not the inspection of the idle, the impertinent, or the curious,—those without an interest to subserve, or advance, or protect. It was never contemplated that any and everybody, as the whim may seize him or them, should be permitted to walk into the office of the company or corpora-

tion, and pry into its affairs. But a shareholder or other person, with a laudable object to accomplish, or a real or actual interest upon which to predicate his request for information disclosed by the books, is given, by the fundamental law itself, the right to inspect them." (Our italics.) In our opinion, the relatrix, as the executrix of a deceased shareholder of the stock of the respondent bank, has brought herself within the scope and plain intendment of that decision, and thus disclosed an interest sufficient to justify a resort to mandamus. Indeed, we can perceive no reason why the person representing as executrix the deceased shareholder, should not have the same right of inspection *pro hac vice* as the latter had while living. That she is not personally a shareholder of the respondent bank, and perhaps a shareholder of another bank, could not be reasonably considered as excluding the right of the estate altogether; nor do we consider the particular danger pointed out in the defendant's return as likely to result from the inspection proposed as sufficient to justify a refusal of relief to the executrix altogether. Of course, proper care should be taken, in the exercise of the right of inspection accorded to her, that the interest of the bank be amply protected and safeguarded from idle curiosity or undue inquisitiveness into the private affairs, not appertaining to the legitimate objects to be attained by the inspection. Nor should the one examining into the affairs of the bank be permitted to examine into the matter of depositors' accounts, to find out who are depositors; if any one is a depositor, the amount to his credit; or anything connected with private matters of depositors.

Article 273 of the constitution of 1898 is identical with that of article 245 of 1879. In *Legendre v. Association*, 45 La. Ann. 669, 12 South. 837, a similar interpretation was placed upon the latter article as was done in the *Bourdette Case*, and in the course of our opinion we said: "The constitutional right to inspect the books [of a corporation at a reasonable time] cannot reasonably be denied. There can be no question that the ownership of stock confers the authority to see that the property is well managed. The exercise of this authority involves primarily the right to examine the books." In *State v. Blenville Oil-Works Co.*, 28 La. Ann. 204, the particular question here presented was decided adversely to the present contention of respondent thus, viz.: "The objection that, if the relator has the right he claims, it is personal to himself, and cannot be exercised by another, we regard as having no force. The possession of the right in question would be futile if the possessor of it, through lack of knowledge necessary to exercise it, were debarred the right of procuring in his behalf the services of one who could exercise it." It seems quite apparent that this rule is entirely applicable to the case of an executrix, the denial of right of inspection to whom would be equivalent

to an exclusion of the right of a deceased stockholder altogether.

On the second proposition which counsel for the respondent submits with regard to the sufficiency of the demand made by the relatrix to entitle her to relief by mandamus, we are of opinion that the answer should be an affirmative one; for it is not denied that Dr. Burke was a shareholder of the bank, and a depositor as well, and it is admitted that, notwithstanding she is executrix of his estate, her demand for an examination of the books of the bank, and particularly those containing his account, was peremptorily refused. The management of the bank seems to have conceded the refusal by the cashier an act of its own, and hence the case is differenced from the *Case of Legendre*, 45 La. Ann. 669, 12 South. 837. We are of opinion that the point made in the respondent's answer to the effect that a by-law of the corporation, which declares that no stockholder or other person shall have the right to inspect the books of the bank without special authority from the board of directors cannot prevail against the relatrix. This question was considered by the court in *Cockburn v. Bank*, 13 La. Ann. 289, and in the course of their opinion they said: "Defendant avers that by the charter of the Union Bank, and the laws applicable thereto, the entire management of its affairs and the control of its books and property are confided to a board of directors, who administer the same, and have the right of deciding when, by whom, and for what purpose the said books shall be inspected, except in cases specially provided by law; and that petitioner has in law no right to demand at his pleasure the inspection of the books," etc. "If the board of directors have the exclusive right alleged to exist in them, they must derive the power and prerogative from the free banking laws of the state or the charter. * * * Defendant has not, however, called our attention to any act of the legislature, to any part of the charter of the bank, or to any of its rules or by-laws which confer such exclusive authority upon the board of directors, and we are not aware of the grant of any such prerogative exclusively to the board of directors. A stockholder in a corporation possesses all his individual rights, except so far as he is deprived of them by the charter or the law of the land. As long, then, as the charter, or the rules and by-laws passed in conformity thereto, and the law, do not restrict his individual rights, he possesses them in full, and can demand to exercise them. It cannot be denied that it is the right of every one to see that his property is well managed, and to have access to the proper sources of knowledge in this respect." (Our italics.) Taking that opinion as our guide, it is evident that a by-law, of itself, is not sufficient to vest full power in a board of directors to decide whether a shareholder may inspect the books of a corporation or not; but, that a by-law should be thus authoritative, it must have the sanction of the charter and the general law.

But, in the light afforded by the jurisprudence interpreting the fundamental law in the premises, we think both the charter and the law are subordinated thereto. Our examination of this case has brought us to the same conclusion it did the judge of the lower court. Judgment affirmed.

On Application for Rehearing.

(Feb. 20, 1899.)

BLANCHARD, J. The court a qua granted the plaintiff's prayer for an expert to assist her in the examination she desired to make of the books of the bank, which, under the law, she has the right to inspect. The plaintiff had asked for the appointment of a particular person, named by her, as such expert. The defendant bank, while resisting the demand for an inspection of its books as herein sought, asked that, in the event the inspection was granted, and the court thought it a proper case for the appointment of an expert to assist plaintiff in the examination, the person named by plaintiff be not appointed, because he was inimical to the bank; and that some other disinterested and unprejudiced person be named as such expert. The court declined to name the party suggested by plaintiff, and appointed as expert W. H. Simmons. The costs of the mandamus proceeding were rightly adjudged against defendant bank, but we do not think any part of the compensation which will be due the expert should have been charged against the bank. The judgment below directs that such compensation be paid jointly by plaintiff and defendant. As this expense cannot be reckoned any part of the costs of this litigation, and as the examination is a matter desired by plaintiff alone, and for her benefit alone, the compensation of the expert should be borne by her alone. In this respect the judgment appealed from is erroneous, and it becomes necessary to correct the same. It is therefore ordered that the former decree of this court, hereinbefore handed down, be set aside, and it is now adjudged and decreed that the judgment appealed from be so amended as to strike therefrom the award against defendant of any part of the compensation which will become due the expert appointed to assist plaintiff in her examination of the books of the bank, and it is directed that such expense be borne by plaintiff alone; and that, as thus amended, the judgment of the court a qua be affirmed, costs of the lower court to be taxed against defendant, those of appeal against plaintiff and appellee. Rehearing denied.

(50 La. Ann. 1324)

BREAUX v. BIENVENU. (No. 12,982.)¹
(Supreme Court of Louisiana. Feb. 20, 1899.)

EMINENT DOMAIN—CONSTRUCTION OF PRIVATE ROAD.

Act No. 54 of 1896, authorizing owners of property situated as described therein to ac-

quire by the expropriation proceedings fixed in the second and third sections of the act the right to construct a road, tramway, ditches, or canal, as the exigencies of the case might require, over the lands of his neighbors to the nearest public road, railroad, or water course for the purpose of getting the products of such land to such public road, railroad, or water course, if constitutional, is in derogation of general right and calls for very strict interpretation. The law does not apply to parties whose lands border upon a public road or stream by which the products of his plantation can reach a market under feasible, though difficult, conditions. The law does not take into account the inconveniences of the situation, nor the greater or less cost of reaching the railroads, the refineries, or public centers of business or trade, but contemplates an absolute inability of doing so without the right of way being granted.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Lafayette; Conrad De Baillon, Judge.

Action by Gus A. Breaux against Galbert Bienvenu. Judgment for defendant, and plaintiff appeals. Affirmed.

The plaintiff, in his petition, alleged that he had built, and then had, a tramway road, of which he was the owner, with a right of way, said right of way running partly on the right of way of Galbert Bienvenu, as described in said petition; that, being unable to agree as to the right of way for the said tramway, he applied to the police jury of the parish of Lafayette, under Act No. 54 of 1896, to assess the amount to be paid to said Bienvenu for said right of way, of which he was duly advised, which, at its session of December 2, 1897, was, by said police jury, assessed at the sum of \$100, and petitioner, on the 31st day of December, 1897, tendered said amount to Bienvenu, which he declined to receive, and grant a deed for right of way as aforesaid; that petitioner had the right, under the law, to keep his tramway on said land as it was originally built with the consent of Bienvenu, and that he was without right or warrant to enter upon said property, or interfere with it; that, in violation of his legal rights, Bienvenu had, since the amount was assessed and tendered him, entered upon said property wrongfully and illegally, and was proceeding to injure and destroy the same, and he was entitled to have Bienvenu enjoined from committing any trespass or doing any injury to petitioner's tramway, or any part thereof. He prayed for an injunction to that effect, and that, after due proceedings, petitioner be entitled to the right of way aforesaid for his tramway on his paying him the sum of \$100. A preliminary injunction issued under order of court as prayed for. Defendant excepted that plaintiff's petition disclosed no cause of action, and, further, that plaintiff was without right of action under the law; that his alleged possession of the strip of land belonging to defendant was under and by virtue of a written lease to him by defendant, which lease expired by limitation on January 1, 1898, and judgment evicting plaintiff therefrom had been rendered by the justice of the peace of

¹ Rehearing denied March 20, 1899.

the Third ward of Lafayette, and plaintiff could not change the character of his possession; that he was without right or cause of action, because his action was one to divest defendant of his property for plaintiff's private benefit and gain; that Act No. 54 of 1896, under which he was proceeding, was unconstitutional, null, and void, for the reason that it aimed to, and the purpose of it was, to divest the owner of his property without due process of law, in violation of the constitution of the state of Louisiana and of the United States; that its purpose was to divest vested rights, and to take property for private benefit and gain; and that it confers judicial powers upon the police jury. The district court overruled the exception of no cause of action, and referred the balance of the exception to the merits to stand as an answer with leave to defendant to amend the same. Defendant answered, pleading first the general issue. Further answering, he averred that Act No. 54 of 1896 was unconstitutional, null, and void, but, if constitutional, the same had not been complied with by the police jury of Lafayette parish in the alleged attempt to take the land of this defendant; that there was no due hearing of both parties; that they did not fix the dimensions of the land to be taken, nor the value thereof, and other provisions of the same were not complied with, and that the alleged action of the police was otherwise vague, indefinite, and insufficient. Further answering, defendant averred, in the event the foregoing pleas be overruled, that, as admitted by plaintiff, he (plaintiff) did not come within the terms, nor was he in any manner entitled to the provisions, of said Act No. 54 of 1896, but, on the contrary, his place fronted upon a public road on one side and the Bayou Vermillion on the other, besides having another road to reach the public road. Defendant specially pleaded that he objected to the entry of plaintiff upon his place; that by so doing said plaintiff would cause him actual damages in the sum of \$500. He further pleaded that this suit, having for its object the taking of private property for private gain, was illegal, oppressive, and vexatious, causing harassment and loss of time to defendant, for which he was liable to defendant in the sum of \$150, and for which defendant should have judgment. He further alleged that he therewith tendered bond in the sum of — dollars, or in such amount as might be fixed by the court, and the sum of \$12 in cash, and that under the law he was entitled to trial by jury herein. The premises considered, defendant prayed that he have judgment rejecting the demand of plaintiff, and for \$150. Defendant filed, afterwards, a supplemental answer, in which he averred that the tramway described in plaintiff's petition was built upon defendant's land under and by virtue of a contract, a copy of which was annexed, and made part thereof. Defendant further averred said contract expired by limitation on the 1st day of January, 1898; that, not wishing

to renew said contract, he notified plaintiff to vacate said property, but that he refused to do so; that defendant objected, and had objected, to the use and occupation of his land by plaintiff beyond the term of said contract. In view of the premises, he prayed that "said contract be decreed to have expired by limitation on January 1, 1898, and plaintiff be ordered to vacate the property of defendant which he holds thereunder, and that defendant have possession of the same. The case was tried before a jury, who returned a verdict in favor of defendant, and thereupon the court rendered judgment in favor of the defendant, dissolving the injunction which had issued in the suit, and rejecting plaintiff's demand. It further decreed and ordered that the plaintiff remove his tramroad from defendant's land as prayed for. Plaintiff appealed.

Orther C. Mouton, for appellant. C. D. Caffery, William Campbell, and Crow Girard (Parkerson & Tobin, of counsel), for appellee.

NICHOLLS, C. J. (after stating the facts). Act No. 45 of 1896, on which plaintiff based his rights, provides that in all cases where the owner whose lands are inclosed, or entirely surrounded by lands of another or others, and where the lands thus inclosed or surrounded do not front upon a public road, railroad, or water course, and who has no right of way to the nearest public road, railroad, or water course, such owner shall have the right to construct a road, tramway, ditches, or canal, as the exigencies of the case may require, over the lands of his neighbors, to the nearest public road, railroad, or water course, for the purpose of getting the products of such land to such public road, or for the purpose of drainage, railroad, or water course, in the manner, and from and under the conditions, fixed in the second and third sections of the act. Those sections provide: That whenever a party owning lands, as stipulated in the first section, desires to construct such roadway, tramway, ditches, or canals, he shall present his petition to the police jury of the parish where the land to be traversed is situated, or where the lands lie partly in one parish or partly in another, to such police jury where most of the property is situated, stating whether he desires to construct a roadway, tramway, or canal; whereupon said jury, after due hearing of both parties in interest, shall decide in open session, by a majority vote of the members present, whether he shall be permitted to construct a roadway, tramway, ditches, or canal, and fix the dimensions thereof; and said jury shall at once proceed to assess the amount to be paid to the owner of the land for the privilege of constructing such roadway, tramway, ditches, or canal, which shall in no case be less than three times the assessed value of the land traversed, nor more than three times the assessed value. In computing and fixing such valuation the said police jury shall count a lineal acre as a whole acre. That on payment to the owner

of the land to be traversed, by the party seeking said right of passage, of the amount assessed by the police jury, as above provided, to be evidenced by the receipt in writing of the party whose land is to be traversed; and on production of such receipt to the president of the police jury such officer shall grant a permit in writing to such party, who shall be at once authorized to proceed to construct such roadway, tramway, or canal, as the case may be, provided that work thereon be begun within one year from date of permit; otherwise, all rights shall be forfeited.

The evidence shows that the plaintiff is the owner of a certain sugar plantation in the parish of Lafayette; that a public road runs along a part of the tract, and that his lands border also to a certain extent on Bayou Vermillion; that by means of this road and this bayou he has access to the town of Lafayette, the Southern Pacific Railroad, and the Lafayette Sugar Refinery, but by longer lines than would be required to reach the same points by a tramway crossing certain lands of his neighbors intervening between his property and the points mentioned; that the plaintiff cultivates and sells cane to the Lafayette and Caffery Refineries, which are situated on the line of the Southern Pacific Railroad; that the cost of delivering his cane to those refineries by the public road or by the bayou is much greater than by a tramway such as has been mentioned; that in 1896 plaintiff, by reason of said increased cost, which he testified would make the cultivation of cane at that point really unremunerative, sought and obtained from his neighbors (among them the defendant) the right to construct and operate a tramway over their respective lands, so as to connect his property with the points mentioned; that the right granted to that effect by the defendant was evidenced by a written act between the parties, and by the terms of the agreement the right was to expire by limitation on the 1st of January, 1898; that defendant, several months before the expiration of this stated period, notified the plaintiff that he would not renew the privilege, and called on him to remove the tramway at the expiration of the grant of right of way; that defendant, on one or more occasions, refused positively to renew the grant, and finally instituted legal proceedings before a justice of the peace to force plaintiff to remove the tramway, and vacate the premises; that that proceeding culminated in a judgment ordering the plaintiff to remove the tramway, and to give possession to *Blennu*; that on appeal to the district court that judgment was set aside upon the ground that the matters and issues raised were involved in the present proceeding, which was then pending in the district court. The evidence shows that the lands of the defendant do not join those of the plaintiff; that the tramway which had been constructed crosses the properties of several of plaintiff's neighbors before it reaches defendant's property.

The exigencies of this case do not call for any expression of opinion whether it is within the power of the general assembly to authorize the expropriation of the lands on one person for the exclusive benefit or convenience of another, where there is no element of public or general interest involved in the expropriation, and whether, if it has such power, it has the right to refer to the police jury, instead of to the judicial tribunals, the adjudication of the rights and obligations of the parties. The testimony discloses the fact that plaintiff's plantation is not so situated as to make the provisions of the act of 1896 applicable to it. That act is in derogation of general right, and calls for a very strict interpretation. Plaintiff's land borders upon both a public road and a stream by which the products of his plantation can reach a market, under difficulties, perhaps, but none the less under feasible conditions. The law does not take into account the inconveniences of the situation, nor the greater or less cost of reaching the railroads, refineries, or the public centers of business and trade, but contemplates an absolute inability of doing so without the right of way sought to be expropriated. We are of the opinion that the judgment appealed from is correct, and it is hereby affirmed.

(51 La. Ann. 755)

O'ROURKE et ux. v. NEW ORLEANS CITY & L. R. CO. et al. (No. 12,939.)¹

(Supreme Court of Louisiana. March 7, 1899.)

STREET RAILROADS—INJURY TO PERSON ON TRACK
—CONTRIBUTORY NEGLIGENCE.

1. A boy 11 years of age, standing at night on the off side of the down-town track of defendant company's street railway, waiting for a car on the up-town track (which was furthest from him) to pass, and, that car having passed, without looking up the track nearest him, to see whether or not it was safe to cross, steps on the track, 12 or 15 feet in front of an approaching down-town car, trips and falls, is run over, and his foot crushed. *Held* a case of want of care on his part, barring recovery of damages; it being shown that, notwithstanding effort on part of motoneer to arrest car, it could not be done in that distance.

2. The motoneer had a right to suppose the boy was waiting for his car to pass, and to expect he would remain where he was out of danger until it had passed.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Nicholas H. Rightor, Judge.

Action by James O'Rourke and wife against the New Orleans City & Lake Railroad Company and the New Orleans Traction Company, Limited. Judgment for defendants, and plaintiffs appeal. Affirmed.

E. Evarisk Moïse, Giulio F. Socola, and John Wagner, for appellants. Denegre, Blair & Denegre, for appellees.

BLANCHARD, J. Plaintiffs are the parents of Walter O'Rourke. They sue for \$20,-

¹ Rehearing denied March 20, 1899.

000 for his use and benefit, and for \$5,000 on their own behalf, as his parents. The cause of action is that one of the street cars of defendants ran over the foot or lower part of the left leg of Walter O'Rourke, and crushed it, in consequence of which the leg was amputated between the ankle and knee. The averment is that the injury to the boy was occasioned by the fault of defendants, through their employes. The accident occurred about 7:30 o'clock on an evening in December, 1898. It was a dark, cold, drizzly, winter night. The car was running on the Prytania street line, and going down town. It was an electrically propelled car, in charge of a motoneer and conductor, and several passengers were aboard. The place of accident was on Prytania street, between Amelia and Antonine streets, in the city of New Orleans. The block between those streets is only 48 feet wide; and one square away, going towards the rear of the city, the two streets merge into one. This narrow block, on the river side of Prytania street, is occupied by the barroom and grocery of Bartello Mancuso. Besides the front entrances to this bar and grocery, there are side entrances,—one on Amelia street, and another on Antonine street. It was a Sunday night. In consequence, the house was closed, but the side entrance on Amelia street permitted the ingress and egress of neighbors and friends visiting the Mancuso family. Among those visiting there that Sunday afternoon and evening were Walter O'Rourke, a bright, active, intelligent lad, 11 years of age, and his younger brother, Albert, 7 years old. They were friends of the Mancuso boys, and had been playing with the latter during the afternoon, in the yard on the Mancuso premises, back of the bar and grocery store. When it became dark, the boys came into the house, and sat around the bar and grocery with the Mancusos until about 7:30 o'clock, when the two O'Rourke lads left to go home. They went out by the side entrance on Amelia street. They lived on the lower side of Antonine street, between Prytania street and St. Charles avenue, or something over a half a square from the Mancusos. Antonine street is below Amelia street, and, to reach their home, it was necessary for the boys to walk a few steps from the Mancuso entrance on Amelia street to Prytania, thence down Prytania to Antonine street, thence across Prytania and across Antonine to the lower side of the latter, and thence to their father's house. There is evidence that when Walter O'Rourke left the Mancuso store he was chased out by Peter Mancuso, one of the boys with whom he had been playing. Peter Mancuso so testifies, and that the reason for his running after the O'Rourke boy was that the latter "had called him names." Walter O'Rourke denies this, and insists that when he left the store he did so leisurely. This is a matter of some importance, since the evidence of the motoneer is to the effect that the boys came running from under the shed covering the sidewalk in front

of the Mancuso store, and the one hurt, in his haste, jumped on the track immediately in front of the advancing car. So that, if Walter was chased out of the store by Peter Mancuso, nothing was more natural than that, expecting Peter to follow, he continued his flight out across the banquette and into the street, not noticing the car until too late. In point of fact, Peter did not follow him out on the street, but stopped at the exit door. While the testimony, for what it is worth, of the little seven year old brother is slightly corroborative of the elder brother on this point, we incline to think that the weight of evidence favors the view that the boys came running out of the side entrance of the Mancuso store, and that Walter continued his running across the banquette, and into the street. After reaching Prytania street, a few steps from the entrance on Amelia street, through which he had made his hasty exit from the store, Walter O'Rourke turned down towards Antonine street, going diagonally across the banquette towards the outer curb. He reached this about midway of the front of the Mancuso store, and jumped across the gutter into the street. From the curb, or outer edge of the banquette, at this point, to the outer rail of the down-town track of the street-car line, is only about 13 feet. He says that, noticing a car coming up town on the track furthest from him, he stopped, before reaching the near track, to let it pass, and then, proceeding to cross, his foot tripped on an unbeveled plank laid between the rails of the track, causing him to fall, and in a moment the car was upon him. He testifies that he neither saw nor heard this car until he fell, and then he heard the motoneer call out to him to "look out," and, realizing his danger, he lunged himself forward, and succeeded in clearing the track, except as to his foot, which was run over and crushed. Continuing, he says that, at the time he tripped and fell, the car was not over 12 feet from him. This is a damaging statement for him. Accepting his own version, he, after leisurely waiting for an up-town car on the far-away track to pass, deliberately, without looking or listening for a car coming on the down-town track, at a crossing which he admits was dangerous, and about which he had been repeatedly cautioned, steps onto the track at a time when a rapidly approaching car is not more than 12 or 15 feet from him. He says that the gong of the down-town car was not ringing, while that of the up-town car was, and that the ringing of the gong on the latter car is what attracted his attention to it. The motorman of the down-town car swears that the gong on his car was ringing. But whether it was or not, and, if not ringing, holding it to be negligence on part of defendants, will it be seriously contended that it was not the duty of this boy, as a matter of care and prudence, to have had due regard to his surroundings, and to have looked up the down-town track before venturing upon it that dark, drizzly night? Not doing this, and getting upon this

track when the approaching car was only from 12 to 15 feet from him, must be held to be such contributory negligence on his part as bars his recovery. When he came out of the Mancuso entrance on Amelia street, he had, if he had exercised it, a view up Prytania street for a considerable distance, and could easily have seen an approaching down-town car several blocks off. This view of the street got better and better as he approached and came onto the banquette of Prytania street; and finally, when he passed off the banquette onto the street itself, there was not only no reason why he should not have noticed and taken heed of the advancing car, even though it were not sounding a gong, but it was reprehensible want of care and negligence on his part not to have done so. *Railway Co. v. Flanagan* (N. J. Err. & App.) 32 Atl. 216; *Sheets v. Railway Co.* (N. J. Sup.) 24 Atl. 483; *Costello v. Railroad Co.* (Sup.) 49 N. Y. Supp. 869; *Mullen v. Railway Co.* (Mass.) 41 N. E. 664; *Masser v. Railway Co.* (Iowa) 27 N. W. 776. "Carelessness of child eight years old, who, with his view unobstructed, runs directly in front of an approaching car, which could be plainly heard, prevents recovery for death." Syllabus in *Morey v. Railway Co.* (Mass.) 50 N. E. 530. "While no one should be held to a degree of care and caution beyond his years, a boy of eleven years and four months of age cannot be relieved from the exercise of all care and prudence." *McLaughlin v. Railroad Co.*, 48 La. Ann. 23, 18 South. 703. If Walter O'Rourke was standing on the off side of the down-town track, as he says he was, waiting for the passage of the car on the up-town track, the motoneer on the down-town car, not then over 15 or 20 feet away, had a right, if he saw him, to suppose he was waiting for his car to pass, and to expect he would remain there, out of danger, until it had passed. He could not anticipate that the boy would carelessly attempt to cross the track, just ahead of the car; and the boy having done so, and having tripped and fallen upon the track, and gotten hurt, he has no case for the recovery of damages. In *Fleishman v. Railroad Co.* (Pa. Sup.) 34 Atl. 119, it was said, "Where a motorman saw a child standing in the street, away from the track, in time to stop the car before reaching it, without anything in its attitude to indicate that it was about to cross the track, and the child, when the car was within ten feet of it, started to cross, and was run over, notwithstanding the effort of the motorman to stop the car as soon as he saw the child start towards the track, the company was not liable." See, also, *Sciortino v. Railroad Co.*, 49 La. Ann. 7, 21 South. 114. This car was going at about half speed, or about 5½ miles an hour. The evidence shows that to stop a car, such as the one in this case, going at that rate of speed, requires about 70 feet. At full speed, or full allowable speed,—11 miles an hour,—it would have required 100 feet or more to have arrested its progress. When the

boy started to cross the track, 12 to 15 feet ahead of the car, and the mishap of tripping and falling overtook him, it was simply impossible for the motorman to have then arrested his car in time to have prevented the catastrophe.

But, with much insistence, it is urged on behalf of the boy that he would have gotten over safe, had he not tripped and fallen, and that what caused his trip and fall was the unbeveled, projecting edge of a plank between the rails, projecting above the rail nearest the boy. It is contended that, his foot striking this projection, he fell upon the track, and was run over; that, if the projection had not been there, he would not have fallen; that the railroad company was charged with the duty of laying the planks between the rails of its tracks, and keeping the same in order; that the particular plank or planks over which the boy stumbled had been newly laid, and the edges thereof near the rail had been carelessly left unbeveled; and that these unbeveled plank edges constituted a dangerous obstruction, for which the company must be held responsible. It is shown on the part of the railroad that the edges of the plank covering of its tracks are beveled only to prevent the planks from being torn up by the wheels of passing vehicles getting between the rail and the ends of the planks, and not as a precaution against foot passengers stumbling over the same in crossing. Besides, if these planks were left unbeveled,—which is not established,—the projection above the rail was only from a half inch to an inch; and this constitutes no such faulty construction or dangerous obstruction as would justify holding defendant company responsible in damages because of a person tripping over the same and falling. It is a fact of universal recognition that the normal condition of the streets of cities and towns is that of unevenness much greater than what is shown here, even taking plaintiffs' view of the same. The street and track where young O'Rourke crossed it was in a reasonably safe condition for a person exercising ordinary care and prudence. This is all that is required of municipal corporations, and the rule can hardly be extended further as to street railways. The case of *Peetz v. Railroad Co.*, 42 La. Ann. 541, 7 South. 688, directly negatives plaintiffs' contention with regard to this plank over which it is claimed the boy stumbled. See, also, *Welsse v. City of Detroit* (Mich.) 63 N. W. 423; *Waggner v. Town of Point Pleasant* (W. Va.) 26 S. E. 352; *Cook v. City of Milwaukee*, 27 Wis. 191.

While it is not charged in plaintiffs' petition that no headlight was burning on the car in question at the time of the accident, it was argued at bar and in the brief of plaintiffs' counsel, and the claim set up that its absence constituted such negligence as justified recovery. Plaintiffs' evidence fails to establish that the headlight was not burning, and the motoneer swears positively that it was. Besides,

all the probabilities point to its having been lighted and burning on the front of the car that night.

The judgment of the court *a qua* was against the pretensions of plaintiffs, and we find no ground for disturbing the same. Judgment affirmed.

(51 La. Ann. 590)

Succession of RABASSE. (No. 12,928.)

(Supreme Court of Louisiana. Jan. 23, 1899.)

EXECUTORS — ACCOUNTING — SECRETES — AUCTIONEERS — ATTORNEYS — FEES.

1. A charge made against a succession of an amount which the executor had contracted to pay a guaranty company for becoming surety upon his bond cannot be sustained in the absence of an express provision of law authorizing same.

2. By the terms of Act No. 104 of 1896, an auctioneer is entitled to demand and receive as a compensation for his services on all sales of succession property made by him a commission of not more than 2 per cent. on the first \$10,000 of proceeds, and 1 per centum of the excess.

3. Jurisprudence has settled the rule, and consecrated it, that the quantum of attorneys' fees in any case where the services have been performed in the presence of the court which is called upon to decide the question, is a matter of law, rather than one of fact, and that it will value same as its opinion and sound discretion dictate, rather than base its judgment upon the opinions of witnesses.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

Opposition of heirs to the final account of the executor of Dr. Eugene Rabasse, deceased. From a judgment against them, opponents appeal. Reversed in part.

E. J. Meral, J. Numa Augustin, and Charles F. Claiborne, for appellants Mesdames Pincaut and Moissons. Henry Chiapella, for appellee testamentary executor. Solomon Wolff (E. Howard McCaleb and James F. Pierson, of counsel), for appellee Henry Chiapella. E. Howard McCaleb, Félix J. Dreyfous, and Solomon Wolff, for appellee David Danziger.

WATKINS, J. The collateral heirs of the deceased opposed the final account filed by the testamentary executor on several grounds, and on the trial of the oppositions the district judge approved and homologated same, after having modified it in a few minor particulars, and from that judgment the opponents have appealed, the executor having acquiesced in the amendments and modifications made.

As many of the items of the oppositions have been withdrawn, and only a few of them are now insisted upon, attention will be directed to those only. The approximate amount of the estimated value of the estate as it is exhibited by the original inventory, \$114,000, and it is upon that basis that the discussion must primarily proceed, notwithstanding the opponents' counsel contend that

the appraisements were excessive, and inflated, and in consequence thereof the amount charged for attorneys' fees is likewise excessive, and ought to be greatly reduced.

Counsel say, in their brief: "If the items of the account are to remain, then we have the following charges of administration, viz.:

Commission, executor	\$ 2,855 40
Charbonnet, notary	550 00
Appraisers	325 00
Clerk Terrebonne	50 00
De Poorter, attorney.....	650 00
Auctioneer	2,129 37
Cretien & Suthon.....	200 00
Buisson, attorney absent heirs....	350 00
Commission on rents.....	170 00
Costs of court.....	200 00
Stenographer	400 00
Experts	275 00
Chiapella's briefs	272 00
Attorneys succession	11,421 63
Charbonnet	339 00
Keepers of seals.....	100 00
Appraisers	50 00
Surety's commission	1,200 00

Total\$21,537 40

—"equal to almost one-third of the total value of the property abandoned to the heirs."

The following is the list of items which are opposed, and with regard to which we are called upon to pass judgment, viz.: (1) The executor's commission; (2) a charge he made against the succession of \$1,200, which he agreed to pay to a third party for procuring him a bond, or for signing his bond; (3) the auctioneer's commission and his charges for advertisement; (4) penalties on taxes paid by the executor; and (5) fees charged by the attorney of the succession. We will take them up and dispose of them serialtim, in the order stated above.

1. The item of executor's commissions of 2½ per cent. on the amount of the inventory is disposed of by the following statement in the principal brief of opponents' counsel, viz.: "We have to submit to the executor's commission of 2½ per cent. upon the amount of the inventories \$114,000, say \$2,855." This confession closes the controversy, in so far as that question is concerned, and leaves the account in statu quo, pro hac vice.

2. With regard to the commissions of 2½ per cent. which the auctioneer charged, counsel for the opponents make the statement that same was made upon each separate adjudication as a distinct and separate sale, and that the judge *a quo* allowed them, only reducing the rate from 2½ to 2 per cent. We extract the following from the brief of opponents' counsel, viz.:

"The commission allowed by the lower court in bills A and C, the sales being below \$10,000, is correctly fixed at 2%. [Page 234.] But, as regards bill B, the sales aggregating \$25,030, should be reduced as follows:

2% on \$10,000.....	200 00
1% on 15,030.....	150 30
	350 30
The auctioneer charged.....	625 75

An overcharge of..... 275 45"

And the following is an extract from the opinion of the judge a quo on this subject, viz.: "The heirs oppose the auctioneer's commission. Act No. 104 of 1896 provides the tariff of charges at 2 per cent. on the first \$10,000, and 1 per cent. on the excess. There is much in the rule settled in Succession of Von Hoven, 48 La. Ann. 620, 19 South. 766, to support the claims of the auctioneer for 2½ per cent., as virtually consented to by some of the heirs, and acquiesced in by all, in the matter of some of the sales accounted for in a former account. But, as there was no express agreement by all, I fix the rate established by the act of 1896. I think the auctioneer is entitled to 2 per cent. on each adjudication made by him, none of them reaching \$10,000. There were some twenty properties sold, situated, some in this city, most of them in the country. There were about twenty separate adjudications to as many different purchasers. Almost to each purchaser there was a separate adjudication, a separate act of sale, a separate price paid, and for each adjudication the delay for a separate title examination. All the properties were not sold on the same day, or at the same time. There was all the trouble of obtaining exact information as to each property and its derivative title. They were separate sales. That some of them may have been grouped under one advertisement, with a separate item of description as to each, does not make of all the adjudications one adjudication. As none of them exceeded \$10,000, the law gives the auctioneer his 2 per cent. on each adjudication. Suppose two-thirds of the appraised value was required to effect the sale,—and such was and is the law,—and suppose that some of the properties brought more than two-thirds, and some of them less than two-thirds, of the appraised value, and that, combining all the prices, an average of two-thirds had been realized, it seems to me that there would be a legal adjudication of such properties only as brought the essential two-thirds, and that there would be no sale of such as failed to bring two-thirds of the appraised value. If this be true, then it must also be true that the auctioneer's power and duties attach separately to each property, that he deals with each separately, and that, therefore, his commission is to be calculated separately on the price brought by each adjudication." It thus appears that the only controversy is with regard to bill B, and that the only amount that is alleged to have been overcharged is \$275.45. It appears that the auctioneer made sales aggregating in proceeds the sum of \$36,280, but, having adjudicated to one of the legatees an amount equal to \$11,200, a commission of 2½ per cent. was charged on the residue of \$25,080, equal to \$625.75. The district judge only allowed 2 per cent., and thus reduced the commission to the sum of \$500.80, and opponents contend that it should have been reduced to \$350.80,—a difference of \$150.80. The contention on the part of the auctioneer is that he made 18 separate and distinct sales for each

of which he is entitled to charge a separate commission. The law which governs the auctioneer's commission is as follows, viz.: "No auctioneer shall demand or receive a higher compensation for his services on all sales of real estate than a commission of two and one-half per cent. on the amount of any sale, public or private, made by him; and on sales of succession property, * * * made pursuant to an order or decree of any court of the state, a commission of not more than two per cent. on the first \$10,000, and one per cent. on the excess." Act No. 104 of 1896, p. 153. This statute is an amendment of Rev. St. § 160, which provides that "no auctioneer shall demand and receive a higher compensation for his services than a commission of two and a half per cent. on the amount of any sale, public or private, made by him," etc. It will be observed, upon comparing the two statutes, that the phrase "the amount of any sale" occurring in the Revised Statutes has been so altered by the statute of 1896 as to read "on all sales"; and that his commissions "on sales of succession property" have been reduced to "two per cent. on the first \$10,000, and one per cent. on the excess." It is plain that the compensation of the auctioneer under the last statute on the subject on all sales of succession property is fixed at the per centum therein designated upon the amount of proceeds realized thereby, and not by the number of separate adjudications. In Succession of Macarty, 32 La. Ann. 6, our predecessors interpreted Rev. St. § 160, above quoted, to mean that for his services an auctioneer is entitled to a commission of two and one-half per cent. on "the entire amount of the sale." And this court recently construed that provision of law to apply to the case of an auctioneer who had made sales of 18 different pieces of succession real estate. Succession of Von Hoven, 48 La. Ann. 620, 19 South. 766. But since Succession of Macarty was decided the legislature has put its interpretation of Rev. St. § 160, beyond cavil or question by its enactment of 1896. We think it evident that this item of auctioneer's fees should be further reduced so as to award him the sum of only \$350.80, instead of \$625.75, as charged in the executor's account.

3. The next item of the opposition to which our attention is directed is the charge made by the auctioneer for advertising, and, as included with his commissions, aggregates the sum of \$2,129.37, as stated in the account. The counsel for opponents have made, in their brief, a careful compilation of the facts appearing in the record, applicable to their contention, and we have extracted same from their brief, after verifying the correctness of their quotations, as follows, viz.:

"The charge of the auctioneer was for six advertisements at 70 cents a square. It should have been for five advertisements only, at the rate of 70 cents a square for the first insertion, and 25 cents a square for each subsequent insertion, as follows:

"Bill A. Record, pp. 57, 230, 234. Picayune:

56 squares at 70 cents.....	\$39 20
48 squares at 25 cents each, 4 times....	48 00
	<u>\$87 20</u>

Amount charged by auctioneer.....	\$217 70
" allowed by law.....	87 20
	<u>\$130 50</u>

"Record, pp. 57, 231. Bee:

50 squares at 70 cents.....	\$35 00
42 squares at 25 cents, 4 times.....	42 00
	<u>\$77 00</u>

Amount charged by auctioneer.....	\$203 00
" allowed by law.....	77 00
	<u>\$126 00</u>

" overcharged \$126 00

Total amount of bill, p. 57.....	\$581 05
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Less overcharges, printing...	\$130 50
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" " commission	126 00
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" " commission	19 35
	<u>275 85</u>

As the bill should be.....	\$305 20
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The lower court made a reduction of..	128 37
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There should be a further reduction of	<u>\$176 83</u>
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"Bill B. Record, pp. 58, 233, and 234. Picayune:

90 squares at 70 cents.....	\$ 63 00
90 squares at 25 cents, 4 times.....	90 00
	<u>\$153 00</u>

Amount charged by auctioneer.....	\$382 50
" allowed by law.....	153 00
	<u>\$229 50</u>

" overcharged \$229 50

"Record, pp. 58 and 232. Bee:

56 squares at 70 cents.....	\$39 20
56 squares at 25 cents, 4 times.....	56 00
	<u>\$95 20</u>

Amount charged by auctioneer.....	\$224 00
" allowed by law.....	95 20
	<u>\$128 80</u>

" overcharged \$128 80

Total amount of bill, p. 58.....	\$1,522 43
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Less overcharges, printing..	\$229 50
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Less overcharges, commission	128 80
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Less overcharges, commission	275 45
	<u>633 75</u>

As the bill should be.....	\$ 888 68
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The lower court made a reduction of	298 45
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There should be a further reduction..	\$ 590 23
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"These rates of advertisements have been maintained in Succession of Von Hoven, 48 La. Ann. 620, 19 South. 766, after a long argument."

In support of their contention opponents' counsel cite the provisions of the following statutes, viz.: "That the costs of such advertisements shall not exceed in the parish of Orleans the rate of seventy cents per square, or fraction thereof, for the first insertion, and twenty-five cents for each subsequent insertion.

* * * Act No. 49 of 1877, p. 62, § 18. "That judicial advertisements shall be made by publication in a daily paper on three different days before the expiration of the term fixed by law, if the term be of ten days; and for those advertisements for which the term of thirty days is fixed, it suffices if they are published in a daily paper, once a week during that term." Act No. 104 of 1878, p. 157. "That said publication in the French language shall be made in precisely the same manner and for the same number of times and on the same terms as by existing laws are required or may be required thereafter, for the publication of judicial advertisements in the English language." Act No. 125 of 1888, p. 186, § 2. The total amounts charged for advertising in the Bee and Picayune aggregate \$1,522.43, and upon this the judge a quo made a reduction of \$298.45, and our examination has led us to the conclusion that there should be a further reduction of \$60.80; thus making a total reduction of \$359.30. In adopting this estimate, we are following the declaration made by this court in the Von Hoven Case, 48 La. Ann. 627, 19 South. 766, as follows, viz.: "We think the rates charged for advertisements entirely unwarranted. The law is perfectly plain on that subject. The charge for judicial advertisements is seventy cents a square for the first insertion, and twenty-five cents for each subsequent insertion, whether made consecutively or not. There is but a single first insertion in a judicial advertisement; all others following the first are 'subsequent insertions.' The doctrine of 'alternative first insertions,' reached by making the advertisements nonconsecutive, and charging each first insertion of a renewal advertisement as an 'alternate first insertion,' may be satisfactory to the newspapers, but not to litigants, and is sustained by no law."

4. The next item of the account opposed is the amount of \$1,200 charged against the succession as the sum which the executor had contracted to pay a security company for furnishing surety upon his bond. This item is opposed upon the ground that the charge is not warranted by the provisions of the Code, and not sanctioned by the jurisprudence of this court; and, as establishing that proposition, counsel for opponents cite the following authorities, viz.: Civ. Code, arts. 1069, 1194, 1200, 1683; Succession of Milne, 1 Rob. 400; Succession of Sprowl, 21 La. Ann. 544; Succession of Day, 8 La. Ann. 624; Succession of Poindexter, 19 La. Ann. 24; Baldwin's Ex'r v. Carleton, 15 La. 398; Succession of Key, 5 La. Ann. 563; City of New Orleans v. City of Baltimore, 15 La. Ann. 625; Succession of Liles, 24 La. Ann. 492; Young v. Chaney, 3 La. 464; Succession of Turnell, 84 La. Ann. 889; Succession of Boyer, 36 La. Ann. 515. Upon this subject our learned Brother of the district court made an elaborate statement of the reasons which impelled him to approve this item of the account as a just charge against the succession, and we have made the follow-

ing extract therefrom as fairly illustrating the views he entertained, viz.:

"The executor credits himself with \$1,200 paid as provided by him to obtain a surety upon his bond as executor. The heirs resist the charge as an illegal one. It is argued that no law authorizes such a charge, and ergo it should be rejected. Prior to Act No. 41 of 1894, the law exacted personal security, such as the Civil Code provides for. Said act authorizes surety companies, under certain guarantees, to underwrite as surety upon bond, in lieu of personal security, and authorized such companies to charge for the service. Since then we find said corporations accepted as surety on all bonds required by law, such as official bonds, warehouse bonds, builders' and contractors' bonds, and bonds in succession matters. In the rush of modern business, suretyship has become a fixed subject-matter of covenanting by the policy of the law. It appears in this case that the executor, holding the power of attorney of an heir, was appointed dative executor, and he gave the bond, which was for a large amount, the inventory amounting to about \$100,000. Several months after he had given said bond, the sureties on his bond, having the legal right so to do, announced their purpose to withdraw from the bond. Litigation of a serious nature had arisen, and it had become evident that it might require several years, as has proved to be the fact, to wind up the affairs of the succession. Thus confronted by the certainty of being left without a bond, and by the certainty that it would be difficult, and perhaps impossible, to find personal security for so large an amount (say more than \$120,000) for the length of time (perhaps years) that would be required to settle the litigation pending, and close the succession, and particularly after sureties upon the bond which he had given had become alarmed and withdrawn from his bond, what recourse had the executor but to apply to a surety company, which Act No. 41 of 1894 had legalized, and recognized as a proper and competent surety? He must either do this or give up the trust. Fairness must concede that this latter was a harsh condition. He had embarked on his duties, and had incurred responsibilities. He had the right to earn his commission by full administration. He held the mandate of an absent heir having a large interest. It was not a certainty that any other representative of an absent heir could give a bond, at least without paying for the surety, as per said Act No. 41 of 1894. The public administrator, always ready, had previously intervened in the succession, and would perhaps succeed to the trust with his statutory charges of 5 per cent. commissions on the inventory, 5 per cent. more on collections, with new attorneys' fees, new costs of inventories, publications, etc. It was, ergo, to the evident interest of the succession that the dative executor should remain in office. It is proved by Mr. Pescud that the surety company would

have charged 1 per cent. for the first year of administration and one-half of 1 per cent. for each succeeding year. The succession is not yet closed, and we are in the third year of the administration, with the certainty of another appeal to the supreme court, just now adjourning until the late autumn, and the probability, therefore, of four years of administration, before this succession can be closed. In this contingency, a charge of 2 per cent. on the amount of the bond of \$120,000 or upwards was a certainty if the executor followed the law, and contracted under it (the act of 1894) with a surety company. It was almost as certain that one-half per cent. more would have resulted as the charge, and possibly 1 per cent. more; i. e. $2\frac{1}{2}$ per cent. or 3 per cent. on the \$120,000 bond. The alternative, then, was the public administrator's commissions of 5 per cent. on the inventory and 5 per cent. on collections, etc., on the one side, or the surety company as a bondsman at 2 per cent. on the amount of the bond, at least, on the other side, or to give up the trust, and take the chances of another representative of the absent heirs applying and giving bond. The chances were that any other representative of an absent heir would have equally to pay for a surety, and, as the charges of the surety company were about equal to what an executor would receive for his commissions, the chances were that no absent heir's representative would have made the application or have given the bond. In this dilemma, the executor engaged a sufficient and solvent surety by contracting, as executor, to pay 1 per cent. for the suretyship. This suretyship was to last during this entire administration. That this was the best he could do is established. That it was economical, the figures show; for while 1 per cent. is \$1,200, the surety company would have charged \$2,400, or perhaps \$3,000, and the public administrator's fees, by law, would have been \$4,000, at least. That it was prudent, for the interest of all, appears in the fact that to begin de novo with inventories in all the parishes, new notices, new delays, new letters, new attorneys, and consequent fees would have cut the estate (I doubt not) \$1,200, which is all that this executor had to agree to. If he had to pay this personally, it will eat up the greater part of his commission. If it be divided out among the several heirs, the charge upon each heir will not be much, and they are all, as a matter of good fortune, and not by the will of the testator, receiving amounts which, in France, will be regarded as large, and which, here, are very considerable. None of them have been at any trouble, and all of them are to receive liberally, as the result of the active executor and his attorney, who have defeated claims, and saved to the estate \$50,000 at least, equal to 250,000 francs in France. The security was for the benefit of the estate. It secures creditors and it secures the heirs. It benefits the executor only as it enables him to earn his $2\frac{1}{2}$ per cent. commission; and surely he has earned it. It seems to me, on every

view of the matter, that the succession which gets the almost entire benefit should pay the 1 per cent. charge for the surety, and for the guaranty that the succession would suffer no loss. The only argument against the view is that no law approves it. Act No. 41 of 1894 is a good reply to this argument. This act authorizes the acceptance of the company or corporation as a legal surety, and authorizes the company or corporation to charge a premium or commission for taking the risk; and where the law accords the right it necessarily allows all that is necessary to avail of the benefits of such rights. * * * The law has announced as its policy in Act No. 41 of 1894 that furnishing surety on such bonds for a money consideration, as a matter of business enterprise, is legitimate business. The conclusion seems to me fair and just that where good security, at fair and reasonable and economical rates, is obtained, that the succession which is thus secured against the acts of the executor ought to bear the charge. Such was the view taken by the Wisconsin court in *Hamacker v. Bank*, 70 N. W. 295. But, if I am wrong in these views, I must not forget that, as Mr. Cleveland said of the tariff: 'We are not dealing here,' under the peculiar facts of this case, 'with a theory, but with a condition.' Each case has its peculiar facts and conditions. Every rule has its exceptions. In this case justice approves the charge, and equity applies when law is silent, and especially in matters of accounting, which is of chancery origin. I therefore overrule the opposition to this charge of \$1,200."

The foregoing reasons and course of argument are cogent and persuasive, and would exercise a strong influence on our decision, if we found any authoritative sanction therefor in either the statute or decision cited; but, in our opinion, there is none in either. The title of the statute referred to is as follows, viz.: "An act to authorize certain corporations to become surety upon bonds required to be furnished by law, and prescribing the conditions under which they may do so." Section 1 provides, among other things, "that hereafter, any corporation duly incorporated * * * for the purpose of transacting the business of guaranteeing the fidelity of persons holding places of public or private trust * * * may be accepted as sole and sufficient surety upon any bond," etc. Section 2 provides, among other things, that "it shall be lawful for any party of whom such a bond or undertaking is required, to agree with such company, acting as surety for the deposit of any and all moneys," etc. Similar provisions occur in the following sections of the act; but in the concluding section (9) we find the following pertinent expression, viz.: "That this act is not intended in any manner, except as above provided, to change existing laws on the subject of suretyship, and except to permit such a company to act and be accepted as a sole surety on all bonds," etc. Act No. 41 of 1894,

§ 9. It is a statute appertaining to the subject of suretyship, and possessing no pertinency to the duties, powers, or responsibilities of executors or administrators, or the management or the administration of successions; and for that reason we think it altogether inapplicable to the question under consideration. In our view, the case stands in the same position as it would if a private person, *sui juris*, had made a similar engagement to become surety upon the bond of the executor for a consideration, and that the succession incurred no other or greater responsibility to the executor therefor. The case decided by the Wisconsin court was under a special statute which differs widely from the act of 1894. For these reasons, we are of the opinion that the succession cannot be called upon to reimburse the executor the sum expended by him in procuring the guaranty company to become surety on his bond, and in this respect the opposition must be sustained, and the claim of \$1,200 rejected and disallowed.

5. The next item opposed is that of attorneys' fees, which are placed on the account at the total amount of \$11,421.63. This sum is equal to 10 per cent. on the total amount of the original inventories. It appears that the sum of \$5,000 was placed on the provisional account of the executor, and that same was allowed by the court *qua*, and paid without opposition by the heirs; but they oppose the further allowance of \$6,421.63 as being excessive. Our learned Brother of the district court made a very exhaustive examination and analysis of this question, and we make the following excerpt from his written opinion, as illustrating his views, viz.: "This succession record on file has grown into large proportions, and the official books of the executor and his vouchers and memoranda, which have been called for and produced, have gathered equally in volume, and these attest the constant attention that has been required, and the faithful attention that has been given, to all and singular the numberless details, great and small, of the business of this succession here, and in the several other places where it had property interests. As I have stated, the heirs at law are collateral, not close in degree of relationship, who live abroad, who have come to the inheritance only by the death of the legatee named in the will prior to the death of the testator, and who were virtually strangers to the deceased. There are no widow, no minors, no ascendants, no brothers, no sisters here. All these facts impress me with the firm conviction that in this solvent and valuable estate neither the law nor a sound public policy requires at my hands any illiberal, or narrow, or strict construction against the executor or against his counsel. Judged by the volume of the estate; judged by the important and complicated litigation that has been managed; judged by the success which has attended the efforts of the executor and

his attorney in defeating claims urged with the persistence and plausibility of appearance, and by able and skillful counsel,—claims amounting to more than \$50,000; judged by the benefit that inures and has inured to the collateral heirs, to whom this succession has proved a windfall, or stroke of fortune; judged by the important questions of law that have been met and dealt with,—I think that the fees of the attorney of the executor are fair and reasonable and just." But, on the other hand, counsel for the opponents make this rejoinder to the argument of the district judge, viz.: "That while various suits were brought against the succession, aggregating \$66,800, and that nearly all of them were defeated, that those defeated were so defeated by the mutual efforts and learning of other counsel in part, who were employed for their defense, and co-operated with the attorney of the executor." These suits and various other matters of litigation brought this succession before this court several times, and its records attest the labor, skill, and learning with which the attorney for the executor, and other counsel who co-operated with him, successfully protected the estate from spoliation, and hence we are able to judge, from our own standpoint of observation, of the value of these services. Jurisprudence has settled the rule, and consecrated it, that the quantum of attorneys' fees in any case where the services have been performed in the presence of the court which is called upon to decide the questions is a matter of law, rather than one of fact, and which the court will value as its opinion may dictate, rather than base its judgment upon the opinions of witnesses. Counsel say in their brief: "In the Bank of Commerce Case, 49 La. Ann. 1060, 1074, 22 South. 207, 213, this court quoted approvingly the decision in Succession of Macarty, 8 La. Ann. 518. As the services to be compensated are rendered under the eye of the court, the taxations ought to be made on its own responsibility, which ought not to be shifted from the bench on the bar, as appears to have been done in this case, in which the decision is made on the opinion of the attorneys that the charge is moderate, and but reasonable." Succession of Caballero, 25 La. Ann. 647. The supreme court will fix attorneys' fees without regard to the opinions of witnesses. *Randolph v. Carroll*, 27 La. Ann. 467; *Dorsey v. Creditors*, 5 Mart. (N. S.) 399; Succession of Mager, 12 Rob. 414; *Uzee v. Biron*, 6 La. Ann. 565. "In the Bank of Commerce Case, the amount distributed by them upon their account was \$189,746.31. Yet the commissioners were allowed only \$2,000, and the attorneys \$5,000; and this court said it was 'more than we should allow if the allowance was open to review.'" Per contra we have this statement from the counsel of the executor's attorney, viz.: "If your honors are with us on the proposition that the \$5,000 fee was for services allowed on the provisional account, and, being un-

opposed, it should not be considered in fixing the value of services subsequently rendered, then we present to the court a unanimity of opinion which is seldom equaled; for all the attorneys called as witnesses agreed as to the correctness of the amount for which our client is placed on the final account; the judge a quo agrees, and counsel for opponents practically do so. It is therefore unnecessary to go into details; it is unnecessary to show that the percentage of the value of an estate which it cost to save it from a horde of forgers and dishonest claimants is not necessarily an indication that the charges are excessive." Before closing, we quote from the syllabus in the opinion in Succession of Richards, 49 La. Ann. 1115, 22 South. 217: "The estimation of the value of professional services of an attorney at law is only a question of law, and one that comes peculiarly within the province of the judge a quo, who superintended the making up of the record upon which same must necessarily depend, giving him a very intimate acquaintance with all of its details, as well as knowledge of the kind and value of what services were performed. In such a case this court will accept his estimation as a correct and proper one, in the absence of any manifest error of judgment on his part." In each of these cases—Succession of Richards and Bank of Commerce—we affirmed the judgment of the lower court for reasons as assigned in the foregoing quotations therefrom; that is to say, that the litigation in which the services of the attorneys were rendered was solely conducted before the district judge, who was called upon to estimate their value. But the instant case is different, in that the litigation in which the attorneys' services were rendered was conducted in great part before this court finally. Applying this test to the question before us, it is our deliberate conviction that the amount placed upon the account and allowed by the judge a quo is excessive, and should be reduced to the sum of \$6,000 in full for all attorneys' fees, and that, as thus reduced, this item of the account is approved and allowed.

6. The remaining question is whether the executor is entitled to the commission he has placed upon the executor's account for the collection of rents, amounting to the sum of \$170. The judge a quo approved this item, and rested his decision mainly upon Succession of Robertson, 49 La. Ann. 80, 21 South. 197, and the cases therein cited, and on *Hale v. Salter*, 25 La. Ann. 323, and Succession of Hopkins, 33 La. Ann. 1166. The case presented in Succession of Robertson was exceptional, the surviving widow and executrix having, by her unaided exertions, increased the sale value of the estate from \$12,000 to \$41,000, and, in addition, she had accumulated over \$6,000 of net earnings for the succession within the brief period of eight months. Under these circumstances, we thought her equitably entitled to 5 per cent., but upon this last amount only.

But in so deciding that case we did not propose to establish any new precedent, nor to depart from the precepts of the Code and our jurisprudence, which were therein quoted and approved; but merely to apply the maxim of equity to a case we regarded as *sui generis*, as those cited and relied upon were. But the instant one is not such a case, and it finds neither support nor application in the Robertson Case. Hence the opposition to this item is well grounded, and must be sustained.

After a careful examination of this record, and the various contentions of counsel pro and con, we have reached the conclusion that the account of the executor should be amended and restated in conformity with the views herein expressed. It is therefore ordered and decreed that the opposition of the heirs be sustained in the amounts and particulars hereinabove set forth, and that the cause be reinstated, and remanded to the district court, with directions to the effect that the testamentary executor restate and correct his final account so as to conform to the law and the views herein expressed; and that costs of appeal be taxed against the several appellees personally and proportionately.

On Application for Rehearing.

(March 7, 1899.)

The reduction which the court intended to make in the original decree, and which the court did make in the matter of fee of attorneys for the succession, was from \$11,421.63 to \$6,000, and this was intended to include all services rendered by the attorneys for the succession of any and every kind. However, the court, having reconsidered its original decree in this respect, has concluded to increase the amount heretofore allowed for attorneys' fees from \$6,000 to \$7,500; this to include all fees, inclusive of the \$5,000 which were allowed and placed upon the executor's provisional account, and since paid. We do this only because counsel representing opponents in argument and brief express themselves as satisfied if the court would reduce the fee of the attorneys of the executor from \$11,421.63 to \$7,500. With reference to the payment of Mrs. Hippolite Bossu, one of the legal heirs of the deceased, counsel claim that she is bound by a contract entered into by her agent with Danziger & Stern to the extent of her interest in the succession of Rabasse, and that she is, accordingly, bound for the sum of \$600, same being one-half of the amount paid to the sureties on the executor's bond. This contract has not heretofore been pressed upon the court's attention, and we therefore think it unnecessary to reopen the decree in so far as it relates to this claim. But we will reserve to Danziger & Stern all rights they may have under their contract in respect to Mrs. Bossu. It is a question which can well be settled between them, and which need not enter as one of the factors in our present opinion. It is therefore ordered,

adjudged, and decreed that our original decree be, and the same is hereby, amended so as to increase the amount of attorneys' fees for all purposes from \$6,000, the amount allowed in the original decree, to \$7,500, and to reserve the rights of Danziger & Stern under their alleged contract with Mrs. Bossu, or her agent, for any amount they may be entitled to recover thereunder. It is further ordered that our original judgment, as thus amended, remain undisturbed, and that a rehearing be refused.

(41 Fla. 94)

GREEN et al. v. SANSOM.

(Supreme Court of Florida. Jan. 31, 1899.)

PLEADING—REPLICATION DE INJURIA—WHEN ALLOWED—APPEAL—ASSIGNMENT OF ERRORS—MASTER AND SERVANT—SAFE APPLIANCES—DEGREE OF CARE REQUIRED—CONTRIBUTORY NEGLIGENCE—PRESUMPTION OF NEGLIGENCE—KNOWLEDGE OF DEFECTS.

1. The pleading, the form of which is prescribed by section 33, c. 1096, Acts 1861 (section 1055, Rev. St.), is in the nature of a general replication de injuria, enabling a party in a compendious manner to traverse all those allegations in a plea which he could have traversed before the enactment of these provisions, but all matters which before the act must have been replied specially must still be so replied.

2. The statutory general replication prescribed by section 33, c. 1096, Acts 1861 (section 1055, Rev. St.), is properly pleaded to the plea of not guilty, special pleas denying specific allegations of the declaration, and a plea alleging that plaintiff's alleged injuries were caused by his own negligence, and not otherwise, in actions for damages alleged to have been caused by defendant's negligence.

3. An assignment of error based upon a general exception to several instructions asserting distinct propositions of law, one or more of which is correct, will be overruled.

4. Where the servant of an independent contractor is sent to do a certain piece of work for the employer of such contractor, and from the time such servant sets to work the employer assumes and exercises control over him and the work performed by him, directing and controlling him as to the methods and details by which the desired result is to be accomplished, the relation of master and servant is thereby constituted between the employer and such servant.

5. Where the employer undertakes to furnish his own employes, or those of an independent contractor, some of the implements or instrumentalities for executing the required work, he thereby assumes a duty to exercise ordinary and reasonable care, measured by the surrounding circumstances, to provide such implements and instrumentalities as will be reasonably safe and suitable.

6. A master is not to be held liable as an insurer of the safety of his employes, or as a warrantor of the instrumentalities and implements furnished by him to enable his servants to accomplish his work, but the law obliges him to exercise such ordinary and reasonable care as prudence and the exigencies of the situation require, in providing the servant with safe machinery and suitable instrumentalities for his work, and if this obligation be performed the law absolves him from all liability for defects therein.

7. The servant owes a duty to his master to exercise ordinary care for his own safety, and while he has a right to presume that his master has performed his duty, and is not, therefore, ordinarily bound to discover latent de-

fects in the instrumentalities furnished him, yet he must notice all those patent and obvious defects which the exercise of ordinary care would enable him to discover; otherwise his own negligence will contribute to his injury and prevent his recovery.

8. Where the master requires his servant to select for his use, in executing a particular work, a rope from a number of ropes at the servant's command, and the servant, in making such selection, selects one which is apparently sound and sufficient for the intended purpose, but which in fact is defective, and the master knows, or by the exercise of ordinary and reasonable care ought to know, of the defect, he will be liable for the injury to his servant resulting from such defect; but, if the servant selects a rope obviously and patently unsound or unsuitable for the desired purpose, he will not be exercising the care required of him, and his master will not be liable.

9. Unless the circumstances attending an accident show that it could not have happened if ordinary care had been used by the master, the happening of an accident does not raise a presumption of negligence on the part of the master in actions between master and servant, in cases other than those provided for by chapter 4071, Acts 1891.

10. In actions by servants against their masters for injuries occasioned by defects in the instrumentalities furnished by the master, to authorize a finding that the master has been negligent it must be shown that the defect was known to the master prior to the accident, or that in the exercise of ordinary and reasonable care he ought to have known it, as that the defect was one which a reasonable and proper test or inspection would have disclosed, and that ordinary and reasonable care required such test or inspection to be made.

(Syllabus by the Court.)

Error to circuit court, Duval county; Rhodon M. Call, Judge.

Action of Richard A. Sansom against W. C. Green and J. J. Green, partners under the name of W. C. Green Company. Judgment for plaintiff. Defendants bring error. Reversed.

Walker & L'Engle and R. H. Liggett, for plaintiffs in error. Cromwell Gibbons and J. N. Stripling, for defendant in error.

CARTER, J. Defendant in error sued plaintiffs in error in the circuit court of Duval county, claiming damages for personal injuries alleged to have been caused by negligence. The defendants, as contractors, were constructing a public building for the United States in the city of Jacksonville, and were required by the government superintendent of construction to test the plumbing therein before its acceptance. They employed one J. E. Kuchler to make the test, who sent the plaintiff, one of his employes, to do the work. Defendants claimed that Kuchler was an independent contractor; that they contracted with him to do the work according to his own methods, reserving no authority or control over him, or the execution of the work, other than that it was to be satisfactory to the superintendent of construction. There was evidence that plaintiff was sent by Kuchler to do whatever work, and in such manner, as defendants might require; that he was occupied in the work four or five days prior to

the injury complained of, during which time he worked under the exclusive supervision and control of one of defendants, performing various duties connected with testing the plumbing, repairing leaks therein according to specific directions given by defendants, in accordance with details and methods of doing the work prescribed by them, and that during this entire period Kuchler was at the building only four or five times, remaining from five to ten minutes only, giving no instructions in regard to the work whatever, but merely inquiring how plaintiff was getting along. Plaintiff's injury is alleged to have occurred in consequence of the breaking of a rope used in constructing a hoistaway by which he was elevated into the tower of the building to repair a leak in a water pipe about 50 feet from the floor. There was evidence tending to prove that about the time this leak was discovered Kuchler and one of the defendants were present, and both said it would have to be repaired. Kuchler said to plaintiff, in Green's presence: "Mr. Green says there are a plenty of ropes here, and you can rig up a hoistaway." When plaintiff was ready to go up in the tower, Mike Howard, an employe of defendants, brought a large rope, which plaintiff rigged through a pulley at the top of the tower. Howard then brought a board with a smaller rope attached. Plaintiff saw that the small rope had been used considerably, but could not tell how long. He took it for granted that the rope was "all right." He made some remark about it when he began to tie it to the larger one, and Howard said: "Oh, that rope is all right." Plaintiff made the small rope fast to the larger one, and was hoisted up to examine the leak, which took him about five minutes, and was then let down. After dinner plaintiff sent his assistant (employed by Kuchler) overhead with material, and plaintiff was again hoisted into the tower by two of defendants' servants. A bucket of melted lead was lowered by the assistant from the floor above. Plaintiff caught the rope above the bucket, and was in the act of pouring the lead in the leaking joint, when the smaller rope suspending the hoistaway broke, causing plaintiff to fall several feet, and the melted lead to spill in one of his eyes, and upon his head and face. Plaintiff succeeded in catching the larger rope, and was lowered to the floor. On the morning when plaintiff went to work, Kuchler told him where he could get some tools and expansion plugs to work with, but during the progress of the work defendants furnished some wooden plugs and plaster of Paris for use by plaintiff. Defendants admitted that, when Kuchler first came to work, they gave him carte blanche to use anything about the building when he might need it. There were several ropes and hoistaways lying about the building when plaintiff constructed the contrivance used by him, but the size or character of these ropes, or the condition of the hoistaways, is not shown.

The evidence tended to show that the ropes used by plaintiff were apparently sound and sufficient for the uses to which they were put, but that ropes of that character will, after being in use awhile, turn dark, and, after being exposed or used a long time, rot; that there is no difference in the appearance of a rotten rope of this character and a sound one that has been used; that the only way to ascertain when a rope of this character that has been in use a long time is sound is to test it; that a test is not always safe, because it will frequently weaken, without breaking, the rope, so that it will afterwards break under a less pressure. Plaintiff did not test the ropes before using them. How long these particular ropes had been in use is not shown, but defendants admitted that the ropes in the building had been in use from six months to two years. The jury rendered a verdict for plaintiff, defendants' motion for a new trial was overruled, and from the judgment entered this writ of error was taken.

The declaration contained two counts. The first alleged that plaintiff was a servant of defendants; that defendants were negligent in furnishing a defective hoistaway. The second alleged that plaintiff was a servant of Kuchler; that the latter was employed by defendants to inspect and test the plumbing in the tower; that plaintiff, at Kuchler's request, went to the building to do whatever work in the line of plumbing that might be required by defendants; that he entered the building at the invitation and by the request of defendants, and was required to inspect and test the plumbing; that it was necessary for plaintiff to be elevated from the ground floor by means of a hoistaway, which was furnished and provided by defendants; that the hoistaway, by reason of defendants' carelessness and negligence, had become unsafe and insufficient to support and maintain plaintiff's weight; and that, by reason of the defects in the hoistaway, plaintiff was, without any fault or negligence on his part, injured. Defendants pleaded not guilty, upon which issue was joined.

Defendants then filed additional pleas. The first alleged that it was not true, as alleged in the first count, that plaintiff was an employé of defendants, but that plaintiff was a servant of Kuchler, as alleged in the second count. The second plea denied certain specific allegations of the declaration, and alleged that Kuchler was an independent contractor; that plaintiff was his servant, and went in and upon the building at Kuchler's invitation, and worked there under the control and supervision of Kuchler exclusively; and that defendants exercised no control over plaintiff or the work in which he was engaged. The third plea alleged that the injury was caused by the negligence and improper conduct of plaintiff, and not otherwise. Plaintiff replied to these pleas: "The plaintiff joins issue on the first, second, and third pleas of the defendants."

I. It is insisted that the second and third pleas alleged new matter requiring a special replication; that the "joinder of issue" filed thereto was a nullity; and consequently that there was no issues based on these pleas to try when the case was submitted to the jury. The defendants went to trial upon these supposed issues, without testing the sufficiency of this general replication by demurrer or motion to strike, and without raising any objections to a trial upon the issues thus supposed to have been joined; and unless it is clear that the replication was a nullity, and that a special replication was absolutely required to these pleas, the defendants should not be permitted to avail themselves of a defect of this character, first sought to be made available after verdict. *Soper v. Jones*, 56 Md. 503. Section 1055, Rev. St., provides that "either party may plead in answer to the plea * * * of his adversary, that he joins issue thereon, which joinder of issue may be as follows, or to the like effect: 'The plaintiff joins issue upon the defendant's first plea;' * * * and such form of joinder of issue shall be deemed to be a denial of the substance of the plea, * * * and an issue thereon." It was said by Pollock, C. B., in *Glover v. Dixon*, 9 Exch. 158, that the form prescribed by this section (which was taken from the English common-law procedure act) is in the nature of a general replication *de injuria*, enabling a party, in a compendious manner, to traverse all those allegations in a plea which he could have traversed before the enactment of these provisions, but that all matters which before the act must have been replied specially must still be so replied. It is not perceived that either of the pleas filed by defendant required a special replication. Even if the second and third pleas were not, in substance, repetitions of the plea of not guilty, they were, in substance, denials of specific allegations in the declarations; and the third plea alleged facts which, if true, showed that plaintiff never had a right of action, because the injuries were caused by his own negligence, and not otherwise. To each of these pleas the statutory general replication was proper.

II. At plaintiff's request, the court gave nine separate instructions, several asserting distinct propositions, some of which were correct. The exception to these instructions was general, and, as some of them were correct, the assignment of error based upon this exception must fail.

III. The other assignments of error question the sufficiency of the evidence to sustain the verdict. It is insisted:

(A) That the relation of master and servant was not proven to exist between plaintiff and defendants at the time of the accident; that the former was a servant of Kuchler, an independent contractor, to whom the defendants owed no duty. But we are of opinion that there was evidence sufficient, if believed by the jury, to show that from the time

plaintiff set to work the defendants assumed and exercised control and direction over him, and the work performed by him, directing and controlling him as to the methods and details by which the desired result was to be accomplished. This was sufficient to constitute the relation of master and servant between them. *Mumby v. Bowden*, 25 Fla. 454, 8 South. 453; *Railroad Co. v. Shalley*, 33 Fla. 897, 14 South. 890; *Oil Co. v. Gilson*, 63 Pa. St. 146; *Kimball v. Cushman*, 103 Mass. 194. Even if Kuchler was an independent contractor, and plaintiff was his servant, the defendants had assumed certain duties towards them which would give plaintiff a right of action for negligence in the discharge of those duties. Plaintiff was doing work on defendants' premises in which they were directly interested. They had told Kuchler that he might use anything about the building when he needed it. If plaintiff's evidence is true, one of the defendants was present when Kuchler told him: "Mr. Green says there are a plenty of ropes here, and you can rig up a holstaway." From this it is evident that defendants knew the dangerous purpose for which a holstaway was needed; that they gave permission to select from their appliances such ropes as might be needed; or, in other words, undertook to furnish the ropes to be used for this specific purpose, leaving the selection to be made by plaintiff. Where the employer undertakes to furnish his own employé, or those of an independent contractor, some of the implements or instrumentalities for executing the required work, he thereby assumes a duty to exercise ordinary and reasonable care, measured by the surrounding circumstances, to provide such instrumentalities as will be reasonably safe and suitable. *Coal Co. v. Scheiber*, 167 Ill. 539, 47 N. E. 1052; *Roddy v. Railway Co.*, 104 Mo. 234, 15 S. W. 1112; *Mulchey v. Society*, 125 Mass. 487; *Coughlin v. The Rheola*, 19 Fed. 926; *McKenna v. The Carolina*, 30 Fed. 199.

(B) That the evidence was insufficient to show that the breaking of the rope was due to defendants' negligence. A master does not insure the safety of his employés. He does not warrant the instrumentalities furnished by him to enable his servants to accomplish his work. The extent of the master's obligation is to exercise such ordinary and reasonable care as prudence and the exigencies of the situation require in providing the servant with safe machinery and suitable instrumentalities for his work. If this obligation be performed, the master is absolved from all liability for defects in such machinery and instrumentalities. On the other hand, the servant owes a duty to his master to exercise ordinary care for his own safety. While he has a right to presume that the master has performed his duty, and is not, therefore, ordinarily bound to discover latent defects in the instrumentalities furnished him, yet he must notice all those patent and obvious defects, which the exercise of ordinary care would enable him to discover; for otherwise

his own negligence will contribute to his injury, and thereby prevent recovery. *Railroad Co. v. Weese*, 32 Fla. 212, 13 South. 438.

In this case defendants did not furnish plaintiff with a particular rope, but required him to select a suitable one from a number scattered about the building. In making the selection under these circumstances, plaintiff was required to exercise ordinary and reasonable care, and, if he selected a rope obviously and patently unsound or unsuitable for the desired purpose, he would not be exercising the care required of him, and the fault would be his own, for which the master would not be liable. He was not required to search for latent or hidden defects, nor to test the rope for that purpose, because, if ordinary care required the ropes to be tested, he had a right to presume that his master had done that. The servant seldom has the time or instrumentalities for testing or searching for hidden defects, while the master has, or ought to have, whenever ordinary and reasonable care requires it. If the rope selected by plaintiff was apparently sound and sufficient for the intended purpose, but in fact was defective, and the defendants knew, or by the exercise of ordinary and reasonable care ought to have known, of the defect, they would be liable for injuries resulting therefrom, but not otherwise. The basis of plaintiff's recovery must be defendants' negligence, not simply that an accident has happened without plaintiff's fault. There are cases where the circumstances attending the accident show that it could not have happened if ordinary care had been used (*Barnowsky v. Helson*, 89 Mich. 523, 50 N. W. 989; *Bahr v. Lombard*, 53 N. J. Law, 233, 21 Atl. 190, and 23 Atl. 167); but this case is not one of those. In actions against carriers by passengers in certain cases, proof of the happening of the accident raises a presumption of negligence, and a similar rule prevails by statute in this state in certain cases of negligence against railroad companies (chapter 4071, Acts 1891); but this statute does not apply to employés of other than railroad companies, and the common law does not authorize such a presumption in actions by employés against their masters. In order to authorize a finding that an employer has been negligent, there must be evidence of some fact from which negligence can be legitimately inferred, other than the mere breaking of an instrumentality furnished by the employer. It must be shown that the defect which caused the break was known to the master prior to the accident, or that, in the exercise of ordinary and reasonable care, he ought to have known it; as that the break was occasioned by a defect which a seasonable and proper inspection would have disclosed, and that ordinary and reasonable care required an inspection to be made. *Sack v. Dolese*, 137 Ill. 129, 27 N. E. 62; *Mensch v. Railroad Co.*, 150 Pa. St. 598, 25 Atl. 31; *Kincaid v. Railway Co.*, 22 Or. 85, 29 Pac. 3; *Davis v. Railroad Co.*, 21 S. C. 93;

Peirce v. Kile, 26 C. C. A. 201, 80 Fed. 865. A review of the evidence in this case, in connection with these principles of law, will show that there was no evidence of any negligence on the part of the defendants, beyond the fact that one of the instrumentalities furnished by them broke. The ropes selected by plaintiff were apparently sound and adequate for the desired purposes. They had borne plaintiff safely while he made an examination of the leaking pipe, without exhibiting any signs of weakening, or exciting any apprehensions as to their sufficiency. It was after the second ascent by means of this hoistaway that the rope broke. The small rope broke a few feet above the board upon which plaintiff was sitting, but there is no evidence that the rope was worn, or rotten, or exhibited any latent defect, at the place where it broke or elsewhere. The size, material, and apparent capacity are not shown, other than that the rope was apparently sufficient for the desired purpose. The only evidence as to the appearance of the rope after it broke was that of one of the defendants, who says he examined it, and that it appeared to have been partly burned and partly broken; but whether this burn was an old, or a fresh one, or whether it was caused by the melted lead, and, if so, whether before or after the break, is not shown, nor was it shown that the melted lead did not burn the rope, and cause it to break. In fact, there is nothing whatever in the evidence to suggest that the rope parted because of any latent defect therein, or to suggest that the "hoistaway, on account of the defects thereof caused by defendants' negligence, broke and gave way," as alleged in plaintiff's declaration. There was no evidence to show that defendants had not regularly tested and inspected the rope, or that it broke because of any defect that could have been discovered by an inspection and test. It is true that Mike Howard, one of defendants' servants, testified that "no one made any test of the rope, that I know of, to see whether or not it was sound," but this remark appears to have been intended by the witness to apply to the time that plaintiff selected the rope for use. What position Howard occupied; what, if any, opportunities he had for knowing whether the rope had ever been inspected; whether he had ever been employed by defendants before the day of the accident,—does not appear. His remark that the rope had not been tested, "that I know of," under these circumstances, cannot be construed as affirmative proof that the defendants had not properly tested the rope. It was not shown that defendants did not have in the building a suitable supply of sufficient and safe ropes from which plaintiff was permitted to select, or that the ones selected by plaintiff were the best in the building. Under these circumstances, the verdict of the jury was without evidence to support it, and the court below erred in refusing the motion for a new trial on that ground. *Adasken v. Gil-*

bert, 165 Mass. 443, 43 N. E. 199; *McKay v. Hand*, 168 Mass. 270, 47 N. E. 104; *Rawley v. Colliau*, 90 Mich. 31, 51 N. W. 350; *Hefferen v. Railroad Co.*, 45 Minn. 471, 48 N. W. 1, 526.

The judgment of the court below is reversed, and a new trial granted.

(41 Fla. 143)

GARRISON et al. v. PARSONS.

(Supreme Court of Florida. Jan. 17, 1899.)

APPEAL IN EQUITY—APPEARANCE BY APPELLEE—ENTRY OF APPEAL—EVIDENCE—PRESUMPTIONS—TIME OF TAKING—JURISDICTION.

1. An appeal in chancery taken within a period less than 30 days from the first day of the next succeeding term of the supreme court, returnable to the first day of such term, is entered in direct violation of law, confers no jurisdiction upon the supreme court, and it constitutes no ground for dismissing a subsequent appeal duly taken by the same party from the same decree.

2. Under chapter 4528, Acts 1897, the record of the entry of appeal in the chancery order book, when duly made, gives to the supreme court jurisdiction over the person of the appellee; but an appellee can, if he chooses, waive the formal record of the entry of appeal, and he can submit himself to the jurisdiction of the supreme court by a voluntary appearance, notwithstanding a failure to record the notice of appeal.

3. Where the transcript on appeal fails to show a proper record of the entry of appeal, the omission may be supplied by competent evidence of such record, dehors the transcript.

4. Where the notice of appeal incorporated into the transcript is followed by a certificate of the clerk showing that it was duly filed, and that it was entered by him in the chancery order book, but omits to give the date of such record or entry in the chancery order book, it will be presumed, in the absence of anything to the contrary, that the clerk discharged his statutory duty by recording it "forthwith" upon its being filed.

5. The statutes of this state do not require that an appeal be taken to the next succeeding term of the supreme court, after the entry of the final decree appealed from, but they authorize an appeal to be taken at any time within six months from the date of the decree appealed from; and such appeal is required to be made returnable to the first day of, or, in certain cases, to a day within, the next succeeding term of the supreme court, after the entry of appeal.

6. In order for the supreme court to obtain jurisdiction over the appellees by reason of the record of the entry of appeal, the entry, as recorded in the chancery order book, must be sufficiently full and explicit to advise the parties entitled to notice, as well as the appellate court, that an appeal has been taken by definitely named parties against definitely named persons.

(Syllabus by the Court.)

Appeal from circuit court, Hernando county; William A. Hocker, Judge.

Action by Fred D. Parsons against Isaac N. Garrison and Virginia Barnett. Judgment for plaintiff, and defendants appeal. Dismissed.

Angus Paterson, for appellants. W. S. Jennings, for appellee.

CARTER, J. On April 21, 1898, in a chancery cause then pending in the circuit court of

Hernando county, between appellee, as complainant, and appellants, as defendants, a decree of foreclosure was rendered, from which appellants entered their appeal, returnable June 14, 1898, being the first day of the June term of this court for that year. The entry of appeal was filed May 25, 1898, and recorded by the clerk on the same day.

On September 2, 1898, the appellants attempted to take another appeal from the same decree, and we quote from the transcript of record filed here all entries relating to this second appeal, as follows: "On the 2d day of September, 1898, defendants filed their entry of appeal, in words and figures following: 'And now, on this, the 2d day of September, A. D. 1898, come the defendants in the cause above named, by T. S. Coogler & Son, their solicitors, and apply for and enter their appeal from the judgment and decree rendered in said cause on the 21st day of April, A. D. 1898, to the supreme court of the state of Florida, to be held at Tallahassee, commencing on the second Tuesday in January, A. D. 1899. T. S. Coogler & Son, Solicitors for Appellants.' Filed September 2d, 1898, and entered in Chancery Order Book, page 28. Frank E. Saxon, Clerk. by S. A. Wilson, D. C."

Appellee now moves to dismiss the first appeal because of failure to file transcript, abstracts, and briefs, and, appearing specially, moves to dismiss the second appeal upon grounds hereinafter more particularly noticed.

I. If an appeal is taken within a period less than 30 days from the first day of the next succeeding term of this court, it must be made returnable to a day in such term more than 30, and not more than 50, days from the date of such appeal. If, in such cases, the appeal be made returnable to the first day of the term, it is entered in direct violation of law, and confers no jurisdiction upon this court. *Spencer v. Insurance Co.*, 39 Fla. 677, 23 South. 442; *Fleming v. Fleming*, 40 Fla. —, 23 South. 571. The appeal of May 25, 1898, was made returnable to the first day of the term, though taken within less than 30 days of such first day. It was therefore void, and the appellants evidently so regarded it; for they never attempted to perfect proceedings in this court by filing transcript, abstracts, and briefs, nor has that appeal ever been docketed here. There is consequently nothing pending in this court to be dismissed, and the first motion must be denied.

II. The second appeal is sought to be dismissed upon the ground that this court has not acquired jurisdiction over the person of the appellee, and in support of this position it is contended (1) that the transcript of the record contains no copy of the certificate of the clerk showing the date, and in what book and upon what page, the notice of appeal was entered by him; (2) that the entry of appeal previously quoted from the transcript, even if recorded, was insufficient to give this court jurisdiction of the person, because (a) it is returnable to a term of this court not authorized

by law, and (b) it fails to show the names of the parties to the decree from which it was taken, or the cause in which it was entered.

1. Under the law as it now stands in this state, a proper entry or notice of appeal, duly filed, gives this court jurisdiction of the subject-matter, and the record of such entry or notice, when duly made, gives it jurisdiction of the person of the appellee. Chapter 4528, Laws 1897, which requires the entry or notice of appeal to be filed with, and "forthwith entered by," the clerk "in the chancery order book," as a substitute for the former citation on appeal required to be issued and served upon an appellee, does not prescribe the method by which the jurisdictional fact—the entry in the chancery order book of such notice of appeal—shall be evidenced to this court, in order that the court may know that it has acquired jurisdiction of such appellee. "The record of such entry in the chancery order book," when duly made, of itself gives this court jurisdiction of the person of the appellee, as completely as the proper service of a citation would under the former practice. The service of the citation was formerly evidenced to us by the return of the officer, and this return was not required to be incorporated into the transcript filed in this court; nor do we perceive any ground upon which we can hold that the evidence of the record of the entry of appeal must appear only from and by the transcript of record required to be filed here. There can be no doubt that an appellee may waive the formal record of the entry of appeal, if he chooses; and he can submit himself to the jurisdiction of this court by a voluntary appearance, notwithstanding a failure to record the notice of appeal. This we have uniformly held ever since the statute was passed. We have also been holding that, where the transcript fails to show the record of the entry of appeal, the omission may be supplied by competent evidence dehors the transcript; and, in accordance with this rule, we have, in several cases disposed of without written opinions, permitted parties, on motions to dismiss, to produce copies of the entry of appeal taken from the chancery order book, and so certified by the clerk. While it is necessary that the transcript should show a proper entry or notice of appeal, duly filed, in order to give jurisdiction of the subject-matter, the fact that such entry has been duly recorded, so as to give jurisdiction of the person, may be shown by any competent evidence, in or out of the transcript. We have thought proper to express these views, because there seems to be a misapprehension as to the effect of our decision in *Chamberlin v. Finley*, 40 Fla. —, 23 South. 559; and appellee has referred us to that case in support of his contention that the transcript in this case fails to contain a certificate of the clerk showing the date when, and the book and page where, he recorded the notice of appeal. In the case mentioned, suggestions were made as to the proper manner of evidencing to this court the fact that the

entry of appeal had been properly recorded so as to give jurisdiction of the person of appellee; but that case did not decide, nor was it intended to decide, that a failure to comply with the suggestions there made would entail a dismissal of the appeal, where it otherwise appeared to the court that it had acquired jurisdiction by the proper record of the notice of appeal. These suggestions pointed out a simple, easy, certain, and at the same time convenient, manner of evidencing to us the jurisdictional fact; and, if appellants and clerks of the circuit court would only follow them in making up transcripts, there would not be so many motions to dismiss, based upon the failure of appellants to show clearly that the requirements of the statute have been complied with. The Chamberlin-Finley Case did not lay down an absolute rule of exclusion, but the views here expressed are entirely consistent with what was there involved and intended to be decided. The entry of appeal incorporated into the transcript in this case is followed by a certificate of the clerk showing that it was filed September 2, 1898, and entered in the chancery order book, p. 218. This certificate shows everything suggested for such a certificate in Chamberlin v. Finley, except the date of the record. The law required the clerk to record the entry "forthwith," and we must presume, in the absence of any intimation to the contrary, that he did his duty, and "forthwith" recorded it.

2. (a) As the second appeal was taken September 2, 1898, it was properly made returnable to the first day of the next succeeding term of this court,—the second Tuesday in January, 1899. *Spencer v. Insurance Co.*, 39 Fla. 677, 23 South. 442. Appellants argue that an appeal must be taken to the next succeeding term after the entry of the decree appealed from, but there is nothing in our statutes to warrant such a construction. An appeal may be entered at any time within the statutory limitation of six months, and the return day must be either to the first day of, or, in certain cases, to a day within, the next succeeding term of this court after the entry of appeal, not the next succeeding term after the entry of the decree. The fact that appellants had attempted to appeal from the same decree to a prior term did not affect their right to enter the second appeal, because, as we have shown, the first appeal was a nullity, and ineffectual for any purpose. *Finance Co. v. Perrine*, 40 Fla. —, 24 South. 484; *Glasser v. Hackett*, 37 Fla. 358, 20 South. 532.

2. (b) The entry of appeal which we have quoted from the transcript fails to identify the cause wherein the decree appealed from was entered, and fails to state the names of the parties taking the appeal, or those against whom it is taken. The statute (chapter 4528, Laws 1897) does not prescribe the form of the entry or notice of appeal which it requires to be recorded, but its object being to substitute for the former practice, of giving personal notice by citation or in open court, a species

of constructive notice, by recording upon a public record the notice or entry of appeal, it clearly contemplates that the record of the notice of appeal in the chancery order book shall be sufficiently full and explicit to advise the appellate court, as well as parties entitled to notice, that an appeal has been taken by definitely named parties against definitely named persons. *State v. Canfield*, 40 Fla. —, 23 South. 591. The statute does not impose upon the appellee the burden of informing himself of the taking of an appeal by his opponent in any manner other than as he may be advised by the proper recorded entry in the chancery order book. This book is not one kept exclusively for a particular case, but it is a record of the court, in which is required to "be entered all orders taken in chancery except those required to be signed by the judge exclusively" (section 1390, Rev. St.); and, if the entry recorded in that book be insufficient to give the definite notice contemplated by the statute, this court will acquire no jurisdiction of the person of an appellee from the record of such defective entry. Parties reading the entry as recorded upon the chancery order book, which we have quoted from the transcript of the record in this case, would ascertain that an appeal had been attempted to be taken by attorneys for unnamed parties from a decree rendered on a certain day in some cause not named; but it would be impossible to know from that entry by and against whom, and in what cause, the appeal was entered. The form of notice of appeal in general use in this state for years prior to the enactment of chapter 4528 is substantially the same as that followed by appellants in this case, except that the old form gave the title of the cause, and the names of the parties plaintiff and defendant, as the case stood in the trial court at the date of such appeal; but the form before us omits these essential matters, for the words "come the defendants in the cause above named" are not preceded by the style of any cause, or the names of any parties plaintiff or defendant. The notice required to be recorded by the statute must be reasonably sufficient to effect the object of the statute, i. e. to give notice of the appeal. The entry of appeal in this case, though recorded, was so defective in the particulars pointed out as to amount to no notice to appellee, and, as this court has not acquired jurisdiction over him, the appeal entered September 2, 1898, is dismissed.

(41 Fla. 1)

FLORIDA CENT. & P. R. CO. v.
FOXWORTH.¹

(Supreme Court of Florida. Feb. 10, 1899.)

RAILROADS—CROSSINGS—NEGLIGENCE—DEATH—
DAMAGES—PLEADING—INSTRUCTIONS—APPEAL
—REVIEW—STATUTES—REPEAL.

1. It is permissible in pleading to refer to, and thereby make a part of one count, the

¹ Rehearing denied March 7, 1899.

whole or a part of the allegations of another count in the same declaration. To be effective, however, the reference must be definite and certain.

2. A party appellant is confined to the specific grounds of objection made by him to questions propounded to witnesses in the trial court.

3. The provisions of section 1, c. 3744, Acts 1887, and section 2, c. 4071, Acts 1891, are applicable in a suit instituted by a widow to recover damages for the death of her husband by the wrongful act of a railroad company under the provisions of chapter 3439, Acts 1883.

4. The provisions of section 1, c. 3744, having been repealed, but substantially re-enacted by chapter 4071, Acts 1891, under a well-settled rule of construction, were not by such repeal destroyed, or interrupted in their operation, but continued in full force.

5. The use of the term "gross negligence," in a charge to the jury, where other instructions recognize contributory negligence as a ground for apportioning damages, and the jury are instructed not to give exemplary damages, does not of itself define, nor does it include, that extreme degree of negligence which is wanton, or reckless of injurious consequences.

6. An instruction merely asserting an abstract legal proposition, without attempting to apply it to the facts of the particular case on trial, is not amenable to the objection that it assumes as proven any matter of fact in dispute.

7. An instruction to the effect that it is negligence "to back a train, without a brakeman at the rear end as a lookout, across the main thoroughfare of a village, when there is no flagman at the crossing, even at a rate but little faster than a person walks," asserts a correct legal proposition.

8. An instruction that "a railroad company operating its trains on the thoroughfare of a village must use greater care than in less frequented localities, and any neglect of any precautions proper in the peculiar circumstances of the locality constitutes negligence," asserts a correct legal proposition.

9. The duties of a railroad company with respect to care in operating its trains are dictated and measured by the exigencies of the occasion, or in the light of the conditions of things at the place where, and the time when, an accident happens; and the building up of a town along its line of road, causing the operation of its trains at that place to be attended with greater danger to others than formerly, imposes a duty upon the railroad company to exercise such additional care as the circumstances reasonably demand.

10. An instruction assuming as proven fact matters which upon the trial are in dispute is erroneous.

11. Under the provisions of section 1, c. 3744, Acts 1887, contributory negligence operates only in reduction or diminution of damages, and the injured person, or (in case of his death) his widow, suing under chapter 3439, Acts 1883, is entitled to recover if the defendant's negligence was one of the proximate causes contributing to the injury, notwithstanding the negligence of the injured person was greater than that of defendant; but the damages must be diminished by the jury in proportion to the default attributable to such injured person.

12. Where a railroad track is laid along a street in a town or village, one is not a trespasser upon said railroad track who crosses the street in which it is laid at a place other than at a public crossing, or the intersection of other streets.

13. If an injury occurs so near a public crossing that the means required to be adopted by those operating a train to enable a traveler to cross in safety at the crossing, if carried out, would have enabled the person injured to cross in safety at the place of the accident, the lia-

bility of the railroad company will be measured by the legal principles applicable to public crossings.

14. In operating its trains in the streets of towns and villages, and in the immediate vicinity of public crossings, a railroad company is bound to keep a lookout when making flying switches, or backing cars by the "kicking back" process; and when it is apparent, or when, in the exercise of reasonable diligence commensurate with the surroundings, it should be apparent to the company that a person on its track, or about to get on its track, under such circumstances, is unaware of his danger, or cannot get out of the way, it becomes the duty of the company to use such precautions by warnings, application of brakes, or otherwise, as may be reasonably necessary to avoid the injury; for, in such cases, though the person injured may have been negligent, the company will, if negligent, under chapter 3744, Acts 1887, still be liable, though the damages must be diminished in proportion to the default attributable to such injured person.

15. Though a person about to cross a railroad track at or near a public crossing or in a street may be guilty of contributory negligence in failing to look and listen, yet if the company, by omitting any act required of it under the circumstances, such as ringing a bell, blowing a signal, or stationing lookouts, directly contributed to the injury to such person by the trains of such company, the company will be liable in damages, to be diminished by the jury in proportion to the contributory negligence of the injured person; but, if the negligence of the company did not directly or proximately contribute to the injury, it will not be liable.

16. In railway operation, the dangerous practice of "kicking cars" or making flying switches in populous localities and near public crossings imposes upon the company a duty to station a lookout upon the rear of the cars, the equivalent of which is not accomplished by ringing the engine bell.

17. It is the duty of railroad companies in operating their trains to give notice of the approach of such trains at all points of known or reasonably apprehended danger, notwithstanding the statute (section 33, p. 237, McClell. Dig.) only requires them to ring the engine bell before crossing the streets of an incorporated town.

18. Where the widow sues for damages for the death of her husband by the wrongful act of another, in estimating her pecuniary loss the jury may properly take into consideration her loss of the comfort, protection, and society of the husband in the light of all the evidence in the case relating to the character, habits, and conduct of the husband as husband, and to the marital relations between the parties at the time of and prior to his death; and they may also consider his services in assisting her in the care of the family, if any; but the widow is not entitled to recover for her mental anxiety or distress over the death of her husband, nor for his mental or physical suffering from the injury. She is also entitled to recover reasonable compensation for the loss of support which her husband was legally bound to give her, based upon his probable future earnings and other acquisitions, and the station or condition in society which he would probably have occupied, according to his past history in that respect, and his reasonable expectations in the future; his earnings and acquisitions to be estimated upon the basis of deceased's age, health, business capacity, habits, experience, energy, and his present and future prospects for business success at the time of his death,—all these elements to be based upon the probable joint lives of the widow and husband. She is also entitled to compensation for loss of whatever she might reasonably have expected to receive in the way of dower or legacies from her husband's estate, in case her

life expectancy be greater than his. The sum total of all these elements to be reduced to a money value, and its present worth to be given as damages. Within these limits the jury exercise a reasonable discretion as to the amount to be awarded, based upon the facts in evidence, and the knowledge and experience possessed by them in relation to matters of common knowledge and information.

(Syllabus by the Court.)

Appeal from circuit court, Duval county; William B. Young, Judge.

Action by Sarah A. Foxworth against the Florida Central & Peninsular Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

On April 23, 1891, the appellee brought suit against appellant in the circuit court of Duval county, the declaration, filed on May 1st, alleging, in substance, in the first count, that plaintiff was the widow of one Daniel A. Foxworth, deceased; that defendant, a Florida railroad corporation, before, after, and during each day of the month of December, 1890, was operating and managing a certain railroad extending between certain named points in this state, and through the town of Callahan, in Nassau county, with its chief offices in Jacksonville; that said Daniel A. Foxworth, husband of plaintiff, on the — day of December, 1890, in the light of day, in the usual course of foot travel, and in the exercise of due caution, proceeded to cross the track of defendant's railroad at a place on its track in the town of Callahan where the people in said town were accustomed and had the right to cross the track in going from the street on one side to the street on the other side of said town, as divided by the railroad; and while the deceased was then and there in the usual course, with due degree of caution, crossing said track at a point where he was entitled to cross, the defendant wrongfully, carelessly, and negligently propelled backward its cars towards and upon said Foxworth, and then and there, by means of its cars, so managed and operated by defendant, did wrongfully, negligently, and carelessly throw down, run over, and kill said Foxworth, to plaintiff's damage of \$50,000.

The second, third, fourth, and fifth counts read as follows: "And for a second count the plaintiff avers each and every the allegations of the first count, and further alleges that the said defendant did not then and there give the usual or proper signal or signals, and did not then and there give the usual or proper warning or warnings; and the plaintiff claims \$50,000. And for a third count the plaintiff avers each and every the allegations of the first count, and further alleges that the said cars so then and there propelled backward by the defendant, as aforesaid, were stationary next before the said Daniel A. Foxworth proceeded to cross said track, and were then and there suddenly and rapidly propelled backward upon the said Daniel A. Foxworth, and did then and there kill, as

aforesaid, the said Daniel A. Foxworth; and plaintiff claims \$50,000. And for a fourth count the plaintiff avers each and every allegation of the first count, and further alleges that the said deeds of commission and omission, each and every, on the part of said defendant, above complained of, were reckless and wanton; and plaintiff claims \$50,000. And for a fifth count the plaintiff avers each and every the allegations of the first, second, and third counts, as set forth above; and plaintiff claims \$50,000."

Defendant demurred to the second, third, fourth, and fifth counts, insisting that these counts were incomplete in themselves, and that it is not permissible to incorporate into subsequent counts the allegations of previous ones by reference merely. The demurrer was overruled, and this ruling is the basis for the first assignment of error.

At the fall term, 1891, of the court, defendant having pleaded not guilty, a trial was had, resulting in verdict for plaintiff in the sum of \$25,000. Defendant's motion for a new trial was denied upon plaintiff's entering a remittitur for \$20,000, and from the judgment entered for plaintiff this appeal was taken at the same term in open court.

The evidence showed that Callahan was a small village of 60 to 150 inhabitants; that the defendant's line of railroad at that point was built about the year 1858; that most of the houses in the village were built after this time; that the accident occurred at a point in the village where the railroad track runs upon a level grade through the business portion of the same (stores or business houses being located upon each side of the track), and within 10 to 50 feet south of where a public road crosses the railroad track; that the deceased, who was between 50 and 80 years of age, attempted to walk diagonally across the railroad track at this point, going from the post office to his home, with an open umbrella to protect him from rain, held in such a position as to shut off his view of a train approaching from the north, and was struck by a car propelled by the "kicking back" process from the north almost immediately after entering upon the track, and before he could cross it, he being at the time apparently unaware of the approach of a train. There was much conflict in the evidence upon almost every point, particularly whether the engine bell rang when the car first started, or at the time of or before the accident, whether there was a brakeman or lookout on the rear end of the car, whether the cars were run any distance before being detached from the engine, or whether the engine was not run back upon the car with great violence, and thereby the car set in motion just immediately before the collision with the deceased. The train carrying passengers and express had just arrived, and, according to one witness, was making "a kind of flying drill to butt the coaches down below the warehouse," after stopping at the

depot above, so that the engine could put off the box cars on the side track. There was evidence tending to show that, even after the car struck the deceased, his life might have been saved by a person on the rear end of the car. We shall not undertake to state all the evidence, but the foregoing will suffice to show the bearing of the charges given or refused.

Defendant's witness M. Dean testified that he was the conductor on defendant's train at the time of the accident; that it was customary at all stations to ring the engine bell when moving a train backward or forward; that the engine bell on this special occasion was ringing when the train started back, and at the time of the accident. On cross-examination the plaintiff's counsel asked him: "Q. How do you recall the specific ringing of that particular bell on that morning any more than you recall the ringing at the next station? A. I could not hear it at the next station. Q. But, if you were present at the next station, is there any fact that enables you to recall this ringing to your memory any more distinctly than you could recall the ringing the next morning, or at the next stopping place?" This question was objected to upon the ground that it was argumentative. The court overruled the objection, and the exception taken constitutes the basis of the second assignment of error.

The court charged the jury upon the question of negligence, at plaintiff's request: "(1) It is gross negligence to back a train, without a brakeman at the rear end as a lookout, across the main thoroughfare of a village, when there is no flagman at the crossing, even at a rate but little faster than a person walks." "(3) A railroad company operating its trains on the thoroughfare of a village must use greater care than in less frequented localities, and any neglect of any precautions proper in the peculiar circumstances of the locality constitutes negligence. (4) If pushing a train increased the risk of plaintiff's husband, it was negligence on the part of the defendant not to give timely notice of what it was doing. (5) The jury are instructed that, while it was the duty of the plaintiff's husband, in crossing the railroad track of the defendant, to look and listen for approaching trains with such care as an ordinarily prudent man would have used, yet that failure on his part to do so—if the jury find there was a failure on his part to do so—was not such contributory negligence as would bar plaintiff's right of recovery, if they further find that the defendant, after seeing the plaintiff's husband, or after it should, in the exercise of due care, have seen the plaintiff's husband on its track, or so near thereto as not to have space to pass clear, failed to exercise all proper means to avoid the accident." "(8) Although one injured by a collision may have failed to exercise ordinary care and prudence, and thereby contributed remotely to the injury complained of, yet, if the accident was directly caused by negligence of the company,

the latter will be liable." "(11) If the jury find from the evidence that the husband of plaintiff received injuries resulting in his death, upon the track of the defendant company, which the deceased was crossing, lying upon a thoroughfare of the village of Callahan, while the defendant company was engaged in transferring a car from the main to the side track by putting the train in motion running towards the switch, and before it was reached, and when sufficient momentum to answer the purpose had been acquired, the engine was detached, and the car, by the momentum thus acquired, was to be carried beyond the side track upon the main line; and they further find that the car thus intended to be thrown beyond the side track had a momentum which carried it along said thoroughfare at the rate of five miles per hour,—the company was guilty of a degree of negligence from which the company is not excused by the fact—if the jury find it to be a fact—that the engineer in charge of the switching rang the bell in response to a signal given him by the conductor of the train to put the train in motion, if they further find the defendant company, after seeing the plaintiff's husband, or after it should, in the exercise of due care, have seen the plaintiff's husband, on its track, or so near thereto as not to have space to pass clear, failed to exercise all proper means to avoid the accident." And upon its own motion as follows: "If you find from the evidence that the defendant's servants exercised all ordinary and reasonable care in backing their train at the time the husband of plaintiff was injured, and that the injury was due solely to the neglect of plaintiff's husband, then you will find the defendant not guilty; but if you find that the servants of defendant were guilty of any negligence, and did not back its train with all ordinary and reasonable care and caution, and the injury was occasioned by the negligence of both the defendant and the husband of plaintiff, then the plaintiff may recover, but the damages must be diminished by the jury in proportion to the amount of negligence of which the husband of the plaintiff was guilty." And refused the following instructions requested by the defendant: "(5) If you find from the evidence that the bell was not rung, and no whistle blown, and no one was on the rear end of train, yet, if deceased was approaching and attempting to cross defendant's track, he was not absolved from the duty of looking up and down the track to see whether a train was approaching; and if failure to take that precaution was the proximate cause of the injury to the deceased, Foxworth, then plaintiff cannot recover damages in this cause." "(10) The laws of Florida only require bells to be rung on the engine of a train before crossing the streets of incorporated cities, and if you find from the evidence that the town of Callahan was not an incorporated city, and that the track of defendant's railroad at Callahan is not upon a street of an incorporated city, then no duty was upon defendant's em-

ployés to ring said bell before said engine began to move." "(13) That chapter 4071, Laws of Florida, entitled 'An act defining the liabilities of railroad companies in certain cases,' does not apply to this case, same having been passed by the legislature after the facts occurred alleged in the declaration on which plaintiff bases her right of action." "(17) If the jury find that contributory negligence of deceased was gross, he cannot recover; but that, if his contributory negligence has been slight, as compared with the negligence on the part of the defendant, defendant would be liable."

Upon the question of damages the court gave the following instructions in behalf of plaintiff: "(6) The law imposes upon the husband the duty of supporting the wife, and gives to the wife a legal claim, in addition to such support, to the society, comfort, and protection of her husband; and the deprivation of these are proper elements to be considered by the jury in assessing damages. (7) If the jury find for the plaintiff, it is their duty to give such damages as the widow may have sustained by reason of the death of her husband, and as the jury may deem fair and just with reference to the injury resulting to her from such death." "(9) What the life of a husband may be worth is a question incapable in its nature of exact determination. How this value is to be measured, and what shall be the amount of the damages resulting to the widow plaintiff, must be left largely to the discretion of the jury. (10) In suits to recover damages for wrongfully causing death of another, under the statutes, the injury sustained may be estimated from the facts proven, in connection with the knowledge and experience possessed by all persons in relation to matters of common observation."

And of its own motion instructed the jury as follows: "The measure of plaintiff's damages in a cause like this is such sum as would be equal to the probable earnings of the deceased, taking into consideration his age, health, business capacity, habits, and experience, and value of his services in the care of his family; and you may also take into consideration the loss of comfort, society, and protection of deceased, but you cannot take into consideration either the pain and suffering of deceased, or the grief and wounded feelings of his surviving relatives, in estimating any damages you may allow." And refused the following instruction requested by defendant: "(14) The plaintiff is only entitled to recover as damages such sum as would be equal to the probable earnings of the deceased taking into consideration his age, health, business capacity, habits, and experience, and value of his services in the care of his family. You are not to take into consideration either the pain or suffering of the deceased, or the grief and wounded feelings of his surviving relatives, in estimating any damages you may allow, but only the pecuniary loss to plaintiff, estimated by deceased's probable future earnings and his

ability to care for plaintiff." The giving and refusal of these instructions constitute the basis of the remaining assignments of error.

John A. Henderson and John C. Cooper, for appellant. A. W. Cockrell & Son, for appellee.

CARTER, J. (after stating the facts.) I. While we do not commend the practice, we think it is permissible in common-law pleading to refer to, and thereby make a part of one count, the whole or a part of the allegations of another count in the same declaration. To be effective, however, the reference should be definite and certain. 1 Chit. Pl. (16th Ed.) p. 429; Dent's Adm'r v. Scott, 3 Har. & J. 28; Freeland v. McCullough, 1 Denio, 414; Crookshank v. Gray, 20 Johns. 844. This rule being fully complied with in this case, the first assignment of error falls.

II. The question propounded to the witness Dean was objected to in the trial court upon one ground only,—that it was in form argumentative. In this court it is argued that the question was objectionable because it sought to obtain a mere opinion from the witness. We cannot consider this objection, because we are confined to those insisted upon in the trial court. Tuten v. Gazan, 18 Fla. 751; Jacksonville, T. & K. W. Ry. Co. v. Peninsular Land, Transp. & Mfg. Co., 27 Fla. 1, 9 South. 661. It is not suggested by appellant in what respect the question is argumentative, nor do we perceive that it is; consequently, the second assignment of error is not well taken.

III. In considering other assignments of error it will be necessary for us to determine whether, in this case, contributory negligence on the part of the deceased will operate as a bar to plaintiff's recovery, or merely in diminution or reduction of damages. In Railroad Co. v. Ylvestra, 21 Fla. 700, it was held that, by the common law, a plaintiff could not recover damages for personal injuries caused by the joint negligence of himself and the defendant; that in such cases plaintiff could not recover upon proof that the injuries were essentially caused by the negligence of a defendant, but only by showing that his own negligence did not contribute in any degree to produce the injury received by him. The same principle was stated and applied in Railway Co. v. Hirst, 30 Fla. 1, 11 South. 506. In the former case the chief justice suggested that this rule was inequitable and unjust, and that legislation was needed apportioning the damages where the negligence of the plaintiff and the defendant both contributed to the injury. At the next session of the legislature this suggestion was acted upon, and chapter 3744, approved June 7, 1887, entitled "An act to apportion the damages in actions against railway companies by persons and employés, and to provide for such recovery of damages against said railway company by its employés," was enacted, whereby, in section 1, it was provided: "That no person shall recover damages from a railroad company for injury to

himself or his property when the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury trying the case in proportion to the amount of default attributable to him." Chapter 4071, entitled "An act defining the liabilities of railroad companies in certain cases," approved May 4, 1891, provides, by section 2, that "no person shall recover damages from a railroad company for injury to himself or his property where the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to him"; and by section 4 "that chapter 3744, Laws of Florida, approved June 7, 1887, be and the same is hereby repealed." This suit was instituted April 23, 1891, by a widow, to recover damages for the alleged negligent homicide of her husband in December, 1890, and the trial was had in November, 1891. Chapter 3439, approved February 28, 1883, authorizing suits of this character to be brought, is entitled "An act fixing the liability of persons and corporations for damages resulting from the death of any one, caused by the wrongful act, negligence, carelessness or default of such persons or corporations, or the agents thereof"; and provides, in section 1, that: "Whenever the death of any person in this state shall be caused by the wrongful act, negligence, carelessness or default of any individual or individuals, or by the wrongful act, negligence, carelessness or default of any corporation, or by the wrongful act, negligence, carelessness or default of any agent of any corporation when acting in his capacity of agent of such corporation, and the act, negligence, carelessness or default is such as would, if death had not ensued, have entitled the party injured thereby to maintain an action for damages in respect thereof, then, and in every such case, the person or persons who, or corporation which, would have been liable in damages if death had not ensued, shall be liable to an action for damages, notwithstanding the death shall have been caused under such circumstances as make it in law, amount to a felony;" and in section 2: "Every such action shall be brought by and in the name of the widow or husband, as the case may be, and where there is neither a widow or husband surviving the deceased, then the minor child or children may maintain an action; and where there is neither a widow or husband, or minor child or children, then the action may be maintained by any person or persons dependent on such person killed for a support, and where there is neither of the above class of persons to sue, then the action may be maintained by the executor or administrator, as the case may be, of the person so killed; and in every such action the jury shall give such damages as the

party or parties entitled to sue may have sustained by reason of the death of the party killed: provided, that any action instituted under this act by or in behalf of a person or persons under twenty-one years of age, shall be brought by or in the name of a next friend."

It is here contended: First. That neither the provisions of section 1, c. 3744, nor of section 2, c. 4071, apply to this case, because they, by express terms, are applicable only to cases where the injured party is himself the plaintiff, and have no reference to cases where death has ensued, and other parties are maintaining the action. It is admitted, however, that if death had not ensued, and the action was being maintained by plaintiff's husband, his contributory negligence, unless it was the sole proximate cause of his injury, would not bar his right of action since the enactment of these statutes, but would require the reduction or diminution of the damages to be recovered by him. As these statutes declare and limit the right of the deceased, had he lived, to recover damages for the injuries received by him, it is clear that they apply to actions brought by the widow under the provisions of chapter 3439, because she is thereby authorized to maintain an action only where the wrongful "act, negligence, carelessness or default is such, as would, if death had not ensued, have entitled the party injured thereby to maintain an action for damages in respect thereof." *Duval v. Hunt*, 34 Fla. 85, 15 South. 876. Second. That chapter 3744 was expressly repealed by chapter 4071, which became effective after the injury to plaintiff's husband, but before the trial in the circuit court. It is admitted by counsel for appellant that the language of section 1, c. 3744, is identical with that of section 2, c. 4071. This is not literally true, as will be observed by a comparison of the two sections; but we think that chapter 4071, which expressly repeals chapter 3744, re-enacts substantially the provisions of section 1 of the latter act, and under a well-settled rule of construction the provisions of that section are not thereby destroyed or interrupted in their operation, but continue in full force. *Forbes v. Board*, 27 Fla. 189, 9 South. 446.

IV. It is urged that the first instruction given at plaintiff's request was erroneous, because: First. The use of the term "gross negligence" meant that the conduct of defendant in doing the acts constituting the "gross negligence" defined were wanton and reckless, and that the injury was occasioned by the sole negligence or fault of the defendant, and was, therefore, inapplicable to any evidence in the case. In other charges given by the court to the jury they were instructed not to give plaintiff exemplary damages, and that they must apportion the damages, in case they found contributory negligence on the part of plaintiff's intestate; from which it was clearly made to appear to the jury that

the term was not used in the sense claimed by appellant. In *Railway Co. v. Hirst*, 30 Fla. 1, 11 South. 506, we held that the use of the expression "gross negligence," in a charge to a jury, does not of itself define, nor does it include, only that extreme degree of negligence which is wanton, or reckless of its injurious consequences, and to which the defense of contributory negligence does not obtain, and cannot be held as having been intended to submit the case to a jury for consideration as one of that character; and particularly so where other charges have recognized contributory negligence as a defense to the action. Second. It is also insisted that the charge assumes certain facts as proven which were disputed in evidence, viz. that there was no brakeman on the rear of the train, no flagman at the crossing, and that the train was backing across the main thoroughfare of a village. We do not think the charge is subject to that construction. It merely asserts an abstract legal proposition, without attempting to apply it to the facts of the particular case on trial, leaving it to the jury to make the application to the facts as found by them. There was evidence tending to show that there was no brakeman on the rear of the train, nor flagman at the crossing, and that the train was backing across the main thoroughfare of a village, but no intimation from the court that this evidence was true, or that these facts were proven. Third. It is admitted that the proposition of law asserted in the charge is correct, but criticised as being inapplicable to the evidence in the case on trial. Giving to the word "gross" the meaning before stated, we think the charge was substantially correct as a legal proposition. The principle, in almost identical language, was held in *Cooper v. Railway Co.*, 66 Mich. 261, 33 N. W. 306, to be correct; it finds some support in *Railroad Co. v. Williams*, 37 Fla. 406 (text, p. 425) 20 South. 558, 564, and the principle is sustained by many authorities. 2 Wood, R. R. § 323; 3 Lawson Rights, Rem. & Prac. § 1187; 2 Shear. & R. Neg. § 471; Patt. Ry. Acc. Law, § 171; *Railway Co. v. Smith*, 93 Ky. 449, 20 S. W. 392, 18 Lawy. Rep. Ann. 63, and note; Beach, Contrib. Neg. § 194. And we think the charge was applicable to the evidence in the case. There was testimony that the deceased was struck by a backing train while attempting to cross defendant's track laid in and along the only prominent street in the village of Callahan, within a few feet of, and practically at, a public crossing; that the train was running at a speed of at least five miles an hour; that the engine bell was not rung, no flagman stationed at the crossing, nor lookout upon the rear of the train; and that the backing cars were cut loose from the engine before the collision.

V. The third instruction for plaintiff also contained a correct abstract proposition, and the court did not err in giving it. It has been approved in *Railroad Co. v. Burge*, 84

Va. 63, 4 S. E. 21, and the same principle is substantially stated in *Railroad Co. v. Williams*, 37 Fla. 406, 20 South. 558, in the following language: "Where steam railroads are laid and operated along or across the streets of populous towns or communities where numerous people of all conditions and descriptions are aggregated, or likely to be, it is their duty to operate the dangerous implements used by them with the utmost degree of care strictly commensurate with the circumstances by which they are there surrounded, in order to avoid injury to others." We do not appreciate the force of appellant's contention that it is exempt from the principles of law embraced in these instructions because its road was in operation before the village came into existence. Its duty in respect to operating its trains is necessarily dictated and measured by the exigencies of the occasion, or in the light of the condition of things at the place where, and time when, the accident happened. *Bucki v. Cone*, 25 Fla. 1, 6 South. 160; *Railroad Co. v. Williams*, 37 Fla. 406, 20 South. 558. The building up of a town along and on its line, causing the operation of its road to be attended with greater danger to others, imposed a duty upon appellant to exercise such additional care as the circumstances reasonably demanded.

VI. The court erred in giving the fourth instruction for plaintiff. The court has no right to invade the province of the jury, by assuming as proven facts, matters which are in dispute upon the trial. This instruction informed them that, "If pushing a train increased the risk of plaintiff's husband, it was negligence on the part of the defendant not to give timely notice of what it was doing"; thereby assuming that defendant did not give timely notice, and confining the jury to an investigation of one question only,—whether pushing the train increased the risk of the deceased. The defendant contended that it did give timely notice by ringing the engine bell, and many witnesses testified that the bell did ring. Plaintiff's testimony was to the effect that the bell did not ring, and the court should not have assumed by this charge that timely notice was not given. *Railroad Co. v. Ynlestra*, 21 Fla. 700; *Ashmead v. Wilson*, 22 Fla. 255; *Doyle v. State*, 39 Fla. 155, 22 South. 272.

VII. Several objections presented, and most earnestly insisted upon, by appellant, to the fifth instruction given at plaintiff's request, are fully and completely answered by the statement that the provisions of section 1, c. 3744, Acts 1887, apply to this case; and that under these provisions contributory negligence is not a complete defense in bar, but operates only in reduction or diminution of damages. The plaintiff, under these provisions, is entitled to recover if defendant's negligence was one of the proximate contributing causes to the injury of the deceased, notwithstanding the deceased's negligence was greater than that of the defendant. This statute does not introduce into this

state the Illinois doctrine of comparative negligence, nor that prevailing in Tennessee, nor does it introduce in its entirety that prevailing in the state of Georgia; consequently, the decisions cited from those states are inapplicable to this case, upon a proper construction of our statutes. It is true that our statute is taken almost literally from similar provisions in the Georgia Code (Duval v. Hunt, 84 Fla. 85, 15 South. 876; Railroad Co. v. Williams, 37 Fla. 406, 20 South. 558); but these provisions of the Georgia Code are construed in connection with, and are limited by, another provision of the same Code, which was omitted from our statute, viz.: "If the plaintiff by ordinary care could have avoided the injury to himself caused by the defendant's negligence, he cannot recover at all." Railroad Co. v. Johnson, 38 Ga. 409; Railroad Co. v. Stewart, 71 Ga. 427. The plain construction of our statute, in the absence of a provision similar to the one quoted, is that plaintiff is not debarred from recovering unless the injury was caused entirely by his own negligence, or by his consent; but that in all cases where the negligence of the plaintiff and defendant produces the injury the plaintiff's damages are to be diminished by the jury in proportion to the default attributable to him. This being the proper construction of the statute, it follows that the court committed no error in giving the first paragraph of its own charge, or in refusing the thirteenth and seventeenth instructions requested by defendant.

(2) The eighth instruction given on behalf of plaintiff was erroneous in using the word "remotely." The failure to exercise ordinary care and prudence might, in some instances, contribute remotely to an injury; while in others it might not only contribute directly, but very greatly, to the injury. The degree of negligence attributable to the plaintiff is a question to be considered by the jury in assessing damages; and where the facts are disputed, as in this case, the court should not assume, in its instructions, that the negligence of the deceased, if any, contributed only remotely to the injury. In other respects the instruction is correct, and the word "remotely" should be eliminated upon another trial.

(3) The appellant contends that the fifth instruction given at plaintiff's request is erroneous, because it held defendant liable for failure to use proper means to avoid the accident after it saw, or, in the exercise of due care, should have seen, the peril surrounding the deceased on defendant's railroad track. It is admitted that the charge correctly stated the law applicable in this respect to public crossings over defendant's track, but it is insisted that the injury occurred below the crossing, that deceased was a trespasser, that defendant was under no obligation to keep a lookout for trespassers, and can only be held liable for a failure to exercise care in avoiding injuries to trespassers when and after it actually sees the trespasser on its track. According to the testimony, the collision occurred within 50 feet

of the public crossing,—by some of the witnesses it occurred within 10 feet thereof; and all the evidence tended to show that the deceased was injured while endeavoring to cross the track where it was laid in the most prominent street in the village. A person is not a trespasser who crosses a street at a place other than a public crossing, or the intersection of other streets. Railroad Co. v. Gibson, 97 Ga. 489, 25 S. E. 484. And if the injury occurred so near a public crossing that the means required to be adopted by those operating the train to enable a traveler to cross in safety at the public crossing, if carried out, would have enabled the person injured to cross in safety at the place of the accident, we think the liability of the defendant will be measured by the legal principles applicable to public crossings. Railroad Co. v. Owings, 65 Md. 502, 5 Atl. 329. Whatever may be the rule as to the duty of a railroad company to keep a lookout for trespassers upon its track in general, we hold that in the streets of towns and villages, and in the immediate vicinity of public crossings, the company is bound to keep a lookout when making flying switches, or backing cars by the "kicking back" process; and that when it is apparent, or when, in the exercise of reasonable diligence commensurate with the surroundings, it should be apparent, to the company that a person on its track, or about to get on its track, under such circumstances, is unaware of his danger, or cannot get out of the way, it becomes the duty of the company to use such precautions by warnings, applying brakes, or otherwise, as may be reasonably necessary to avoid the injury; for, as said by this court in Railroad Co. v. Williams, 37 Fla. 406, 20 South. 558, "though the plaintiff may have been guilty of contributory negligence in stepping upon the track immediately in front of a moving engine, yet the defendant," under the act of 1887, "is still liable for the injury if it could have prevented it by the exercise of reasonable and proper care after the discovery of the plaintiff's negligent act, or if it could have discovered it, by the exercise of such care, in time to avoid the injury." Railroad Co. v. Burge, 84 Va. 63, 4 S. E. 21; Patton v. Railway Co., 89 Tenn. 370, 15 S. W. 919.

(4) From what has been said it is apparent that the court did not err in refusing the fifth instruction requested by the defendant. True, it was the duty of the deceased to look and listen before crossing defendant's track, and, if he failed to do so, it was negligence on his part contributing to his injury; yet if the defendant, by failure to ring a bell, blow a signal, or station a lookout, directly contributed to the injury, it would be liable to damages, diminished in proportion to deceased's contributory negligence. If, however, the failure of defendant to ring the bell, blow the signal, or station a lookout, though negligent omissions on its part, did not directly or proximately contribute to deceased's injury, the defendant would not be liable.

VIII. There was no error in giving the eleventh instruction requested by plaintiff. In the preceding paragraph we have considered all objections suggested by appellant, except the one which claims that defendant's duty under the circumstances of this case would have been completely performed by ringing the bell in the manner indicated by this instruction. The courts have frequently condemned the dangerous practice of "kicking cars," or making flying switches, in populous localities, and near crossings, and have almost uniformly held that the increased hazard of these practices over the ordinary manner of railway operation imposes upon the company a duty to station a lookout upon the rear of the cars, the equivalent of which is not accomplished by ringing the engine bell. 2 Wood, R. R. § 323, p. 1517; 3 Lawson Rights, Rem. & Prac. § 1187; 2 Shear. & R. Neg. § 471; Beach, Contrib. Neg. § 194. This precaution is much more effective than the simple ringing of a bell, and if persons are injured on or near crossings, or other places much frequented by persons, where, by the exercise of this precaution, the injury could have been avoided, the company will be liable. If it be true, as contended by plaintiff, that the deceased, when injured, was crossing defendant's track, oblivious of the approach of a train, holding an open umbrella in such a manner as to obstruct his view of an approaching train, and a lookout stationed upon the rear of the car, in the exercise of reasonable diligence, could and would have discovered the plaintiff's perilous situation in time to avert the collision by warnings, application of brakes, or otherwise, then the failure to put a lookout on the rear of such train was negligence on defendant's part, contributing directly to the injury, and the plaintiff would be entitled to recover; the jury diminishing the damages in proportion to the default attributable to the deceased. *Railroad Co. v. Williams*, 37 Fla. 406, 20 South. 558.

IX. The tenth instruction requested by defendant was properly refused. It is argued that the statute then in force (section 33, p. 287, *McClell. Dig.*) only required defendant to ring its engine bell before crossing the streets of an incorporated town. This statute does not purport to define defendant's duty in this respect outside of incorporated towns, but leaves that to be determined upon common-law principles. Independently of statute, it is the duty of those in charge of a train to give notice of their approach at all points of known or reasonably apprehended danger. This follows from the general rule requiring them to measure their precautions by, and to make them reasonably commensurate with, the conditions and circumstances by which they are surrounded. *Railroad Co. v. Dillon*, 123 Ill. 570, 15 N. E. 181; *Winstanley v. Railway Co.*, 72 Wis. 375, 39 N. W. 856; *Loucks v. Railway Co.*, 31 Minn. 526, 18 N. W. 651; *Hinkle v. Railroad Co.*, 109 N. O. 472, 13 S.

E. 884; *Durkee v. Canal Co.*, 88 Hun. 471, 34 N. Y. Supp. 978; *Railroad Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569; *Louisville & N. R. Co. v. Com.*, 13 Bush, 388; *Gates v. Railroad Co.*, 39 Iowa, 45.

X. By the common law no damages were recoverable for the death of a human being. We are, therefore, without precedents as to the measure of damages in cases of this character, other than those based upon the construction of statutes varying in their language. A great majority of the courts of this country have held that in actions of this character the loss of the society of the deceased cannot be considered in estimating damages. The basis for this array of precedents is the opinion of the English court, construing Lord Campbell's Act, in *Blake v. Railway Co.*, 16 Jur. 562. We have examined a multitude of these cases, and in none of them have we found any reason given for disallowing this element, except in *Railroad Co. v. Zebe*, 33 Pa. St. 818; and the decision in this case is confessedly based upon, and the reasons given are practically those of, the English case. In the Pennsylvania case the main question considered was whether damages for mental suffering or wounded feelings could be allowed, and incidentally the court held that loss of society falls within the same category with mental suffering, and should be disallowed. The English case, though confined entirely to the question of mental suffering, has been generally cited as authority for excluding damages for loss of the society and protection of a husband. The reasoning of that decision is based upon four propositions: First, the title of the act, "An act for compensating the families of persons killed by accident," not "for solacing their wounded feelings"; second, the provision requiring the jury to divide between the persons for whose benefit the action was brought the amount recovered in such shares as they thought proper, and the impracticability of estimating and dividing the damages for mental anguish of and between the numerous persons for whose benefit the action is brought; third, because the language of the act seemed more appropriate to a loss of which some estimate might be made by calculation than an indefinite sum, independent of all pecuniary estimate, to soothe the feelings; and, fourth, "if a jury were to proceed to estimate the relative degrees of mental anguish of a widow and twelve children from the death of the father of the family, a serious danger might arise of damages being given to the ruin of the defendants." In the Pennsylvania case it is said that such damages are speculative and fanciful, and it is there asserted that the great merit of the English rule is that "it is one of equality, compensating the rich and the poor, the refined and the cultivated, and those less so, by the simple standard of pecuniary loss." While our statute has several features in common with Lord Campbell's Act, it is essentially different in many important

particulars. Unlike the English statute, it is not one for "compensating families," but one "fixing the liability of persons and corporations for damages resulting from death," etc. Our statute, unlike the English one, by giving a right of action to the administrator of the deceased, imposes the liability whether there be a family to compensate or not. Its effect was to abrogate the common-law rule, for which, if any reason ever existed, the world has long since outgrown it, denying damages for human life, and to affix a penalty by an award of pecuniary damages for a careless or wrongful act resulting in another's death. In authorizing suits to enforce this liability, our act gives the right to those who are supposed to suffer most by the death of the deceased, but on no account does the action fail for want of a person to sue, as with Lord Campbell's Act. Other points of dissimilarity between them are: Under the English statute the suit is brought by the administrator for the benefit of the beneficiaries, while the beneficiaries sue directly under our statute. Under the English statute the jury are required to apportion or divide the recovery among all the beneficiaries, while under ours no division is made by the jury; and, indeed, if there be a husband or wife surviving, the exclusive right of action inures to him or her without reference to other members of the family. And so with minor children and dependents, the existence of a higher class of persons authorized to sue in the order named in the statute debars all other classes from any right of action themselves, or from participation in the recovery by the higher class. *Duval v. Hunt*, 34 Fla. 85, 15 South. 876. In the *Duval-Hunt* Case we held that, where the suit was brought by dependents, their recovery was limited to an amount equal to the present worth of a future support for plaintiff, estimated upon the basis therein mentioned. This view is entirely consistent with, and plainly conformable to, the nature and extent of the damages proximately suffered by one dependent upon the deceased for a support only, because he has lost nothing by the death of the deceased except the support which he would have received had deceased lived; but it was not thereby determined, as insisted upon by the appellant, that the same rule for assessing damages for a dependent would apply to a suit by the wife, or any other person authorized by the statute to sue. Our statute requires the jury to give such damages "as the party entitled to sue may have sustained by reason of the death of the party killed"; not such damages as the deceased might have recovered had he lived, as contended by appellee. It is clear, therefore, that a widow is not entitled to recover for the pain and suffering of the deceased, because that is not a damage sustained by her, but by the deceased, and dies with his person, unless an administrator can recover therefor in a suit by him under the statute, as to which we express no opinion. The stat-

ute failing to declare what particular elements enter into the damages sustained by a widow by reason of the death of her husband, and the common law furnishing no guide for estimating damages sustained by one from the death of another, we must necessarily have recourse to the general rules governing the assessment of damages in other actions, and among the first we find that "the object of awarding damages is to give compensation for pecuniary loss; that is, to put the plaintiff in the same position, so far as money can do it, as he would have been if * * * the tort had not been committed." 1 Sedg. Meas. Dam. § 30. Another is that the damage to be recovered must always be the natural and proximate consequence of the act complained of. 1 Sedg. Meas. Dam. § 122. Applying these principles to this case, it is proper to inquire, who is the plaintiff? Of what wrongful act does she complain? What has been the natural and proximate consequence to her; or, stated differently, what has she directly lost by reason of this wrongful act? The answers are not difficult to give. She is a widow complaining of the death of her husband by the wrongful act of another, and she has lost all the rights and benefits which she would have had a legal claim to receive during the probable joint lives of herself and husband, and those accruing after his death, had she survived him. Chief among those accruing to her during their joint lives are the comfort, society, protection, and support of the husband. They are all eloquently expressed in that portion of the marriage ceremony constituting the contract between them, whereby the man is required "to love her, comfort her, honor and keep her in sickness and in health." There can be no question that the wife's right to the society of the husband is a recognized legal right, as much so as the right to his support. When one of the parties dies by the wrongful act of another, the consequences are not merely the annulment of a contract, or the ending of a partnership organized for pecuniary gain, but the dissolution of the only status known to the law in which the companionship and society of the parties to each other is so essential that the relation will be annulled if that society be willfully withdrawn. The word "husband" or "wife," disassociated from all idea of companionship, has but an empty sound. The Pennsylvania court in a later case (*Railroad Co. v. Goodman*, 62 Pa. St. 329) recognizes the injustice of denying compensation for companionship of husband and wife in cases of this character by holding that the husband's damages are to be "measured by the value of her services as a wife or companion; * * * that the pecuniary loss was to be measured by the nature of the service, characterized as it was by the relation in which the parties stood to each other. Certainly, the service of a wife is peculiarly more valuable than that of a mere hireling. The frugality, industry, usefulness, attention,

and tender solicitude of a wife and the mother of children surely make her services greater than those of an ordinary servant, and therefore worth more. These elements are not to be excluded from the consideration of a jury in making a mere money estimate of value." The comfort, society, and protection of a husband are no more fanciful or speculative than the frugality, industry, usefulness, attention, and tender solicitude of a wife; and the one can be as well compensated by that simple standard of pecuniary loss by which the damages of the rich and the poor, the refined and cultivated, and those less so, are measured, as the other. The right of a husband to recover damages for being deprived of the society of his wife by reason of injuries inflicted by the negligence of another has been often recognized at common law, though not in cases involving death; and it has never been considered that the damages on this account were either speculative, fanciful, or liable to bankrupt a defendant. *Jones v. Railroad Co.*, 40 Hun, 349; *Ainley v. Railway Co.*, 47 Hun, 206; *Blair v. Railroad Co.*, 89 Mo. 334, 1 S. W. 367; *Furnish v. Railway Co.*, 102 Mo. 669, 15 S. W. 315. In the following cases loss of society has been held a proper element for consideration in estimating damage under various statutes in this class of cases, some of them confining such element to actions by a husband or widow: *Railroad Co. v. Freeman*, 97 Ala. 289, 11 South. 800; *Munro v. Reclamation Co.*, 84 Cal. 515, 24 Pac. 303; *Pepper v. Pacific Co.*, 105 Cal. 369, 38 Pac. 974; *Petrie v. Railroad Co.*, 29 S. C. 303, 7 S. E. 515; *Baltimore & O. R. Co. v. State*, 24 Md. 271; *Webb v. Railway Co.*, 7 Utah, 17, 24 Pac. 616; *Railroad Co. v. Noell's Adm'r*, 32 Grat. 394; *Simmons v. McConnell*, 86 Va. 494, 10 S. E. 838; *Wells v. Railway Co.*, 7 Utah, 482, 27 Pac. 688; *Hyde v. Railway Co.*, 7 Utah, 356, 26 Pac. 979. The case of *Webb v. Railway Co.*, 7 Utah, 17, 24 Pac. 616, has been cited to sustain the proposition that loss of society is not an element of damage in this class of cases. That case holds that a mother is entitled to recover only her pecuniary loss, and not for mental pain and suffering caused by the death of a child, in an action for damages under a statute somewhat similar to Lord Campbell's Act, but it is there admitted that the word "pecuniary," in this connection, "is not construed in any very strict sense, and the tendency is to still greater liability, and to include every element of injury that may be deemed to have a pecuniary value, although this value may not be susceptible of positive proof, and can only be vaguely estimated. It may include the loss of nurture, of the intellectual, moral, and physical training which a mother only can give to children; * * * the loss of the society of a near relative." The same court has held that while nothing is to be allowed for mental suffering, or as a solace for feelings, the jury may allow damages to a widow and daughter for being deprived of

the support, care, nurture, companionship, assistance, and protection of the deceased (*Wells v. Railway Co.*, 7 Utah, 482, 27 Pac. 688); and, in an action by parents, that the jury may take into consideration the loss to the parents of the society of their child (*Hyde v. Railway Co.*, 7 Utah, 356, 26 Pac. 979). Under our statute we hold that in estimating the pecuniary loss sustained by a widow in consequence of the death of her husband the jury may properly take into consideration the loss of the comfort, protection, and society of the husband in the light of all the evidence in the case relating to the character, habits, and conduct of the husband as husband, and to the marital relations between the parties at the time of and prior to his death. The sixth instruction on behalf of the plaintiff was properly given, and the court correctly refused the fourteenth instruction requested by defendant, because it excluded the elements of "comfort, protection, and society" from the consideration of the jury.

(2) The second instruction by the court of its own motion, as well as the fourteenth instruction requested by defendant, in that they each authorized the jury to give plaintiff as damages the full sum of the probable future earnings of the deceased, taking into consideration his age, health, business capacity, habits, experience, and the value of his services in the care of his family, were erroneous. The widow is not entitled to the gross sum of her husband's future earnings. The deceased would necessarily have consumed at least a portion of those earnings for his own individual benefit, had he lived.

It is a difficult matter to lay down general rules by which to estimate damages in this class of cases. Those which occur to us as being applicable to this case, so far as we can judge from the evidence in the record, are as follows: In estimating the pecuniary loss sustained by the widow, the jury may properly take into consideration her loss of the comfort, protection, and society of the husband in the light of all the evidence in the case relating to the character, habits, and conduct of the husband as husband, and to the marital relations between the parties at the time of and prior to his death; and they may also consider his services in assisting her in the care of the family, if any; but the widow is not entitled to recover for her mental anxiety or distress over the death of her husband, nor for his mental or physical suffering from the result of the injury. She is also entitled to recover reasonable compensation for the loss of support which her husband was legally bound to give her, based upon his probable future earnings and other acquisitions, and the station or condition in society which he would probably have occupied according to his past history in that respect, and his reasonable expectations in the future; his earnings and acquisitions to be estimated upon the basis of the deceased's age, health, business capacity, habits, experience, energy, and his

present and future prospects for business success at the time of his death,—all these elements to be based upon the joint lives of herself and husband. She is also entitled to compensation for loss of whatever she might reasonably have expected to receive in the way of dower or legacies from her husband's estate, in case her life expectancy be greater than his. The sum total of all these elements to be reduced to a money value, and its present worth to be given as damages. *Tiff. Death Wrongf. Act*, §§ 158, 159, 166; 3 *Wood, R. R.* § 414; 2 *Sedg. Meas. Dam.* § 573 et seq. Within these limits the jury exercise a reasonable discretion as to the amount to be awarded, based upon the facts in evidence and the knowledge and experience possessed by them in relation to matters of common knowledge and information. *Tiff. Death Wrongf. Act*, § 177; *Railway Co. v. Miller*, 2 *Colo.* 442; *City of Chicago v. Scholten*, 75 *Ill.* 468.

In view of other instructions to the jury to the effect that they should not give damages for the pain and suffering of the deceased, nor for the grief and wounded feelings of the surviving relatives, we discover no error in the seventh and tenth instructions given on behalf of plaintiff, except that they do not clearly embrace the idea that the jury, in estimating damages, must be governed by, and not go outside of, the evidence, and the knowledge and experience possessed by all persons in relation to matters of common knowledge and observation. Upon another trial they should be amended in this respect.

The ninth instruction for plaintiff was erroneous, because it authorized the jury to give as damages the value of the life of the deceased, and gave them too much discretion in estimating the damages. *Duval v. Hunt*, 34 *Fla.* 85, 15 *South.* 876. Her recovery is not the value of the deceased's life generally, but the value of that life to her, or the loss sustained by her from the premature death of the deceased, as shown by the proofs.

The judgment is reversed, and a new trial granted.

(51 *La. Ann.* 633)

HOGGARD et ux. v. MAYOR, ETC., OF MONROE. (No. 13,019.)¹

(Supreme Court of Louisiana. Feb. 6, 1899.)

MUNICIPALITY—TORTS OF COUNCIL—LIABILITY—FERRIES—ESTABLISHMENT.

1. Municipal corporations are not liable in damages for acts of their common councils in respect to matters entirely outside of the powers of the corporation.

2. The authority of towns situated on navigable streams to establish and operate public ferries rests entirely, in Louisiana, upon special grants to that effect; and the fact of the existence of such a special grant must be averred in a petition seeking to hold a municipal corporation liable for damages claimed to have occurred in the maintenance of a public ferry.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Ouachita; W. N. Potts, Judge.

Action by W. E. Hoggard and wife against the mayor and city council of Monroe. Judgment for defendant, and plaintiffs appeal. Affirmed.

This case is before us through an appeal by plaintiffs from a judgment of the district court sustaining defendant's exception of no cause of action. Plaintiffs, in their petition, asked judgment in the sum of \$15,000 as damages for the death of their minor son, who, it was alleged, was drowned from a ferryboat through the negligence and misconduct of defendant's servants and employes in charge of the boat. The allegations of the petition bearing upon the issue before us were: "That on the 18th of August, 1898, the defendant corporation was engaged in the maintenance and conduct of a public ferry across the Ouachita river, a navigable stream, within the corporate limits of the city of Monroe. That on said day Charles Hoggard, the minor son of petitioners, was engaged in hauling wood to the city of Monroe, and in so doing was compelled to cross the said Ouachita river at said ferry, and, at the invitation of defendant's servant and employé, entered the flatboat belonging to, and operated by, said corporation. Driving his team on said ferryboat, there being no barriers at the rear end of said boat, he stopped the same on or near the center of the boat, when he was required by the keeper of said ferry (the employé of said corporation) to drive to the rear of the flat or ferry boat, to make room for other wagons and teams thereon. That, in his effort to obey these instructions, his team became unmanageable, and walked off from the rear of said boat into the river, carrying and precipitating the wagon and petitioner's son with them into the stream, where, after a great and desperate effort and struggle to save himself, he was drowned. That, notwithstanding ample time elapsed from the precipitation of plaintiffs' son into the water until he lost his life, there was no effort whatever made by the said corporation, its employes and servants, to render him any assistance, or attempt to save his life. That the death of their son was the result of gross, wanton, and extreme negligence, and criminal carelessness, on the part of said corporation, and its employes and servants, in the fitting out and operating of said ferry, and not from any fault or carelessness of petitioners' son. That said negligence on the part of the corporation, its servants and employes, consisted, among other things, especially in its failure to provide its boats with suitable chains, poles, or other barriers to prevent teams, vehicles, and passengers from being precipitated, as was their son, into the river, which chains, poles, or barriers it was incumbent on the defendant corporation, under the law, as a keeper of a public ferry, to provide its boats with, as well as other necessary appli-

¹ Rehearing denied March 20, 1899.

ances for the safety of persons trusting their lives and property into its temporary care and keeping. That said negligence of the defendant corporation, its servants and employees, especially consisted, further, in the command of the keeper of said ferry (he being the servant and employee of defendant) to plaintiffs' son to drive his team to the rear of said boat and make room for other teams, notwithstanding the absence of a barrier or other character of appliances to check the same, and prevent its precipitation into the water, and further in the absolute failure on the part of the corporation, its employees and servants, to make any effort whatever to assist plaintiffs' son in his struggles to save his life, notwithstanding there was ample time in which such effort could have been successfully made, if the said defendant had provided its ferry with properly constructed life-saving appliances, as it should have done, and which failure was negligence."

Hudson, Potts & Bernstein and Charles J. Boatner, for appellants. Stubbs & Russell, for appellee.

NICHOLLS, C. J. (after stating the facts). Plaintiffs allege that the city of Monroe was engaged in the maintenance and conduct of a public ferry across the Ouachita river, a navigable stream, within the corporate limits of that city; but they nowhere allege that this was done under the authority of general law, of statutes conferring powers to that effect upon municipal corporations generally, or of a special provision in its charter. The circumstance that municipal corporations may be situated on the banks of navigable streams does not carry with it an inherent or impliedly granted power to operate a ferry across the stream. *Millsaps v. Mayor, etc.*, 37 La. Ann. 641. If it did, it would be proper for us to take judicial notice of the fact. We know of no statute conferring generally a power of that kind upon towns so situated. On the contrary, section 1501 of the Revised Statutes confers upon police juries, throughout the state, the exclusive privilege of establishing ferries within their respective limits, and of generally regulating the police of the same, except those within the control of municipal corporations. The ferries referred to as being "under the control of municipal corporations" are those under the control of municipal authority, by direct, general, or special statute grant. There being no general, inherent, or implied authority, or general statute vesting authority, in municipal corporations, to establish and operate public ferries, the right to do so must rest in particular cases upon special authority, and the existence of that authority should be specially pleaded. Plaintiffs herein make before us the broad contention that the city of Monroe is bound to them independently of any authority in it, either general or special, to operate ferries. That liability flows from

the fact itself that the city did carry on a ferry, and that, as resulting from that fact, injury was done to plaintiffs' son. They urge that it is monstrous to say that the city of Monroe should operate a ferry, freed from all responsibility for the manner in which it was conducted; but this argument involves an assumption of fact, that the "city" did operate such a ferry. It may be true that one was conducted under authority of the common council in the name of the city; but, unless the corporation itself was authorized to establish the ferry, it cannot be said that the act of the council was the act of the city. The council represents the city only in respect to matters which fall within the corporate powers of the corporation. Beyond this, its acts are ultra vires. We think that it is universally recognized as law that acts of the directing body of municipal corporations, covering matters entirely beyond the powers of the corporation, do not bind the latter, though it has been held, if the acts be within the powers, but directed to be done at some particular time, or in some particular manner, departure from such provisions of law would not necessarily make the acts absolutely void. Defendant refers the court, on this subject, to 2 Dill. Mun. Corp. §§ 968-971, and § 973a, note; 2 Thomp. Neg. p. 737; 15 Am. & Eng. Enc. Law, p. 1165; Elliott, Roads & S. pp. 355, 356; Shear. & R. Neg. § 299; Brice, Ultra Vires (Green's Ed.) p. 246; *Becker v. City of La Crosse* (Wis.) 75 N. W. 84; *Royce v. Salt Lake City*, 15 Utah, 401, 49 Pac. 290; *Mayor, etc., v. Cunliff*, 2 N. Y. 165; *Smith v. City of Rochester*, 76 N. Y. 506; *Stoddard v. Village of Saratoga Springs*, 127 N. Y. 261, 27 N. E. 1030.

Plaintiffs advance in support of their position a decision of the supreme court of the United States in *Salt Lake City v. Hollister*, 118 U. S. 256, 6 Sup. Ct. 1055; but we think the court in that case did not intend to go, nor did it in fact go, to the extent which plaintiffs assert. That case was presented and passed upon under an exceptional state of facts. The city of Salt Lake was not brought into court upon a claim made against it, based on either contract or tort, but was in court as a plaintiff seeking to recover money which it alleged it had been improperly and illegally made to pay, but under protest. The city, in bringing its suit, fell under the operation of the rule that the right to resist payment of a claim, when advanced, is much broader than is the right when money has been paid under it to recover it back. Independently of this, the supreme court held that the law made the imposition of a tax in favor of the government follow as the immediate and direct result of the fact itself of the carrying on of a particular business, without reference to who carried it on, or under what circumstances it was done. The city of Salt Lake had, without authority, carried on a distillery. Called on to pay a tax, it made the payment, but, under protest, and sought

afterwards to have the sum so paid reimbursed to it. The court held that the claim so presented was not well founded, and, in the course of its opinion, declared and showed that the acceptance of the doctrine contended for was against public policy, in tax matters, as it would lead to the destruction of the tax system. There is no matter of public policy favoring the acceptance of the doctrine advanced by plaintiffs in cases like the present. On the contrary, it would lead up necessarily to ruinous public results, and would do away with all the checks which experience has shown to be absolutely essential for the safety and well being of the different communities. We would not be justified in departing from established legal landmarks to meet the hardships and supposed equities of a particular case. For the reasons assigned, it is ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, affirmed.

(76 Miss. 551)

LEFLORE COUNTY v. BUSH.

(Supreme Court of Mississippi. March 13, 1899.)

SCHOOL LANDS—SALE—EVIDENCE.

Under Ann. Code, § 4148, providing that adverse possession for 25 years shall be prima facie evidence that the laws authorizing the sale of sixteenth sections set apart as school lands have been complied with, such possession furnishes the only presumption of such fact; and section 1806, making the tax collector's deed prima facie evidence that the tax sale was valid, does not apply to such school lands.

Appeal from chancery court, Leflore county; A. H. Longino, Chancellor.

Bill in chancery by Leflore county against appellee, J. W. Bush, to cancel appellee's title to the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 18, township 21, range 1 E., in Leflore county, Miss. The bill charges that this section was reserved for the support of public schools, and that it had never been lawfully sold or leased, and that the title remains in the United States, for school purposes, and that the inhabitants of the township are entitled to this section for the support of schools, and that appellee is in possession of the N. W. $\frac{1}{4}$ of said section. The prayer of the bill is that appellee be required to disclose what title or claim he has, and for cancellation of whatever title or claim he has. Appellee's answer denied all the allegations of the bill, except his possession and claim to the fee adversely to complainant. On the hearing, appellant introduced in evidence certified transcripts from the general land office at Washington, and from the land office at Jackson, Miss., showing that this section was originally reserved for school purposes, and the agreed testimony of one Parker, who stated that he had known the land since 1853, and that none of it was opened until 1879 or 1880, and that appellee had been in possession since 1897, and that appellee and those he claimed under had been

in possession of the land for more than three years before the bringing of this suit. Appellee introduced the land assessment roll for 1871, which showed that the land was then assessed to one Hart; then a deed from the state of Mississippi to one Fuller (this deed recites that the land had been sold to the state May 10, 1875, under the abatement act); then a deed from the tax collector of Leflore county to Gardner & Jones, dated March 8, 1892, for the taxes of 1891; then a deed from them to Jones; then a deed from Jones to Hynum, and a deed from Hynum to appellee. On the final hearing the court rendered a decree dismissing complainant's bill. From that decree this appeal is taken. Reversed.

Coleman & McClurg, for appellant. Rush & Gardner, for appellee.

WHITFIELD, J. The case of Chamberlain v. Board, 71 Miss. 949, 15 South. 40, has no application to suits brought under chapter 123 of the Annotated Code of 1892, relative to the sixteenth sections, in so far as a tax collector's conveyance furnishing a presumption that a sixteenth section had been leased, and had become, therefore, subject—as to the term—to taxation, is concerned. Section 4148 of said Code furnishes a new rule of evidence where sixteenth sections are concerned. The only presumption that there had once been a "lease or a sale" of such school lands, now recognized by the law, is one arising, under said section, from "adverse possession for a period of twenty-five years, under a claim of right or title." And section 1806 of said Code has now no application to these school lands. The new rule of evidence is illustrated by the cases of Carroll Co. v. Estes, 72 Miss. 171, 16 South. 908, and Amite Co. v. Steen, 72 Miss. 567, 17 South. 930. And the change made by the Annotated Code is a wise one, in protection of the school lands. Decree reversed, and cause remanded.

(77 Miss. 39)

HOME MUT. BUILDING & LOAN ASS'N v. LEONARD et al.

(Supreme Court of Mississippi. March 20, 1899.)

UNLAWFUL DETAINER—EQUITABLE DEFENSES—BUILDING AND LOAN ASSOCIATIONS.

Where a building and loan association sues in unlawful detainer for land bought in for the association at a trustee's sale under a mortgage to the association, the facts that the money for which the mortgage was given was advanced at a fixed premium; that the fines were compounded, being fines on fines; that the trustee who sold the property gave no notice of existing prior incumbrances in his advertisement; that he was an attorney for the association, and also a director and stockholder therein, and procured the bidder to buy in the property for the association,—cannot be urged as a defense, though they may be sufficient to entitle defendant to relief in a suit in equity.

Appeal from circuit court, Madison county; Robert Powell, Judge.

Action in unlawful detainer, by the Home Mutual Building & Loan Association against Richard Leonard and others, to recover possession of a house and lot which plaintiff, in the course of its business, had sold under a third mortgage, and bought in. The uncontroverted facts in the case are that the money was advanced at a fixed premium; that the fines were compounded, being fines on fines; that the trustee who sold the property gave no notice of the prior incumbrances in his advertisement; that he was named as trustee, was attorney for the board, and also a director and stockholder, and procured a bidder to buy in the property for the building and loan association. A peremptory instruction was given defendants, and an appeal was prosecuted. Reversed.

J. A. P. Campbell, W. H. Powell, and Alexander & Alexander, for appellant. J. B. Chrisman and Mayes & Harris, for appellees.

WHITFIELD, J. This record presents a case with some features of extraordinary hardship, and we are not to be understood as saying that the appellees may not be entitled to relief in the proper forum; but the defenses which would be available, if any, are equitable, and cannot be interposed in this action (End. Bldg. Ass'ns, §§ 309, 315, 512), and to that forum appellees may still resort, if they desire. It is not allowable for them further to present as a defense here matter which would sustain a proceeding by quo warranto on the part of the state. *Id.* §§ 481, 508. "No private person," says the author, "can ask for its dissolution on such grounds, nor insist upon the consequences with which the state might visit corporate misbehavior, for the purpose of escaping his contract obligations with the association." The Colorado case (*Hamill v. Bank*, 22 Colo. 384, 45 Pac. 411) went off upon the effect of an agreement between the parties that the time of maturity of the debt secured by the trust deed had been postponed to a period beyond the date of the sale and purchase under the instrument, in the light of the wording of their statute. The defense "substantially was," under the wording of the statute, "that the property had not been duly sold, nor the title in plaintiff duly perfected." 22 Colo. 386, 45 Pac. 412. Practically the whole force of the decision was that, under the statute and the agreement, it was competent to defend by showing that the right to possession which would have otherwise resulted from the deed under the foreclosure sale had been by the agreement deferred. The agreement qualified and limited the rights under the trust deed. That is not our case. *Lobdell v. Mason*, 71 Miss. 937, 15 South. 44, and *Williams v. Simpson*, 70 Miss. 113, 11 South. 689, do not apply. The trust deeds are not void for illegality; and, if it be true that the equitable defenses can be sustained by proof,—as to the sufficiency of which proof we say nothing now,—the appellees may have their day in the ap-

propriate forum. Unfortunately, with us the distinctions between law and equity have not been abolished. Reversed and remanded.

(76 Miss. 492)

WEILER et al. v. MONROE COUNTY.

(Supreme Court of Mississippi. March 20, 1899.)

PUBLIC LANDS — RIGHT TO SELL — LIMITATIONS — LEASES — REVERSIONARY INTEREST.

1. Act 1839, directing the state to lease certain of its lands, does not enable it to convey a fee in the lands.

2. Limitations will not run against the reversionary right of one leasing land for 99 years, during the period of the lease, though his rights under the lease are barred by limitations.

Appeal from chancery court, Monroe county; Baxter McFarland, Chancellor.

Bill by Monroe county against Weiler & Haas. From a decree for plaintiff, defendants appeal. Affirmed.

Monroe county filed its bill, under chapter 123 of the Code of 1892, to establish the title of the county in reversion to section 16, township 14, range 118 W., in said county, averring that in December, 1833, the section was leased by the township trustees for the term of 99 years, and that defendants, as subsequent vendees, held under that lease; praying that that lease be declared in force. Defendants answered the bill, denying all the material allegations of the bill, and averred that they owned the land in fee simple, and set up the affirmative defense of adverse possession for 25 years and 10 years. From a decree granting the relief asked by complainant, the defendants appealed to the supreme court, and the case was reversed and remanded, because no sufficient proof was made of the lease. See *Haas v. Monroe Co.*, 74 Miss. 682, 21 South. 969. Complainant's bill was then amended, setting up that defendants and those under whom they claimed recognized the title of complainant under a lease, and acknowledged such holding, and were estopped from claiming a fee-simple title adversely to complainant. A lease for 99 years was tendered. The averments of this amended bill were denied in defendants' answer. From a decree granting the relief sought by complainant, and fixing the time for the expiration of the lease on the 26th day of December, 1932, and taxing the costs equally between complainant and the defendants, the defendants appealed.

Bristow & Sykes, for appellants. Gilleylan & Leftwich, for appellee.

WHITFIELD, J. In the former opinion in this case, on the first appeal (21 South. 969, 22 South. 188), we attached too much significance to the act of 1839, as authorizing a sale in fee of the sixteenth section lands. The words "lease or sale," occurring in many acts, some before and some after this act, were manifestly loosely used by the legisla-

ture, as interchangeable with each other; for a careful reconsideration of the whole subject has satisfied us that there never was in this state any legislative authority to sell in fee these lands. We have been wholly unable to find such legislative authority. The lands were directed to be leased. They were leased, at an early date, for 5 years; later, as when the lands here were dealt with, for 99 years. The loose language of these statutes seems to have misled counsel on both sides, as well as ourselves. Holding, before, that a sale under the act of 1839 was "not impossible," we dealt with a case wherein the testimony could not be said to show a lease rather than a sale; and, the recitations in the deeds in fee coming in aid of the supposed possible sale, the possession seemed referable as well to such sale as to a lease; and, the proof—in that mistaken view of a possible right to sell in fee—not establishing a lease, we reversed the case. But, since there never was power to sell in fee, and since all were charged with knowledge of that as the law, and since a lease for 99 years was the utmost appellee's vendors could have legally got, the appellee can demand no more. The complainant tenders a lease for 99 years from December 26, 1833, as to the whole section, with an admission that the money for the lease has all been paid; and this is the full extent of the appellee's rights, in any view. The statute of limitations, whatever its effect in favor of appellants as to the lease, did not run against the reversion. The learned chancellor has correctly settled the rights of the parties, and the decree is affirmed.

HINSON v. FORSDICK.

(Supreme Court of Mississippi. April 3, 1890.)

PAROL EVIDENCE TO VARY WRITTEN INSTRUMENTS.

1. Testimony of a tax collector and his deputy that certain land, sold for taxes, and listed among lands sold to the state, was put on such list by mistake, is not an impeachment, but an explanation, of their official acts, and hence admissible.

2. Testimony of a tax collector and his deputy that land was sold for taxes, and a deed executed on a certain day, and that the date inserted in the deed was a mistake, is admissible.

Appeal from chancery court, Tallahatchie county; A. H. Longino, Chancellor.

Suit between Arthur Hinson and H. J. Forsdick. From a decree against him, Hinson appeals. Reversed.

Dinkins & Caldwell, for appellant. St. John Waddell, for appellee.

TERRAL, J. On the 2d day of March, 1885, the N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section 13, township 23, range 2 E., in Tallahatchie county, was sold by W. M. Calhoun, the tax collector of said county, for the taxes due thereon. The land was assessed as owner unknown, but the attorney of Forsdick, in his brief,

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states that it was the property of Scott King, and admits that Scott King and Arthur Hinson have been in the continuous possession of said land from and before said 2d day of March, 1885, to the trial of the case. The taxes amounted to \$2.21, and the tax collector executed a deed of the land to Scott King, dating it as of the 3d, instead as of the 2d, day of March, 1885, and also inserted this parcel of land in the list of land sold by him to the state. The certificate of the list of lands sold to the state was not signed by the tax collector, and there was no evidence that it was written by him, or under his direction. In the deposition of H. H. Dogan, the office deputy of Calhoun, the tax collector, he testifies that he made out the list of land sold to the state, and that the list of land sold to the state was an error or mistake, so far as it contained in it the tract of land in controversy, and that in fact it was sold and struck off on the 2d day of March, 1885, to Scott King, and a deed to him for it was made on that day, and that the deed in evidence was by mistake or oversight dated the 3d day of March, 1885. But at the instance of Forsdick the deposition was excluded. The evidence of Tax Collector Calhoun to the same effect was offered by Hinson, and excluded by the court at the instance of Forsdick. From a decree against him, Hinson appeals.

We think the evidence of the tax collector and of his deputy was not in impeachment, but in explanation, of their official acts, and was clearly admissible for that purpose; and, if credited, this shows a good title in Hinson to the land sued for. The decree of the chancery court is reversed, and the case is remanded for a new hearing.

(76 Miss. 708)

JACKSON v. ALABAMA & V. RY. CO.

(Supreme Court of Mississippi. April 3, 1890.)

CARRIERS — EJECTION OF PASSENGER — QUESTION FOR JURY.

Whether a railroad company is liable for ejecting a female passenger, who cannot pay fare, on a dark, rainy night, at a point in a swamp several miles from a station where shelter could be obtained, should be left to the jury.

Appeal from circuit court, Hinds county; Robert Powell, Judge.

Action by Aurelia Jackson against the Alabama & Vicksburg Railway Company. From an order sustaining defendant's demurrer, plaintiff appeals. Reversed.

Brame & Brame, for appellant. McWillie & Thompson, for appellee.

WOODS, C. J. Very briefly stated, the declaration filed by the appellant in the court below alleges that she boarded, at a switch or flag station on the line of appellee's railway, about four miles west of the town of Clinton (a regular station), soon after nightfall on November 20, 1898, a passenger train, as a passenger in good faith, bound for Jackson; hav-

ing, as she believed, largely more money than was requisite to pay her fare on the train. No ticket was purchased before boarding the train, as there was no station house or ticket office kept by the railway company at said flag station or switch. Soon after the train had pulled out from the flag station, appellant was approached by the conductor, and requested to pay her fare, when she vainly made search for the money which she had upon her person when she started to board the train. The conductor was informed by her that she had lost her money in getting on the train, or had lost it in the car after entering. Failing to find her money, she was immediately ejected from the train, at a point about one mile east of the said flag station, and about three miles west of Clinton. The night was dark, cold, and rainy, and the place of her ejection was in a swamp, with water on the sides of the track, and remote from any habitation. The appellant earnestly and tearfully besought the conductor not to eject her, but in vain. She made her way back on foot to the flag station, chilled by winds, drenched by rains, and through the darkness. Reaching the flag station, she found no one there, and no place of shelter. She then continued her walk to her father's house, three or more miles away, reaching that shelter about midnight. As the result, she became sick and disabled, and has not yet fully recovered. Her money was found the next morning at the point where she got upon the train the night before, and where she had inadvertently dropped it in her effort to board the car. The question is not whether a railway company has the right to eject one from its train who has neither a ticket, nor the means of paying fare. That is universally conceded. The question is whether, at the time and place, and under the circumstances, the right of ejection in this instance was properly exercised. The appellant was within three miles of Clinton, where shelter and protection could have been had, when she was put off the train in a swamp, on a dark, cold, and rainy night, remote from any known habitation, and exposed to the discomfort and peril of an ejection under the then known conditions surrounding her. The demurrer of the railway company admits all the material allegations of the declaration, and should have been overruled. The case presented by appellant's declaration demanded an answer, and a jury should have passed upon the evidence, under proper instructions. Reversed and remanded.

FAIRBANKS CO. v. BRILEY et ux.
(Supreme Court of Mississippi. April 8, 1899.)
SEPARATE PROPERTY OF WIFE—IMPROVEMENTS—
CONTRACT WITH HUSBAND.

Where a contract for plumbing on the separate property of a wife is made with the husband, and upon his credit, without the written consent of the wife, as required by Ann. Code, § 2700, her property cannot be held liable.

Appeal from circuit court, Pike county; W. P. Cassidy, Judge.

Action by the Fairbanks Company against George O. Briley and wife. Judgment for defendants, and plaintiff appeals. Affirmed.

J. B. Sternberger, for appellant. J. H. Price, for appellees.

TERRAL, J. The appellant, the assignee of a claim for certain plumbing work done by its assignor, W. T. Flood, under a contract in writing made with George O. Briley alone, sued George O. Briley on said contract, and made Mrs. E. C. Briley a party to said suit, and sought therein to subject to the payment of its claim not only the fixtures attached to the building, but also the dwelling house and the curtilage thereof, the title to which is in Mrs. Briley. The court having denied the relief sought as to Mrs. Briley, the Fairbanks Company appeals.

The contract for the plumbing work on the homestead of Mrs. Briley was made with the husband alone, and upon his credit, without the written consent of Mrs. Briley, as required by section 2700, Ann. Code; and we see no reason for subjecting the property of Mrs. Briley to the payment of the debt. The plumber, Flood, in the making of his contract for the work, looked alone to the husband for its payment. He carved out his own security for it, and he cannot now enlarge his rights by looking to Mrs. Briley, who did nothing to mislead him in the formation of the contract, and his assignee stands in no better attitude than he would if suit had been brought by him. Affirmed.

O'GWINN et al. v. WINNER et al.
(Supreme Court of Mississippi. April 8, 1899.)
ASSIGNMENT FOR BENEFIT OF CREDITORS—COLLECTION OF DEBTS.

An assignment for benefit of creditors required the assignee to collect notes and debts, and compromise them on such terms as might seem best, and to convert all the property into money within six months. *Held* not unreasonable, as limiting the collection of debts to six months.

Appeal from chancery court, Clarke county; N. C. Hill, Chancellor.

Bill by Winner & Meyer and others against D. O'Gwinn and others. There was a decree for complainants, and defendants appeal. Reversed.

W. T. Houston, for appellants. Miller & Baskin, for appellees.

TERRAL, J. D. O'Gwinn, on the 2d day of December, 1897, made an assignment of all his property, consisting of real estate, tangible personal property, and of sundry accounts, notes, and debts due him, to G. L. Donald, as assignee, and by said assignment he made it the duty of said assignee "to collect the notes, accounts, and other evidences of debt hereby

assigned." It provided, further, "that, if there be any notes and accounts or debts that cannot be collected by law in full, said assignee may compromise said claims upon such terms as may seem best; that he should dispose of all of said property assigned to him at public or private sale, for cash, as he may deem best and most expedient for the beneficiaries; that all of said property assigned shall be converted into money within six months from this date, or sooner, if possible; that the assignee, after paying the expenses of the trust, should pay the assignor's attorney \$200, and should pay all other creditors pro rata." Winner & Meyer and others, creditors of said D. O'Gwinn, brought this bill against said assignor and the assignee, setting up their claims as such creditors, reciting the statements of said assignment, claiming them to be a fraud upon creditors, and asking said assignment to be set aside, and complainants to be given a first lien upon said assigned property, and a decree for a sale thereof for the payment of their said claims. The assignor and the assignee demurred to the petition, and the demurrer was overruled, and they appeal therefrom.

It is insisted that the assignment in this case falls within the condemnation of the doctrine announced in *Richardson v. Stapleton*, 60 Miss. 97, because it is said that the assignee is not given a reasonable time within which to collect the debts assigned to him, and that for him to follow the directions of the deed of assignment would sacrifice the notes and accounts, especially those due from foreign debtors. It is a rule of law to give such a construction to a written instrument as may uphold it, if such effect can be consistently accomplished; and, taking the instrument as a whole, we do not regard the assignee as being required to sell the debts unless they shall be collected within six months. The deed of assignment does not limit the assignee to six months in the collection of the debts, but under it he may take such reasonable time as may be needed for that purpose. The decree of the chancery court is reversed, and the case is dismissed, at the costs of the cross petitioners.

(77 Miss. 764)

YAZOO & M. V. R. CO. et al. v. ADAMS,
State Revenue Agent.

(Supreme Court of Mississippi. March 27,
1899.)

ENFORCEMENT OF TAX LIENS—PARTIES—STATE
RAILROAD COMMISSIONERS—CONSTITUTIONAL LAW
—DUE PROCESS OF LAW—EQUAL RIGHTS—COL-
LATERAL ATTACK.

1. A railroad company owning a majority of the stock and bonds of another company, and whose agents compose the majority of the latter company's directors, is a proper and necessary party in a suit to foreclose a tax lien created under Code 1892, § 8743, on the property of the latter.

2. Code 1892, §§ 3875-3886, and Act Feb. 7, 1894 (Laws 1894, pp. 29-31), providing for the

assessment of railroad property for back taxes by railroad commissioners who have no authority to assess other kinds of property, and from whose decision there is no provision for an appeal, are not repugnant to Const. § 112, and Const. U. S. 14th Amend., prohibiting the deprivation of property without due process of law, and guarantying to every citizen the equal protection of the laws, though other taxpayers may appeal from the tribunal fixing their taxes, in view of a provision of said section 112 authorizing a special mode of valuation and assessment of railroads.

3. A decision by railroad commissioners, under Code 1892, §§ 3875-3886, and Act Feb. 7, 1894 (Laws 1894, pp. 29-31), assessing railroad property for back taxes, cannot be collaterally assailed except for fraud.

Appeal from chancery court, Hinds county; H. O. Conn, Chancellor.

Suit by Wirt Adams, state revenue agent, against the Yazoo & Mississippi Valley Railroad Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

This is a suit in equity to enforce a lien for taxes for the years 1886-1891, inclusive, on what was formerly the property of the Louisville, New Orleans & Texas Railway Company, in the hands of the appellants, the Yazoo & Mississippi Valley and Illinois Central Railroad Companies. On the 17th of April, 1895, the appellee, the state revenue agent, instituted before the railroad commission of Mississippi a proceeding to have the railroad property which was the property of the Louisville, New Orleans & Texas Railway Company assessed for taxation, for the years 1886, 1887, 1888, 1889, 1890, and 1891, as property which had escaped taxation for want of an assessment. In the proceeding aforesaid notice was served upon the Yazoo & Mississippi Valley Railroad Company as the successor of the Louisville, New Orleans & Texas Railway Company, and also upon the Illinois Central Railroad Company. That proceeding was enjoined mainly on the ground that the railroad commission had no authority to assess taxes for any year prior to the year 1892, in which year they for the first time were made assessors of railroad and other taxes, and the statute did not contemplate any assessments for years prior to that date by them. The injunction was dissolved, and the railroad commission proceeded and made the assessment in accordance with the demand of the revenue agent, and from their order making such assessment the railroad companies took an appeal to the circuit court of Hinds county. Thereupon the revenue agent filed his bill in chancery setting forth the assessment made, and praying a decree for the amount of the taxes, and the establishment of a lien, and a sale of the railroad property if the taxes were not paid accordingly. It set forth the consolidation of 1892, and showed how it was that the Yazoo & Mississippi Valley Railroad Company became the successor of the Louisville, New Orleans & Texas Railway, and alleged that the former company was then the holder of the property sought to be subjected. The bill made the Illinois Central Railroad

Company a party defendant, as well as the Yazoo & Mississippi Valley Company, averring their interest in the property sought to be subjected, and averring that the Illinois Central had assumed to pay the taxes assessed. To this bill the Yazoo & Mississippi Valley Railroad Company interposed a plea, to the effect that the suit was prematurely brought, inasmuch as there was an appeal still pending and undetermined to the circuit court from the order of assessment. The Illinois Central Company demurred to the bill, on the ground, generally stated, that the same did not show any liability on the Illinois Central Railroad Company, or any reason for making the same a party defendant. At a later date the Yazoo & Mississippi Valley Railroad Company filed a further plea, setting forth the fact that the circuit court had dismissed the said appeal on the ground that the same was not authorized by law, and that the said court had no jurisdiction thereof. Wherefore respondent averred that the provisions of the Code of 1892, from section 3875 to section 3886, and the act of 1894, in so far as the same authorized assessment for back taxes to be made against the railroads by said railroad commission, and authorized suits to be instituted thereon by the revenue agent, were unconstitutional and void. And the Illinois Central Railroad Company filed also an additional demurrer, raising the point that the act of 1894 was unconstitutional and void, because the same violated section 112 and section 14 of the constitution of the state of Mississippi, and the fourteenth amendment to the constitution of the United States. At the special February term, the court overruled these demurrers, and held these pleas insufficient in law and equity, and ordered the defendants to answer; whereupon the defendants, each for itself, appeal.

Mayes & Harris, for appellants. J. A. P. Campbell and Critz, Beckett & Kimbrough, for appellee.

WHITFIELD, J. The bill charges that the Illinois Central Railroad Company is the owner of the majority of the stock and bonds of the Yazoo & Mississippi Valley Railroad Company, and has also a majority of its directors. Practically and substantially, therefore, the Illinois Central Railroad Company has an actual controlling interest in the Yazoo & Mississippi Valley Railroad Company, and, to all intents and purposes, is in possession of its property. That is the real situation; and it is, through all forms, to the substance that courts look. Besides, it sufficiently appears that the Illinois Central Railroad is a large bondholder of the Yazoo & Mississippi Valley Railroad Company, and so entitled to redeem. *Keokuk & W. R. Co. v. Scotland Co.*, 152 U. S. 328, 14 Sup. Ct. 605. If, in truth, the Illinois Central Railroad Company had no interest, what was easier than to file a disclaimer? On the contrary, the exhibit to the bill shows

that the Illinois Central Railroad Company joined with the Yazoo & Mississippi Valley Railroad Company in filing a bill against the appellee seeking to enjoin him from making the very assessment here involved, asserting, in that injunction litigation, a real and vital interest; and yet, when the assessment is made, and the effort is being made by the revenue agent to enforce it, this same party, the Illinois Central Railroad Company, demurs, and says it is improperly joined as a party. It is not sought to obtain a personal decree against the Illinois Central Railroad Company. The theory of the bill is to enforce, in rem, against the property charged with the taxes, the amount of the taxes; to effectuate against, and out of, the property itself, on which the paramount tax lien is charged, that tax lien, and to have a decree subjecting the property to the payment of the taxes. Code 1892, § 3746; Code 1890, § 470. And the Illinois Central Railroad Company does have, as the party practically and substantially controlling this property, and practically and substantially in possession of it, a real interest in this controversy, and is, we think, a proper and a necessary party.

The only really serious contention of the appellants is the one presented by the additional demurrer of the Illinois Central Railroad Company, and the second plea of the Yazoo & Mississippi Valley Railroad Company, the substance of which is that one tribunal is provided by law for the assessment of railroad property and a different tribunal for the assessment of other property; and also that, if this be allowable, then the act of February 7, 1894 (*Laws 1894*, pp. 29-31), violates the constitution (section 112), in granting an appeal to one class of taxpayers from the tribunal assessing the taxes of those in that class, and denying an appeal to another class of taxpayers (railroad companies) from the judgment of the tribunal assessing the taxes of those in that class. The insistence is that, in these two respects, sections 3875 to 3886, inclusive, of the Code of 1892, as also the said act of February 7, 1894, are violative of the constitution of this state (section 112), and of the constitution of the United States,—that is to say, of the fourteenth amendment thereto and the first section of the said fourteenth amendment,—in this, to wit, in denying to the appellants “due process of law” and “the equal protection of the laws.” The former decision in this case (*Railroad Co. v. Adams*, 73 Miss. 648, 19 South. 91) really disposed of these contentions; for it would have been an idle performance to have rendered the judgment which was rendered, had this court deemed these acts violative of either the state or the federal constitution. But, aside from this consideration, it is clear there is nothing in the contentions. The constitution (section 112) expressly provides: “But the legislature may provide for a special mode of valuation and assessment of railroads, and railroad and

other corporate property, or for particular species of property belonging to persons, corporations, or associations not situated wholly in one county." Acting in pursuance of this constitutional authorization, sections 3875-3886, and the said act of February 7, 1894, were passed. The purpose is plain. The scheme was to take railroad property, because of its peculiar nature, and the inherent difficulties attending a just and wise adjustment of taxes on that class of property, out of the hands of subordinate county officials, and put it into the hands of a board of special state assessors of railroad property for taxation; to segregate, for the purposes of taxation, all property of that class,—all railroad property,—and put it in a class by itself. All railroad property is dealt with alike. There is no discrimination between railroads. When the property of railroads is assessed, ample notice is actually given them, besides the notice the law gives them in fixing the time when the state railroad assessors shall meet to impose the taxes and hear objections. They have a full hearing, upon a full notice, on both law and facts, as to the imposition of taxes on them. In this case they were duly served with notice. They appeared; interposed their objections; the fullest proof was introduced, as shown by the record; and their complaint now, on this second appeal, at this late stage in this litigation, wherein the state is seeking to recover her taxes,—the lifeblood of her existence,—is that the appellants now think these acts unconstitutional.

It has been too long and too thoroughly settled, to now admit of discussion, that it is not only competent, but necessary, in any justly-framed system of taxation, to provide for different modes of taxation of property, according to the different nature of the property, so long as all property of the same nature and class is dealt with alike. It is nothing more than a classification of property according to its nature and uses, and dealing with it, as to its revenue-bearing duties, accordingly as all property of that class is dealt with. Uniformity and equality of taxation—as to the mere mode of imposing taxes—are not violated by putting all railroad property, on account of its nature and uses, and the difficulties attending its proper assessment for taxation, in one class, and assessing it according to a special mode provided therefor by the legislature, so long as all railroads are dealt with alike, and there is, consequently, no discrimination between those in that class. This is too plain to need the citation of authorities. They are overwhelming. All along, it must be remembered that this is not an effort to assess current taxes, but back taxes. It is a case where the railroads have escaped taxation. Acts 1888, p. 49, § 1; Acts 1890, pp. 12, 13, § 5; Acts 1894, pp. 29-31, §§ 2-4. Nor does the fact that no appeal is given from the action of the state railroad assessors to the railroad companies violate either the state or the federal constitution.

It must be borne in mind that the appellants allowed the six months, within which the remedy by certiorari for the correction of errors of law was open to them, to expire without availing themselves thereof. Code 1892, §§ 89, 90. They had their full hearing, as shown on both the law and the facts. Nor did they, when the circuit court dismissed the appeal taken from the action of the state railroad assessors on the ground of want of jurisdiction, because the law did not authorize such an appeal, prosecute an appeal from that judgment of the circuit court to this court. But the effort, now here being made, is to assail collaterally the finding of the state railroad assessors. This is directly in the face of the holding of this court, on the former appeal in this same case, where the court said, speaking through Chief Justice Cooper (73 Miss. 662, 19 South. 98): "By providing for notice to the owner, and thus affording him the opportunity of interposing his objections to his assessment of the property, the determination of all questions of fact necessarily involved in the inquiry is submitted by law to the tribunal having jurisdiction in the premises." That tribunal was this board of state railroad assessors. That board had jurisdiction of the parties and of the subject-matter, made the fullest investigation of the whole matter, and their finding cannot be thus collaterally attacked. The decisions of the supreme court of the United States are absolutely conclusive of this. In *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 229, 17 Sup. Ct. 312, that court says: "Whenever a question of fact is submitted to the determination of a special tribunal, its decision creates something more than a presumption of fact, and, if such determination comes into inquiry before the courts, it cannot be overthrown by evidence going only to show that the fact was otherwise than so found or determined." See, to the same effect, *Railway Co. v. Backus*, 133 Ind. 541, 33 N. E. 430, the court saying: "The state board having fixed the valuation and assessed the property, their action in this behalf is final, and cannot be avoided or set aside, except for fraud on the part of the state board of tax commissioners which would render the assessment void." And see, to the same effect, *Water Co. v. Clark*, 94 Ky. 47, 21 S. W. 246; *Stanley v. Supervisors*, 121 U. S. 535, 550, 7 Sup. Ct. 1234; *Williams v. Supervisors*, 122 U. S. 154, 7 Sup. Ct. 1244; *Winona & St. P. Land Co. v. Minnesota*, 159 U. S. 534, 16 Sup. Ct. 238, § 102; 25 Am. & Eng. Enc. Law, p. 236; *Palmer v. McMahon*, 133 U. S. 665, 10 Sup. Ct. 324. And so the decisions of the same learned court are decisive against appellants, that, having had provision made for notice, and one full hearing, the denial of the right of appeal to all railroads—all in the same class—is no denial of due pro-

cess of law, or of the equal protection of the laws. Speaking to this very point, in *Railway Co. v. Backus*, 154 U. S. 427, 14 Sup. Ct. 1117, Mr. Justice Brewer says: "Equally fallacious is the contention that, because to the ordinary taxpayer there is allowed, not merely one hearing before the county officials, but also a right of appeal, with a second hearing before the state board, while only the one hearing before the latter board is given to railroad companies in respect to their property, therefore the latter are denied the equal protection of the laws. If a single hearing is not due process, doubling it will not make it so; and the power of a state to make classifications in judicial or administrative proceedings carries with it the right to make such a classification as will give to parties belonging to one class two hearings before their rights are finally determined, and to parties belonging to a different class only one hearing. * * * Did it ever enter into the thought of any one that such classification carried with it any denial of due process of law?" And to identically the same effect are *Irrigation Dist. v. Bradley*, 164 U. S. 168, 169, 17 Sup. Ct. 56; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 228, 17 Sup. Ct. 312; *Winona & St. P. Land Co. v. Minnesota*, 159 U. S. 534, 535, 16 Sup. Ct. 83. Whether the "ordinary taxpayer" is given an appeal is no concern of the railroads, so long as there is a just and legal classification of railroad property, and a dealing with all in that class on exactly the same terms; some sufficient notice and hearing being afforded all railroads. The acts in question do not, therefore, violate the state or the federal constitution in denying to railroad companies an appeal from the action of the state railroad assessors.

It is further to be said that the action of that board was in conformity with the decision of this court rendered June 20, 1898 (No. 8,629 in this court), 24 South. 317, and was, for this additional reason, correct. That action, except for fraud, cannot now be assailed, but is binding and conclusive on the appellants. Affirmed.

(76 Miss. 635)

BOARD OF LEVEE COM'RS FOR YAZOO-MISSISSIPPI DELTA v. BROOKS et al.

(Supreme Court of Mississippi. March 27, 1899.)

EMINENT DOMAIN—JURISDICTION.

Want of jurisdiction in the circuit court of proceedings under the statute regulating the exercise of the power of eminent domain is not cured by Const. § 147, declaring that no judgment or decree in any circuit court shall be reversed or annulled for want of jurisdiction arising "from any error or mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction."

Appeal from circuit court, Coahoma county; F. A. Montgomery, Judge.

The board of levee commissioners for the Yazoo-Mississippi Delta, claiming the right of

eminent domain, by its chief engineer, on the 3d day of July, 1896, filed its petition addressed to the clerk of the circuit court of Coahoma county for the purpose of condemning for levee purposes certain lands therein described, aggregating 146.69 acres, belonging to the appellees, requiring that process issue to the sheriff of said county for summoning Walter Clark, C. B. Danforth, and Henry Wall to view said lands, and assess the value thereof, in conformity with the act of the legislature of February 7, 1894. On July 17, 1896, said Wall, Danforth, and Clark appraised said land at \$3,125.79. On the 27th of July, 1896, Brooks, Neely, and others, the persons owning the land sought to be condemned, appealed from said appraisal, and filed their declaration, or statement of law and fact, in said circuit court. An issue being made up, the board of levee commissioners moved to dismiss the proceeding because the circuit court had no jurisdiction of it. The motion was overruled, and the board appealed. Reversed.

Cooper & Waddell, for appellant. D. A. Scott and J. A. P. Campbell, for appellees.

TERRAL, J. This is a proceeding under the statute regulating the exercise of the power of eminent domain, commenced in the circuit court of Coahoma county on the 3d day of July, 1896, when said court had no jurisdiction of such proceeding, and which want of jurisdiction rendered the action of the court utterly null and void, and nothing can relieve it of this hopeless infirmity except it be section 147 of the state constitution, which is invoked for that purpose. The constitution provides: "Sec. 147. No judgment or decree in any chancery or circuit court, rendered in a civil cause, shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree, from any error or mistake as to whether the cause in which it was rendered was of equity or common law jurisdiction; but if the supreme court shall find error in the proceedings other than as to jurisdiction, and it shall be necessary to remand the case, the supreme court may remand it to that court which, in its opinion, can best determine the controversy." The constitution does not help the proceeding. The cause is not one of equity or of common-law jurisdiction. By the common law the circuit court had no jurisdiction of eminent domain proceedings, nor did the chancery court, by its institution in this state, have such jurisdiction; and the proceedings were entirely void because not in conformity with the power conferred. *Railroad Co. v. Drake*, 60 Miss. 626; *Mills, Em. Dom.* § 84; *Commissioners v. Allen*, 60 Miss. 98; *Brown v. Beatty*, 34 Miss. 227. If by mistake of the chancellor one of our chancery courts should entertain a suit of unlawful entry and detainer, which is not a common-law suit, but pertains to a special court composed at least of

two justices of the peace, and from its decree an appeal should be taken here, could we entertain jurisdiction of it? We think not. Or should a chancery court, by mistake of the learned chancellor, entertain a suit for debt on open account for less than \$200, which pertains alone to the jurisdiction of the justice of the peace of the proper district, and its decree is complained of in this court, could we uphold such action? Certainly not. It has been held that, if the circuit court adjudicates an action of debt there brought for less than \$200, an appeal here gives this court no jurisdiction. For reasons equally cogent an appeal from a decree of the chancery court in a similar action of debt for less than \$200 could not be validated by judgment here. *Stephen v. Elseman*, 54 Miss. 535; *Fenn v. Harrington*, Id. 733; *Griffin v. McDaniel*, 63 Miss. 121; *Delmas v. Morrison*, 61 Miss. 314; *Andrews v. Wallace*, 72 Miss. 291, 16 South. 204. Should a chancellor emulous of larger power try in his court an ordinary action of ejectment, the decree of the court therein, if right upon the principles applied to the case, would, perhaps, be valid under section 147 of the constitution; or if a circuit judge should adjudicate a specific performance of contract for the sale of land, his action, if conformable to equitable principles on that subject, possibly could not be assailed here for want of jurisdiction; but the action of said tribunals in such cases would be valid, because the causes pertained, by the constitution of said courts, to the one or the other of them. But one of these courts may not usurp the statutory power of the other, and have claimed for such usurpation the curative effect of section 147, because they are not covered by the letter or by the spirit of said section. Those instances do not contain mistakes as to whether the cause is of equity or of common-law jurisdiction, so as to be cured by section 147 of the constitution. They are not causes of equity jurisdiction or of common-law jurisdiction pertaining to the circuit court, and the attempted proceedings in those courts, being in a matter over which that individual court had no jurisdiction whatever, cannot be upheld under section 147. They are not mistakes, but are usurpations, and cannot be supported. It is a rule often announced by this court that every special statutory authority must be strictly pursued, and, if not so pursued, the action taken is null and void. 60 Miss. 93; Id. 626; *Mills. Em. Dom. § 84*; 10 Am. & Eng. Enc. Law (2d Ed.) 1054; *Brown v. Beatty*, 34 Miss. 227.

Reversed and dismissed.

(119 Ala. 231)

MILLSAPS et al. v. SHOTWELL et al.

(Supreme Court of Mississippi. April 3, 1899.)

LIMITATIONS—ESTOPPEL—SPECIFIC PERFORMANCE—VENDOR AND PURCHASER—TRUST.

1. Under a devise of an undivided interest in lands in trust for the distributee until he

has become a temperate and prudent man, and remained such for five years, whereupon the lands shall vest in him in fee, limitations do not run against his right to have the lands partitioned, and to recover his share, until he has for five consecutive years remained temperate, since his interest does not vest until then.

2. Lands were devised in trust for a drunkard until his reformation, when they were to go to him in fee. Prior to his reformation, he agreed with one of the trustees to convey the same to said trustee, as soon as the title vested in him, for certain lands conveyed to him by the trustee. *Held*, that the trustee was not, on the reformation of the cestui que trust, entitled to a specific performance of the agreement, since it was made in violation of the trust.

3. Equity will refuse, as being inequitable, specific performance of an agreement to convey an undivided one-fourth of 8,000 acres of land in exchange for an undivided three-fourths of 200 acres, where it does not appear that they are of equal value.

4. A will devised lands in trust for a drunkard until his reformation, when they were to vest in him in fee. Before his reformation, he agreed with one of the trustees to convey the lands to the latter when vested with the legal title, in consideration of a conveyance of another tract to him by the trustee. The trustee conveyed such tract to the drunkard, who went into possession, and then the two trustees conveyed the trust estate to the son of one of them, to defeat creditors, and to divest the title of children of the cestui que trust, who, under the devise, were to take if their father never reformed. After the death of the trustees' grantee, the cestui que trust assisted in compromising a contest of his will, but his heirs claimed nothing under the deed to him, and the lands conveyed by it were not involved in the will contest. *Held*, that on reformation the cestui que trust was not estopped from claiming the lands devised to him by the will, as against claimants under the deed from the trustees having notice.

Appeal from chancery court, Coahoma county; A. H. Longino, Chancellor.

Suit by Reuben Shotwell and another against R. W. Millsaps and another. There was a decree for complainants, and defendants appeal. Reversed.

Brame & Brame and Alexander & Alexander, for appellants. J. W. Cutrer and W. R. Harper, for appellees.

WHITFIELD, J. All the parties to this record claim from the same common source,—Robert Shotwell; and the appellants hold derivatively from Bourbon Shotwell, Sr., the son of Robert, and the half-brother of Reuben Shotwell. There are no creditors' rights of any sort here involved. The contest is sharply between Reuben Shotwell and those claiming under him, and Bourbon Shotwell, Sr., and those claiming under him, as to the effect, upon the property involved, of the provisions, for Reuben's benefit, in the will of Robert Shotwell. That will was made in July, 1866, and duly probated and recorded, and all the parties to this litigation are charged with a knowledge, by that record, of its contents, and are to be dealt with as so knowing said contents. By that will, Bourbon Shotwell, Sr., and A. L. Shotwell were invested, as trustees, with the legal title to a

one-fourth undivided interest in this property, charged with the duty of furnishing Reuben, and his family, should he have any, a support. "For no other purpose whatever" were they to use the income of that fourth. Reuben was not then known to be alive. He had been, and up to about March 10, 1891, continued to be, a common drunkard, "unfit for the care of property." By reason of this character, his father was unwilling to invest him at all with the legal title to any part of the estate, and provided that if he never, for five continuous years, "became a temperate and prudent man, thus showing himself to be trustworthy," at his death this one-fourth interest should "descend to and be inherited by his children equally," but, if he should so reform, then and thereupon "he should have his property delivered to him unconditionally, to hold in his own proper right." The trustees, Bourbon Shotwell, Sr., and A. L. Shotwell, accepted this trust, and entered upon the discharge of its duties. It does not appear, however, that they managed Reuben's one-fourth interest for him, or supported him or his family from the income of that one-fourth interest, as was by the will required, during the time in which Reuben remained a drunkard, and "unfit for the care of property." About May, 1878, Bourbon, Sr., got Reuben to sign an agreement to the effect that, "when Reuben Shotwell's part of the property should be set aside to him in his own right, by the proper authorities, so that the said property should vest in him absolutely," said Bourbon Shotwell, Sr., should convey to Reuben his three-fourths interest in about 200 acres of land, in consideration that Reuben should convey to him his one-fourth interest in all the property devised by Robert Shotwell to the said Reuben and Bourbon. And Bourbon Shotwell executed, shortly after that date, such a deed, but Reuben refused to execute any deed, and informed Bourbon, by letter, that he stood upon his rights under his father's will. Reuben remained in possession of the 200 acres, and made therefrom his own support, and in this bill brings the 200 into hotchpot, and prays partition of them with the other lands. Subsequently Bourbon Shotwell, Sr., got his co-trustee, A. L. Shotwell, to join him in executing a deed to Walter G. Shotwell, his son, to the property here involved, except the said 200 acres, which deed Walter never recorded. Subsequently, and on said Bourbon Shotwell's death, all this property was partitioned between the heirs of said Bourbon Shotwell as if it had descended to them, utterly ignoring the deed to Walter. Subsequently Walter, on his death, devised his part of this property, received under this partition, to his sister, Mrs. Ellen Green, charged with certain legacies and annuities. A contest of this will was had, and compromised; what part Reuben had, by his advice, in contributing to the compromise, being differently stated by different witnesses, but this all occurring before Reuben's

reformation. About March 10, 1896, Reuben completed his five-years period of probation, having for five years prior thereto remained "uniformly a prudent and temperate man, and thus shown himself to be trustworthy." The bill in this case was filed in May, 1896, by Reuben and his wife, to whom he had conveyed one-half his interest, seeking partition, etc., of all the lands named. We do not propose to fill in this skeleton outline of the case with a detailed statement of the multitudinous facts set out in this record. Suffice it to say, we have gone over them all most carefully and thoroughly, aided by the very able and helpful briefs of the counsel on both sides. We shall state the defenses, and announce the conclusions at which we have arrived, referring to the briefs of counsel for the authorities supporting our views.

The defenses relied on may be grouped under four heads: (1) That the appellees are barred by the statutes of limitations, or some one of them, pleaded. (2) That Reuben Shotwell executed, in pursuance of the agreement of 1878, a quitclaim deed to Bourbon Shotwell, Sr., the effect of which was to convey the interest he then had, if any, and by estoppel, by force of the statute, any adverse interest he might thereafter acquire. (3) That if he made no such quitclaim deed, he at least executed the agreement of 1878, and stood on it, and can be held by Bourbon Shotwell, Sr., and those claiming under him, to a specific performance of that agreement, and made now to convey, as per its terms. (4) That, if all else fails, then the appellees are, by the conduct of Reuben, estopped to have the relief sought, or any relief.

The clear, dominant, controlling purpose of Robert Shotwell was that, until Reuben should have reformed, no estate to the one-fourth interest should vest in him; that, if he never did, that estate in fee should go to his children; and that the trustees should devote the income from the whole of that fourth to the support of him and his family, themselves actively managing that interest, caring for and preserving it, and paying over such income as stated; and that, should the trustees, under the power of disposition in the management of Reuben's share confided to them by the will, dispose of it, such disposition should be made with an eye single to "the interest of Reuben or his children, should he have any"; and, finally, that, should he reform, then, but not until then, his said interest should vest in him in fee. And notice of all this the record of the will imparted to the world. Let us now test the defenses in the light of this purpose.

1. As to the defense of the statutes of limitations, it is obvious that Reuben had no right of action prior to March 10, 1896. He was precisely in the attitude of a contingent remainder-man as against a life tenant. His interest was wholly expectant, dependent upon whether or not the very uncertain condition of the interest's vesting should ever be

complied with. Till the conditions were by him fulfilled, he had nothing to sue for. This defense is wholly untenable.

2. So far as the execution and effect of a quitclaim deed in pursuance of the alleged agreement of 1878 is concerned, it is sufficient to say the proof shows that no such deed was ever executed.

3. As to the position that Reuben Shotwell can now be compelled to specifically perform that agreement, it is a perfect answer that it was a clear breach of trust on the part of the trustee Bourbon Shotwell, Sr., to make such an agreement, or to execute the deed which he did, to Reuben Shotwell, attempting, in direct violation of the testator's purpose, to vest Reuben, before his reformation, with the fee to any part of this estate. As well said by one of the learned counsel for the appellees: "It must be borne in mind that Bourbon, the trustee, owed a duty to his creator, the deviser in the will, as well as to Reuben, the cestui que trust; and that duty was to protect the corpus of the estate from being squandered by Reuben. And when, in his answer, he sets up a conveyance in fee simple to Reuben of any part of this trust estate, he then and there declares his own breach of trust. It was incompetent for him to take from Reuben or convey to Reuben any part of this trust estate by partition, exchange, or otherwise." It is not for him to say now that Reuben was sui generis, having accepted a trust for him, bottomed on the absence of "fitness to care for property," and declaring the testator's purpose and his duty, to see that he get nothing but support out of the income till reformation; and, if he did not reform, that then his children were to take the fourth interest in fee. The agreement was wholly inequitable. It cannot stand the scrutiny of a court of conscience. He was to accept Bourbon's interest in 200 acres for his interest in 8,000 acres. Courts of conscience do not lend their aid to the specific enforcement of alleged contracts violating solemn trusts.

4. We think, on a full and careful review of all the evidence adduced in support of the alleged estoppel, that the testimony falls far short of sustaining the defense in favor of any of the appellants. The deed to Walter Shotwell from Bourbon Shotwell, Sr., and A. L. Shotwell, was indisputably made, as shown by Bourbon Shotwell's own letters, for the double purpose of defeating creditors and of divesting the title of Reuben's children, in the very face of the duties imposed by the trust. We do not care to quote these extraordinary letters. The double purpose is shown beyond all doubt by the letters. The heirs of Bourbon Shotwell, Sr., themselves repudiated it, and took as such heirs, ignoring it, and so partitioned the estate. And what was in contest in the attack on Walter Shotwell's will was the said share Walter got by said partition as his father's heir, nothing being claimed by him under the deed

aforesaid from his father to him. And whatever advice Reuben gave in the will contest was before he had complied with the conditions of his father's will, and before, consequently, he had any vested interest in the said one-fourth of the estate devised by his father; and that interest of Walter's so involved in the said contest of his will was not identical at all with the interest Reuben is here asserting. Whether the parties to that contest actually knew or not, they were charged by the record of the will with the knowledge of its contents, aside from the testimony that they did actually know. It seems clear from the testimony—which is competent—that nothing was done by Reuben, on the facts in this case, in view of the peculiar nature of his contingent estate, which estops him to assert his now vested right. Whether these appellants knew actually the contents of this will, recorded in the chancery clerk's office in this city, and chose to take the risk of Reuben's never reforming or not, they must be held bound by the record of the will to a knowledge of its contents. The exercise of the slightest degree of ordinary care and diligence would have disclosed the whole situation, and they were bound to the use of ordinary diligence in ascertaining the facts which the record of the will, recorded in the chancery clerk's office in this city, disclosed. And this it was their folly not to have done, if it be conceded that they did not actually know the fact of the existence of some will of Robert Shotwell, and its contents.

We think Stacy should have been made a party. It does not appear that he ever conveyed to Reuben Shotwell. In order that the final decree fixing the rights of the parties may properly ascertain and define the shares in the land, or its proceeds, if sold for division, he should be before the court; and for this error we feel bound to reverse the decree, that this error may be corrected. We approve the action of the chancellor as to the rents and taxes and improvements. Well-settled principles sustain his action. We confess our inability to understand the action of the chancellor in setting apart a definite share in the lands to the appellant Millsaps. The decree adjudges him entitled to a named proportion in all the lands involved, being apparently the whole interest of Bourbon Shotwell, Jr., in his father's estate. Now, what Bourbon Shotwell, Jr., gave Millsaps was a trust deed on the precise land that was set apart to him under the partition deed executed between the heirs of Bourbon Shotwell, Sr. Those lands are specifically described, and were bought in by Millsaps, and a deed made to him therefor by the commissioner. How, because Millsaps got a deed to these identical lands, the chancellor could set apart to him, not those lands, but Bourbon Shotwell's interest in the lands theretofore attempted to be conveyed to Walter Shotwell, and also in the 200 acres Reuben brings into hotchpot, we do not understand. As Bour-

bon Shotwell, Jr., prosecutes no cross appeal, we only call attention to it that, as in Stacy's case, the court may so proceed as to fix accurately the title and the rights of the parties. We think appellants should pay all costs, since they do not, in their answers, show Stacy owned an interest.

BARTON v. NEW ENGLAND MORTG. SEC. CO.
(two cases).

(Supreme Court of Mississippi. March 13, 1896.)

SPECIFIC PERFORMANCE—PREMATURE SUIT—PRINCIPAL AND AGENT—AUTHORITY.

1. A suit to specifically enforce an agreement to convey before the time when, by its terms, the conveyance was to be made, is premature, though the vendor has conveyed the lands to third persons having notice.

2. A landowner advertised the lands for sale, and requested prospective purchasers to write to his attorney. The attorney wrote to a third person, quoting a price, and asking him what could be done towards a sale, and to rent the lands, if no sale could be made. Receiving an offer from such third person, he answered him that he had written the owner as to the sale on the terms proposed, and, later, that the owner would take a certain price, and might give time for part of it, but that he could not say positively that he would do this; and to get a proposition near the figures given, and the attorney would submit it. *Held*, that the third person had no authority to contract on behalf of the owner for the sale of the lands.

Appeals from chancery court, Chickasaw county; Baxter McFarland, Chancellor.

Two suits by Charles Barton against the New England Mortgage Security Company. There were decrees for defendant, and plaintiff appeals. Affirmed.

A bill was filed in the chancery court by Charles Barton against the New England Mortgage Security Company alone, on the 30th of August, 1895. The purpose of the bill was to enforce the specific performance of a contract for the sale of lands described in the bill. A written contract was filed with the bill as an exhibit. This contract was dated August 27, 1895, and appended to it was the signature of the defendant, per T. J. Buchanan, agent. By this contract the defendant was to sell complainant a plantation of 768 acres, as described in the bill, for \$7,800, payable, \$300 cash, and \$1,700 January 1, 1896. The defendant was to execute a warranty deed to complainant on the payment of the \$1,700 on January 1, 1896. The other payments were to be made in 10 equal payments. The bill alleged that defendant had bargained said land to some parties to complainant unknown, since entering into this contract, and now refused to carry it out; that complainant was desirous of carrying out the contract; and prayed specific performance. Defendant demurred to the bill, setting up that the bill on its face showed impossibility of specific performance, as it showed defendant had parted with the land, and because

the bill was prematurely brought, as no deed could be called for, under the contract, until January 1, 1896. This demurrer was sustained, on December 10, 1895, and complainant was given leave to amend. He filed his amended bill, December 14, 1895, which stated substantially the same facts set out in the original bill, and, in addition, alleged that defendant, since making the contract, had sold the land to others, naming the parties, who knew of said contract when they bought, making the parties named parties to the bill. The same demurrer was sustained to this bill. Complainant was allowed five days to file a supplemental bill, but the supplemental bill was not filed, but in April, 1896, an original bill was filed against all the defendants to the other bill, alleging substantially the same facts as in the other bill. Defendant answered this bill, denying all the material allegations, and pleading the pendency of the other case, about the same subject-matter. Complainant then dismissed the suit as to all the defendants except the New England Mortgage Security Company, and asked for a jury to assess damages, which was denied. On the trial it was denied by defendant that T. J. Buchanan had authority to make a contract of sale of the land. To show that Buchanan had authority to make a contract of sale on the terms and prices fixed in the contract, complainant introduced a pamphlet styled, "Home, Sweet Home," issued by defendant, and some letters to Buchanan written by their attorney at Birmingham, Ala. The pamphlet contained a list of lands owned and for sale by defendant in Alabama and Mississippi, including the lands in controversy, under the following heading: "List of Farmers' Homes in Alabama and Mississippi Now Offered for Sale by the New England Mortgage and Security Co. J. F. F. Brewster, president; J. P. Shannon, treasurer, Boston, Mass.; Caldwell Bradshaw, attorney, Birmingham, Ala. N. B. The company has acquired, through its loan business, the farms herein described, and, as it is not a real-estate company, will dispose of these lands at a sacrifice, for cash, or will sell on long time and easy payments. See inside cover. The following lands are now on the market at prices within the reach of all. The company will sell for cash or on time, to suit purchasers, not exceeding ten years. It has adopted the rent and sale contract or lease system, by which any one may own his own home on payments little in excess of the rental value. For more particular and detailed report as to cultivation, etc., address the undersigned. These properties are selling rapidly, and all questions touching title and points of interest to purchasers will be promptly answered. Before visiting the section, get full information as to most available points by rail and names of parties in the locality who will show you the lands. Address all communications to the company at Boston, or to Caldwell Bradshaw, attorney,

Birmingham, Ala." The following letters were introduced, written to T. J. Buchanan:

"Birmingham, Nov. 15th, 1894. Further, in reply to yours on 9th, in re sale of G. W. Wall place, and that part of the Fanny G. Sykes place in Chickasaw county, will say that I have a letter from the company stating that they will take \$8 per acre all round for the properties. This amounts to about \$9,500 for the two places. Please take the matter in hand, and see what can be done towards perfecting sale of the property. If you cannot make sale of it, then make the very best rental contract you can for 1895, on the two places. [Signed] Caldwell Bradshaw."

"Birmingham, Ala., Jan. 22nd, 1895. Dear Sir: I have your favor of 19th inst. in re rental of G. W. Wall place, part of it to Murry and Dobbs, and note your reason for holding off from the rental, which I think is very good. If you can sell the Fanny Sykes place at \$8 per acre, and get one-fourth cash, balance as stated, and 7 per cent. interest, I think the company would accept the proposition; also I am inclined to think that the sale of the 80 acres, part of the Wall place, would be a capital plan, and have written to the company to-day to know whether or not they would allow us to make the sale on the terms outlined in your letter, and, if so, we can close it out at an early date. In the meantime, I would ask you to furnish us with the names of your proposed purchasers, and I will investigate the question of rental, to see that that does not conflict with a sale, and, if it is possible for us to close out the sale of the two places, let's do it. This would put us in shape so that I could have papers prepared at once, and forward to you on receipt of reply from company. [Signed] Caldwell Bradshaw."

"Birmingham, Ala., July 5th, 1895. Dear Sir: In reply to your favor of 30th ult., in matter of price of the Clark place, by which I suppose you mean what we call the 'G. W. Wall Place,' will say that I have the company's last figures on this property at \$6,000, and, if the purchaser will pay a reasonable amount in cash, I think they will sell it on good long time, for balance ten years, if necessary, at six per cent. interest. I am not authorized, however, to say positively that they will do this, but it is my judgment that they will. If you get a proposition anywhere near these figures, then let me have it, and I will submit it, and make sale, if it can be done. [Signed] Caldwell Bradshaw."

A letter from the defendant company to Caldwell Bradshaw, dated January 25, 1895, was also introduced. In this letter they stated they would take \$8 per acre all round for the G. W. Wall place, and \$11 per acre for the Sykes place. In this letter they also agreed to cut the places up into lots. Buchanan testified that he made the contract within the terms of the letters between himself and Bradshaw. Bradshaw testified for

defendant that it never delegated its corporate authority to Buchanan, or to any one else, to sign contract for the sale of real estate, and Buchanan had no authority to sign the contract for the company. On final hearing, the bill was dismissed. From that decree, complainant appealed.

Roane & McClellan and Clifton & Eckford, for appellant. Gilkeylen & Leftwich, for appellee.

WHITFIELD, J. These two cases are submitted, and have been carefully considered, together. We approve the action of the chancellor on the pleadings and on the merits. On the merits, the principles announced in *Everman v. Herndon*, 71 Miss. 823, 15 South. 135, are decisive against appellant. The decree in both appeals is affirmed.

(76 Miss. 515)

GARNER v. STATE.

(Supreme Court of Mississippi. March 27, 1896.)

JURY—CHALLENGE FOR CAUSE—HOMICIDE—EVIDENCE—DECLARATIONS OF WIFE.

1. A juror, on a trial for murder, swore that he was not related, by marriage or otherwise, to the deceased, and was accepted by defendant. After the jury had been sworn, it was ascertained that he was so related, and defendant moved for leave to withdraw his acceptance, and to challenge the juror for cause, which the court overruled. He then moved for leave to challenge peremptorily, which the court denied. The court had sustained two challenges for cause, made by the state, to veniremen, because of their relationship to the accused. *Held*, that the defendant's motion was improperly denied.

2. On trial for murder, on cross-examination, defendant's wife denied having told a certain person that her husband had killed the deceased. Afterwards such person testified that he heard of the murder at the time when the wife of the accused, her daughter, and himself alone were present. There was no evidence that either the wife or the daughter witnessed the crime. *Held*, that the evidence was improperly admitted, as in fact stating to the jury that the wife or daughter told him that accused committed the murder.

Appeal from circuit court, Pike county; W. P. Cassidy, Judge.

Tom Garner was convicted of murder, and appeals. Reversed.

Mixon & Latterhos and Will A. Parsons, for appellant. Wiley N. Nash, Atty. Gen., for the State.

WOODS, C. J. Upon the impaneling of the jury, one S. O. Boyd was examined upon his voir dire touching his qualifications as a juror, and swore that he was not related, by marriage or otherwise, to the deceased or to the accused, and thereupon the said Boyd was accepted as a juror by the state and the defendant. After the panel had been completed, and the jury specially sworn, and before any other step had been taken in the cause, the fact was ascer-

tained by the defendant that a son of the said Boyd had married a niece of Scott Causey, the husband of Mrs. Maggie Causey, for the murder of both of whom the defendant had been indicted, and for the murder of the latter was then to be tried. The defendant then moved the court for leave to withdraw his acceptance of said Boyd as a juror, and to challenge him for cause. The state formally admitted the facts set out in the motion, but the court overruled the motion. The defendant, having not exhausted his peremptory challenges, renewed his motion, and prayed leave to challenge Boyd peremptorily; but this was by the court likewise denied, and this action of the court is assigned for error.

It is important to note, in this connection, that in impaneling the jury the court sustained two challenges for cause, made by the state, to two veniremen, because of their relationship to the defendant. One of these veniremen testified that he was a fifth cousin of the accused, and the other testified that he had been informed by some person, that day, that he was a third cousin of the accused, but that he himself did not know whether he was any relation of the defendant. As the prime object in impaneling a jury, and especially in trials for capital offenses, is to secure a fair and impartial body, to which the momentous issue is to be submitted on the facts, the scrupulous regard paid by the court to the right of the people to have a fair and wholly impartial jury, in sustaining the challenges of the state to the two veniremen indicated, is not open to criticism; and if the challenge of the defendant to Boyd had been made when he was examined on his voir dire, we cannot doubt that the challenge would have been allowed. But, under the circumstances, the power of the court to allow the defendant's challenge to the accepted juror, Boyd, is clear, and should, we think, have been exercised as asked. The power existing in the court, when the motion was made, to set aside the defendant's acceptance of the juror, and to allow the challenge, either for cause or peremptorily, following its former rulings on the state's challenges of the two other veniremen who were related, or supposed, in one instance, to be related, to the accused, the defendant's motion should have been sustained, and he permitted to challenge the obnoxious juror, who had been accepted in ignorance of his relationship to the deceased and her husband, and because he had answered that he was not related to them, by marriage or otherwise. In the case of *Lewis v. State*, 9 Smedes & M. 115, it is said, with approval, that the rule is stated to be that an incompetent juror may be set aside at any time before evidence has been introduced; and in the case of *McGuire v. State*, 37 Miss. 369, the same rule is distinctly laid down in a case involving this identical question. While the sufficiency of an objection to a juror is a matter resting, for the most part, in the sound discretion of the court, yet, where there are reasonable grounds to suspect that

the offered juror will act under some undue influence or prejudice, especially in capital cases, he should be excluded from the panel, as incompetent. *Id.* Under all the circumstances adverted to by us, it appears to our mind that the defendant's motion should not have been denied, and that his challenge to the juror Boyd should have been allowed.

On the cross-examination by the state of the wife of the defendant, who was introduced on his behalf, she was asked if Henry Farnham came to her house on the morning in which the murder of Causey and his wife occurred, to which she answered: "Yes, sir; he came there about 11 o'clock." She was then asked if she and her daughter were not crying when Farnham came up, and if she did not then tell Farnham that her husband had been over there (at Causey's), and had killed Scott and Maggie Causey; and she denied the crying, and denied the alleged conversation. When Farnham was subsequently introduced as a witness for the state, and was asked as to the crying of Mrs. Garner and her daughter, and as to the alleged conversation, which had been denied by Mrs. Garner on her cross-examination by the state, the jury first being withdrawn, he testified that Mrs. Garner and her daughter were on the gallery of the house, and crying, and that Mrs. Garner told him that her husband had gone over there (to Causey's), and had killed Scott and Maggie,—Mr. and Mrs. Causey. This evidence the court refused to permit to go to the jury, and properly. Afterwards this witness was permitted to testify, over the objection of defendant, that he first heard of the murder about 11 o'clock, on the gallery of the house of the accused, and that Mrs. Garner, her daughter, and himself were the only persons present. The inevitable effect of this evidence upon the jury was to satisfy its members, if believed by it, that Mrs. Garner or her daughter told the witness that the defendant committed the murder, though there is no pretense, even, that either Mrs. Garner or her daughter witnessed the horrible crime, and that, by indirection, the court permitted that to be done which it had correctly held could not be done directly. That the evidence was incompetent is manifest. Applying the infallible test laid down by this court in the elaborate and exhaustive opinion delivered in the case of *Williams v. State*, 73 Miss. 820, 19 South. 826, the error in admitting this evidence of Farnham is palpable. "The test of whether a fact inquired of in cross-examination is collateral is this: Would the cross-examining party be entitled to prove it, as a part of his case, tending to establish his plea." Surely no one will contend that, if Mrs. Garner had been called as a witness for the state, the prosecuting attorney should have been allowed to ask her if she had not told Farnham that her husband had murdered the Causeys. It must be borne in mind, too, that no cautionary instruction touching this damaging evidence was given the jury, and they were thereby left free to

regard it as criminating evidence against the accused. That its effect was immensely injurious to the defendant cannot be doubted.

For the errors indicated, we feel bound to reverse the judgment. Reversed and remanded.

(76 Miss. 496)

STATE v. QUINTINI.

(Supreme Court of Mississippi. March 27, 1899.)

CRIMINAL LAW—JUSTICES OF THE PEACE—COMPLAINT ON INFORMATION AND BELIEF.

1. Under Ann. Code, § 2421, providing that, on presentation of an affidavit of the commission of a crime of which a justice of the peace has jurisdiction, he shall try the case, an affidavit of a constable, made "on information and belief," justifies the arrest and trial of an accused.

2. An abbreviation of the name of the month and of the name of the state in an affidavit of the commission of a crime, though objectionable, may be cured by amendment.

Appeal from circuit court, Hancock county; T. A. Wood, Judge.

A. Quintini was convicted before a justice of the peace of assault and battery, and appealed to the circuit court. From a judgment quashing the affidavit and discharging defendant, the state appeals. Reversed.

Wiley N. Nash, Atty. Gen., for the State.

TERRAL, J. A. Quintini was tried and convicted before Edwin Lalzer, a justice of the peace of Hancock county, of an assault and battery upon Henry Bosetto, and fined \$5, from which conviction he appealed to the circuit court of said county, where, on the motion of the said Quintini, the affidavit was quashed, and the defendant discharged. The affidavit is in these words: "The State of Mississippi, Hancock County. Before me, Edwin Lalzer, a justice of the peace for the 5th district of said county & state, Albert J. Carver, constable, on information and belief makes oath that Augustine Quintini did on the 11th day of Aug., 1898, in the 5th district of Hancock county, Miss., within the limits of said justice of the peace jurisdiction, and within the limits of the city of Bay St. Louis, assault and beat Henry Bosetto, against the peace and dignity of the state of Mississippi. Albert J. Carver, Constable. Subscribed & sworn to before me this 12 day of Aug., 1898. Edwin Lalzer, J. P." The grounds of the action of the learned circuit court are not given in the judgment, and we are left to conjecture their nature. The abbreviations of the names of the month of August and of the state of Mississippi are objectionable; but, if the motion was sustained on that ground, the state should have been given leave to amend the affidavit. The affidavit expresses the charge of the crime in the words of the best authors, and concludes

as required by the constitution, and we find no objection to it on that account.

The brief of the attorney general says that he is informed by the district attorney that the affidavit was quashed because it was not made on the personal knowledge of the affiant. The common law was ever jealous of the personal rights of the subject; and its principles in this respect are embodied in section 23 of the constitution, which secures all persons from arrest, unless on probable cause, supported by oath or affirmation. In reference to prosecutions before justices of the peace, section 27 of the constitution provides that the proceedings in such cases shall be regulated by law; and section 2421, Ann. Code, reads that, "on affidavit of the commission of a crime of which he has jurisdiction, lodged with a justice of the peace, he shall try and dispose of the case according to law." By the general principles of the common law, every accusation of a crime against an accused person must be charged directly and positively, stating the nature and cause of the accusation; and our bill of rights does not impair these common-law principles. But neither the constitution nor section 2421, Ann. Code, requires the affidavit to be sworn to by one having personal knowledge of the facts stated in it; nor do we see any reason for supplying such omission on the part of the legislature. The improbability of finding a person who knows all the facts of any crime, and who, if knowing them, would be willing to charge them in such language as imports undoubted guilt, possibly induced the legislature not to require personal knowledge in the affiant; and that the legislature did not intend the affidavit to be made on personal knowledge is evidenced by the repeated attempts of that body to have misdemeanors prosecuted before justices of the peace, instead of before the circuit courts, as by the act which authorized grand juries to refer misdemeanors presented to them to the proper justice of the peace of the county for trial. A person may be arrested only on probable cause; but probable cause, in law, is a charge of crime made on oath, without regard to the fact whether the oath is made on personal knowledge, or upon information and belief merely. By common law, certain officers made information without oath, and such unsworn information was probable cause by that law. Here Carver was a constable, a sworn officer of the law; and his affidavit, made upon information and belief, charging Quintini with a crime, was probable cause, and constituted a valid charge against Quintini for his arrest and trial. *State v. Davie*, 62 Wis. 306, 22 N. W. 411; *Clark, Or. Proc.* § 6; *Blish, Cr. Proc.* § 230; *Bigham v. State*, 59 Miss. 529; *Coulter v. State*, 75 Miss. 356, 22 South. 872. We are of the opinion that the circuit court erred in quashing the affidavit in this cause, and in discharging the accused.

BILOXI CANNING CO. v. STILLWELL-BIERCE & SMITH-VAILE CO.

(Supreme Court of Mississippi. March 27, 1899.)

SALES—ACTION FOR PRICE—PEREMPTORY INSTRUCTIONS.

In an action for the price of a refrigerating machine, a peremptory instruction for plaintiff is erroneous, where he guaranteed the machine to make an average quantity of ice per day, and there was evidence that it did not do the work.

Appeal from circuit court, Harrison county; T. A. Wood, Judge.

Action by the Stillwell-Bierce & Smith-Vaile Company against the Biloxi Canning Company. There was a judgment for plaintiff, and defendant appeals. Reversed.

Mayes & Harris and E. M. Barber, for appellant. White & Neville, for appellee.

TERRAL, J. The appellee, the plaintiff below, sued the defendant company, in the circuit court of Harrison county, in an action of assumpsit for the unpaid purchase price of one "Victor Ice & Refrigerating Machine," and, by means of a peremptory instruction, recovered a judgment therein for \$3,682.15. The defendant company pleaded that it had not accepted the ice and refrigerating machine, and especially that the guaranty of the capacity of said machine made by plaintiff to the defendant had not been fulfilled. The contract, which was in writing, evidenced that the plaintiff had guaranteed the machine to make on an average four tons of ice per day of 24 hours of continuous operation, and to cool two storage rooms, 12 feet wide, 12 feet long, and 11 feet high, to 36 deg. Fahrenheit; and the defendant offered evidence tending to show that the machine would not do the work guaranteed, and that the ice produced, through defects in the vats, was not merchantable, and on these accounts it insisted that it had not accepted said machine, and that at least a deduction should be made from the purchase price by reason of the breach of the warranty before stated. And in this contention we think the defendant is sustained by the principles of law governing such subjects, and that the instruction given was error. Reversed and remanded.

(76 Miss. 545)

YAZOO & M. V. R. CO. v. ADAMS, State Revenue Agent.

(Supreme Court of Mississippi. March 27, 1899.)

RAILROADS—TAXATION—EXEMPTIONS—LEASED LINES.

1. Laws 1882, p. 888, § 8, exempts the Y. & M. V. R. Co. from municipal taxation on condition that it construct its road to the Mississippi river, in order to induce the investment of capital in the construction of a road. Because of the physical difficulty of constructing and maintaining railroads to the Mississippi and other river bottoms, no private company

had been able to establish one. Said company thereafter acquired a completed road to the Mississippi by consolidation with another company. *Held*, that the acquirement of the road by the consolidation did not exempt the company from taxation, a physical construction being required.

2. A city has no power to exempt a railroad company from municipal taxes.

3. A railroad company cannot relieve itself from liability for taxes by leasing its road to another company, which assumes the payment of such taxes.

Appeal from circuit court, Hinds county; Robert Powell, Judge.

Action by Wirt Adams, as state revenue agent, against the Yazoo & Mississippi Valley Railroad Company, for the taxes due the cities, towns, and villages along the line of appellant's road. This is the second appeal of this case. The first appeal (22 South. 824) was by the revenue agent from the judgment of the lower court sustaining a demurrer to the declaration on the ground that by the terms of appellant's charter it was unconditionally and perpetually exempt from municipal taxation. This judgment of the lower court was reversed, and the cause remanded; the court holding that the exemption from municipal taxes was conditioned that appellant should construct its road to the Mississippi river. After the mandate was filed in the circuit court, the declaration was amended so as to cover the taxes for the years 1886 to 1897, inclusive. To the declaration so amended the defendant filed three pleas: (1) The general issue; (2) that it had constructed its road to the Mississippi, in this: that it had, by consolidation with the L. N. O. & T. R. Co. reached the Mississippi river at points where said last-named road touched the same; (3) an exemption granted by the board of mayor and aldermen of the city of Jackson from the municipal taxes of said city. Demurrers were filed to the second and third pleas, and were sustained by the court. Afterwards appellant filed its fourth plea, setting up that its road had been leased to the Illinois Central Railroad Company, and that under the terms of said lease the Illinois Central had bound itself to pay all taxes; that defendant is exempt from municipal taxation under its charter, and that the power of the legislature to make such exemption was recognized by the supreme court in the Cook Case, 56 Miss. 40; that at various terms bills had been introduced in the legislature seeking to repeal said exemption, but they were not passed, and that said charter of exemption still stands in force. A demurrer was filed to this plea, and was sustained. The case thereupon went to trial on the plea of general issue. A peremptory instruction was given plaintiff, and defendant appeals. Affirmed.

Mayes & Harris, for appellant. Williamson & Potter, for appellee.

WHITFIELD, J. The preamble of the act (Laws 1882, p. 838) under which the exemption here is claimed recites as follows:

"Whereas, the physical difficulties of constructing and maintaining railroads to, across, along or within either the Mississippi, Sunflower, Deer Creek, or Yazoo bottoms or basins, or the other alluvial lands herein referred to, are such that no private company has so far been able to establish a railroad and branches developing said basins and alluvial lands, and connecting them with the railroad system of the country: Now, therefore, in order to induce the investment of capital in the construction * * * of such a railroad," etc., numerous and extraordinary privileges were granted; among others, an exemption from taxation as set out in section 8 of the act, upon the express condition of "the completion of said railroad (that is, the Yazoo & Mississippi Valley Railroad) to the Mississippi river." And yet, without pretense of ever having "completed" the construction of the said railroad to the Mississippi river, it is gravely urged that because the Y. & M. V. R. Co. consolidated with the L. N. O. & T. R. Co., which had bought the N. J. & C. R. R., the exemption had been earned. It ought to be obvious that a paper consolidation is not a completion by physical construction to the Mississippi river. The reasons underlying the exemption—the consideration to the state—are plain, are adverted to in the preamble, and utterly negative the claim of appellant. *Adams v. Railroad Co.*, 75 Miss. 275, 22 South. 824; *Railroad Co. v. Thomas*, 65 Miss. 562, 5 South. 108, affirmed in 132 U. S. 174, 10 Sup. Ct. 68. The city of Jackson had no power to grant the exemption claimed. There is no merit in any of the contentions. Affirmed.

(75 Miss. 863)

McGUIRE et al. v. UNION INV. CO. et al.
(Supreme Court of Mississippi. April 3, 1899.)

TAXATION—ASSESSMENT ROLL—TIME FOR FILING.

Code 1892, § 3783, provides that a failure to return an assessment roll on the day named therefor shall not affect the validity of the assessment, if it is approved by the board of supervisors. Section 3784 provides that the board may extend the time for filing such return one month, if it appear that the assessor is capable, and good cause be shown for the extension, but that this may be done only when it is manifest that the assessment will be completed within that time. *Held* that, where the board extends the time for the return by a delinquent or incapable assessor for two months, its approval of an assessment then returned, without giving taxpayers an opportunity to object, is invalid.

Appeal from chancery court, Bolivar county; A. H. Longino, Chancellor.

Bill by O. G. McGuire and others against the Union Investment Company and others. The bill in this case was filed to cancel a cloud upon the title to land. It alleges that the land was sold in 1894, for the taxes of 1893, and struck off to the state, and that complainants purchased from the state in 1896. They ask for the cancellation of defendants' title as a cloud upon their title.

Defendants answered the bill, denying all the material allegations thereof. They charge that the sale made by the tax collector to the state of the land was null and void, and that the assessment roll under which the sale was made was null and void, and did not authorize a sale of said land for taxes, because it was not completed by the assessor and delivered to the clerk of the board of supervisors on or before the first Monday of July, 1892, as required by law, and the time for the completion of the roll was not extended by the board at its July, 1892, meeting, but the board of supervisors, instead of ordering a new assessment at its August meeting, as required by law, extended time to the assessor to complete the roll, which should have been filed on the first Monday in July, 1892, to the 5th day of September, 1892; that said roll was filed on the 5th day of September, and was approved by the board on the third day after it was filed, and the taxpayers had no opportunity to file objections thereto. The orders of the board of supervisors were made exhibits to the bill. From a decree denying the relief sought in the bill, and dismissing it, and taxing defendants with the costs, complainants appealed, and the defendants prosecuted a cross appeal. Reversed as to defendants.

Sillers, Jones & Owen, for plaintiffs.
Moore & Clark, for defendants.

WOODS, C. J. "The failure of the assessor to certify and swear to his assessment roll, or to return it on the day named for its return, shall not affect the validity of the assessment, if approved by the board of supervisors, or by operation of law," is the language of section 3783, Code 1892. Under this section, it is contended for appellant that the failure to file the roll on or before the first Monday in July, 1892, and the further failure to file the roll on the first Monday in August of the same year, and a filing on August 17th, under an order made by the board of supervisors allowing the assessor until first Monday in September, and its approval by the board of supervisors on that day, without opportunity to taxpayers to file objections thereto, does not invalidate the assessment. But this view is maintainable only when section 3783 is wrested from all the other provisions of the Code, which constitute one whole harmonious scheme of assessments. Looking at the succeeding sections of the Code on this subject, we find that, by section 3784, the board of supervisors at its July meeting may extend the time for the completion and return of the assessment until the first Monday in August, if it shall then, at the July meeting, be found that the assessor is capable, and that good cause be shown for the failure to return the assessment roll at the July meeting. But the section then concludes: "This, however, shall not be done unless it be manifest to the board that the assessment will be completed within that time; otherwise it shall proceed,

under the next succeeding section, to order a new assessment." Section 3785 requires the board of supervisors, at its July meeting, to examine the assessment rolls returned by the assessor, and then determine if a new assessment be necessary; and if the assessor be found to be incapable, or if his assessment be found to be so imperfect that it ought not to be approved, the board may appoint some suitable person, other than the assessor, to make the assessment, and return it as speedily as possible, and within such time as the board of supervisors may prescribe. Section 3786 requires assessments made by a person, other than the assessor, appointed by the board for that purpose, to be returned, if practicable, by the first Monday in September; and, when so made and returned, the board shall immediately assemble, receive, and examine the same, and appoint some early day to hear and determine objections thereto and to publish notice thereof. There are other sections constituting important parts of this one entire and harmonious scheme for making assessments; but those we have referred to are sufficient to show a total departure by the board, in this case, from the law applicable.

If the board of supervisors can, in the face of the plain requirements of the statute, extend the time for the completion and return of his assessment by a delinquent or incapable assessor until the first Monday in September, what will prevent its extending the time in a like case until November or December? And if the board can approve an assessment made, as the one in hand was, in utter violation of law, without appointing an early day to give taxpayers notice, in order that they may make objections, where shall the limit to its exercise of arbitrary power be drawn? There is a vast difference between a failure to return an assessment roll on the very day named for its return, followed by compliance on the board's part with all the other requirements of law, and a failure to return for two months, and an approval, without opportunity to taxpayers to make objections, on the very day fixed by the board's order for its return. The statute was designed to cure trifling and immaterial delay in returning the assessment, but surely not to authorize assessors to return and boards to approve at their unrestrained pleasure at any time. This question, in a case resting upon the same facts that are disclosed in the present appeal, was decided by us adversely to appellants' contention in *Reinach v. Security Co.* (at the spring term, 1898, of this court), 23 South. 1020, but the case was then thought by us to be so plain as not to require a written opinion. We are persuaded that the decree against the appellees for costs was the result of inadvertence, and the same is set aside and reversed, and the appellants are taxed with costs in the court below and here. With this trifling exception, the decree of the court below is affirmed.

(51 La. Ann. 636)

JONES et al. v. JONES et al. (No. 12,847).¹
(Supreme Court of Louisiana. June 24, 1898.)

PAROL EVIDENCE—PRESCRIPTION OF TAX-TITLE—
ESTOPPEL—PLEADING.

1. The familiar rule of evidence that parol testimony is inadmissible to affect, alter, or change title to immovable property, is given interesting application herein.

2. Likewise the rule of law relating to the prescription of tax titles and acts of sale translatif of property, and relating to estoppels by conduct as affecting minors after becoming of age.

3. Any creditor having an interest that prescription should be acquired by his debtor may plead it.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Concordia; J. L. Dagg, Judge.

Action by C. B. Jones and others against Laura Jones and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Lazarus, Moore & Luce, for appellants.
Elam & Dale, for appellees.

BLANCHARD, J. In August, 1889, Mrs. Laura Jones, widow of Charles Jones, deceased, contracted a loan of \$13,000 from the Union Mortgage Banking & Trust Company, Limited, for which she executed her several promissory notes, and to secure payment thereof mortgaged, by public, authentic act, the lands, with improvements, farming implements, etc., constituting the Elmly plantation, situated on Black river, in the parish of Catahoula, and containing 2,705.69 acres, more or less. The earlier interest notes appear to have been paid, but there was default in the payment of the later ones, as well as in the one covering the principal of the indebtedness (\$13,000), which matured August 14, 1894. The mortgage company took out executory process to enforce its mortgage rights. The sale of the property was arrested by injunction invoked by the mortgagor on grounds setting forth both the nullity of the mortgage and the informality and illegality of the foreclosure proceedings. The trial of this injunction suit resulted in a judgment in favor of the defendants, rejecting plaintiffs' demand, dissolving the writ, and directing the sheriff to proceed with the execution of the writ of seizure and sale. No appeal appears to have been taken from this decree. The sheriff proceeded with the execution, and readvertised the property for sale on January 2, 1897, when he was again arrested by injunction, sued out by C. B. Jones and F. S. Jones, plaintiffs herein. They are sons of Mrs. Laura Jones by her marriage with Charles Jones, and, alleging themselves to be forced heirs of the latter, claim that his interest in the property was never legally divested, and that at the time their mother contracted the mortgage under which the Elmly plantation was seized they (plaintiffs) were, as heirs aforesaid of their father, owners of

¹ Rehearing denied March 7, 1899.

an undivided one-half interest in the property, and hence their right to arrest the sale by injunction.

We condense, from their petition, the case of these plaintiffs as follows: Charles Jones died in Catahoula parish in 1870, leaving an estate valued at more than \$30,000. His succession was open, and a paper purporting to be a last will and testament in olographic form was admitted to probate, R. H. Cuney recognized and confirmed as executor thereunder, and placed in possession of the succession property, and inventory and appraisal was made; but the same has disappeared, and no record thereof can be found in the clerk's office. Mrs. Laura Jones, their mother, was, in April, 1870, confirmed as natural tutrix of plaintiffs, they being minors at that date, and R. H. Cuney was appointed under-tutor, though it is denied that he ever took the oath of office as such; and it is charged that the tutrix failed to cause an inventory of their property to be taken and recorded as required by law, and because of this neglect her appointment became null and void. That in October, 1870, their mother, acting as agent and attorney in fact of Rosa and Ella Jones, major heirs of Charles Jones, and in her pretended capacity as natural tutrix of plaintiffs, instituted suit against Cuney, executor, attacking the will of Charles Jones as void, and praying to be placed in possession of the property of his estate in her said capacity as agent and tutrix. That this suit resulted in the validity of the will being maintained, but declaring that by its terms the seisin of the estate did not vest in the executor, who was ordered to deliver over to Mrs. Jones, as agent and tutrix, all of the succession property. That their mother, pursuant to said decree, took possession and control of the property, to wit, the Elmly plantation and its appurtenances; and that, in consequence, though not lawfully qualified as tutrix, she became subject to all the obligations as such and as negotiorum gestor. That in April, 1871, their said mother, in her own name and right, instituted suit against Cuney in his capacity as executor of Charles Jones, deceased, and as under-tutor of plaintiffs, and against Rosa and Ella Jones, major heirs of Charles Jones, in which she prayed to be recognized as sole owner of the Elmly plantation, and for the setting aside and revocation of all acts and things that had been done militating against her claim of ownership. That in this suit the court decreed a certain judgment of separation of property rendered in the Fifth district court of New Orleans in March, 1849, between Laura and Charles Jones, dissolving the community between them, to be void; also that the sale of an undivided half interest of said Elmly plantation under said judgment, at which Mrs. Jones became the purchaser, was likewise void; and that the subsequent acquisition by her from William Dunbar (co-owner) of the remaining half of the plantation was a community ac-

quisition; also that the sheriff's sale, in March, 1860, at which Charles Jones acquired title to the Elmly plantation, which had been seized in satisfaction of a judgment obtained at the suit of Lalande against Mrs. Laura Jones, was void; and, lastly, the court decreed that the original sheriff's deed to Mrs. Jones of an undivided half of the property should stand as a *dation en paiement*, and the other half be recognized as the property of Charles Jones. That, so far as they (plaintiffs herein) are concerned, the judgment in the suit last mentioned is void, for the reason that Cuney, who was cited to represent them therein as under-tutor, was not such, because never qualified, and that all acts done by him as under-tutor and by their mother as tutrix are void absolutely, because of want of qualification in the one case and of want of registry of extract of inventory in the mortgage book in the other case. That their mother is estopped from pleading the nullity of the judgment rendered by the New Orleans court decreeing her separate in property from their father, and dissolving the community; and that the Elmly plantation, having been lawfully acquired at sheriff's sale in execution of a judgment against her, the same was, at the death of their father, his separate property, and descended to his heirs in full fee simple. That the purchase of the property at tax sale in November, 1872, by C. J. Boatner was for account of Mrs. Laura Jones as the agent of the major and tutrix of the minor heirs of Charles Jones, and this was later shown by the transfer of the title by Boatner to Mrs. Jones; and, further, that the tax adjudication to Boatner was, any way, void because of want of previous demand for payment of the taxes, and because of insufficiency of description to support the sale of the property. That the transfer of the title by Boatner to Mrs. Jones was void because at the time she was acting as the tutrix and legal representative of plaintiffs, and, though she had failed to qualify according to law, was disqualified and incapable of acquiring an adverse interest in property belonging to them. That while C. B. Jones, one of plaintiffs, did, in December, 1872, sell and convey to his mother his interest in the property, the deed was void for want of consideration, and, further, because said Jones was under age at the time, and under the control and tutelage of his said mother and tutrix, and it was only recently that he was made aware of his incapacity to dispose of the property. The mortgage company, the sheriff, and Mrs. Jones are made parties defendant, and the prayer is that the judgment rendered in November, 1891, in the suit of Mrs. Jones against Cuney, executor and under-tutor, and others, be decreed void so far as the same affects them (plaintiffs); that the Elmly plantation be decreed to have been the separate estate of Charles Jones, and to have descended as such to plaintiffs, as his forced heirs, to the extent of an undi-

vided one-half thereof; that the tax sale to Boatner, the conveyance from him to Mrs. Jones, and the pretended sale by C. B. Jones to her be all declared void; and that the injunction against the sale under the foreclosure proceedings be perpetuated, etc. The mortgage company make answer, denying that plaintiffs own any part of the Elmly plantation; aver the same to be the property of Mrs. Jones; that she was decreed owner of an undivided half thereof by judgment rendered in November, 1871, in her suit against Cuney as executor and under-tutor; that in October, 1872, she purchased the interest of Rosa and Ella Jones (her daughters) in the property; that in December, 1872, she purchased the interest of C. B. Jones (her son) in the same; that in November, 1872, the tax collector sold and adjudicated all of the interest of the estate of Charles Jones in the plantation at tax sale to C. J. Boatner, after full compliance with all legal requirements, which title was subsequently duly confirmed to and in said Boatner by the auditor of the state, after expiration of the redemption period; that the auditor's deed had the effect of making absolute and perfect the title of said Boatner, and that all parties are forever estopped from contesting its validity, which estoppel is specially pleaded against plaintiffs in injunction; that in February, 1875, Boatner conveyed the Elmly plantation for good and sufficient consideration to Mrs. Jones, by conveyance valid in form, and translativ of the property; that all of the several transfers, acts of sale, and conveyances were duly and seasonably recorded in the conveyance records of the parish where the plantation was situated; that both plaintiffs knew at the time of this purchase, and made no objection thereto, and have since made none until now, that their mother, ever since her purchases as hereinbefore set forth, has been in the actual possession of the property as owner, resided thereon in that capacity, and the same has been, ever since the purchase from Boatner, assessed for taxation solely in her name, and her possession has been open, constant, and peaceable, as owner, for more than 20 years, to the knowledge and with the acquiescence of plaintiffs, who have permitted her to deal with the public generally as owner, and are thereby estopped from asserting any claim as owners thereof; and that as such owner Mrs. Jones executed the mortgage to the respondent company to secure the large sum of money borrowed by her, which she received and used. Alleging the validity of the tax sale to Boatner, and that of all of the other titles by which Mrs. Jones acquired and holds the plantation, they plead the prescriptions of one, two, three, five, and ten years against any right of plaintiffs in injunction to bring any action at all to set aside the tax sale, or disturb the same on account of any alleged informality, irregularity, or nullity. But, if the tax sale be not valid, reserving all legal rights, they plead

in the alternative the validity and binding force of the judgment rendered in November, 1871, in the suit of Mrs. Jones against Cuney, executor and under-tutor, and others, and interpose the same prescriptions against any action to annul same, as well as the plea of res judicata. They plead the same prescriptions against all demands of C. B. Jones to question or annul the conveyance made by him to his mother. In the event the judgment in the suit of Mrs. Jones against Cuney, executor, etc., aforesaid, be not maintained as valid, they ask that all rights be reserved to them (respondent company) to show that the alleged and pretended purchase by Charles Jones of the property under the judgment rendered in the suit of Lalande against Mrs. Jones was null and void, and did not divest the ownership of Mrs. Jones in the property. They set up that the mortgage company has paid the taxes due upon the property for the last several years, and took subrogation of the state's rights; that plaintiffs have never exercised any ownership of the property; that their claims now set up are pretended and fictitious, asserted merely for the purpose of gaining time on this indebtedness for their mother, whose prior injunction of the sale of the property under the mortgage had been dissolved. Reserving the right to sue upon the injunction bond for damages, respondent company prays for rejection of the demand of the plaintiffs; that Mrs. Jones be decreed the legal owner of the property; that the injunction be dissolved, the company's mortgage recognized, and the sale thereunder to satisfy the indebtedness be allowed to proceed. No answer was filed by the other defendant, Mrs. Laura Jones. Upon the issues presented by the answer of the mortgage company, judgment was rendered rejecting the demand of plaintiffs, dissolving the injunction, and ordering the sheriff to proceed with the execution of the writ. Plaintiffs appeal.

It is not disputed that, from the date of her purchase from C. J. Boatner, Mrs. Jones had actual possession, as owner, of the plantation up to the time it was seized by the sheriff under the foreclosure proceedings instituted by the mortgage company, and cultivated it during the time of this possession for her own account. It also appears that she paid all the taxes on the property, except those paid by the mortgage company, and that the plaintiffs never had possession of the plantation, never enjoyed any of its revenues, were never held or considered during this time as owners of any part thereof, no taxes therefor were ever assessed in their name, and they never paid any taxes. It is in evidence that C. B. Jones was born on December 24, 1852, and F. S. Jones on February 5, 1860; so that, when the former sold his interest in the Elmly plantation to his mother, on the 5th of December, 1872, he had not reached his majority by about one year. He became of age, however, on December 24,

1873, and from that date to the time of the filing of this suit 23 years had elapsed, during all of which time he remained in quiet acquiescence in the sale he had made to his mother. He was, at the time of the conveyance, temporarily sojourning in Europe. He never returned to the plantation, and has never asserted any ownership in it until now. He permitted his act of sale to his mother to stand of record unchallenged. It was, in terms, sufficient to convey the property, and set forth a valuable consideration, which the evidence sustains. There was nothing in the act to indicate he was not 21 years of age when he executed it. At the time C. J. Boatner conveyed the property to Mrs. Jones, after his purchase of it at tax sale, C. B. Jones was more than 21 years of age. His mother was no longer his tutrix then, and over 20 years had elapsed from the date of that sale to the filing of this suit, during all of which time he questioned neither the tax title acquired by Boatner nor the conveyance made by the latter to his mother. Under those circumstances there can be no doubt of the applicability as to him of the prescriptions invoked by the mortgage company. Rev. Civ. Code, art. 3542; *Brownson v. Weeks*, 47 La. Ann. 1042, 17 South. 489; *Vaughan v. Christine*, 3 La. Ann. 328. He is without color of title to any interest whatever in the property. F. S. Jones was 15 years of age when Boatner conveyed the property to Mrs. Jones. But he became of age on February 5, 1881, and from that time down to the filing of this suit, a period of nearly 16 years, he took no steps to contest the title Boatner had acquired at the tax sale, nor the conveyance he made of the property to Mrs. Jones. The tax collector's deed to Boatner states that 20 days' written notice to pay the taxes assessed against the property was given both to R. H. Cuney, executor of the estate of Charles Jones, and to Laura Jones, as agent of the major heirs of the said Jones, and as tutrix of his minor children; and, said parties having failed to pay the same within the legal delays, he proceeded to seize, advertise for sale, and sell the property, to wit, the Elmly plantation, describing it by legal subdivisions, assessed as the property of the estate of Charles Jones, deceased, and the same was adjudicated to said Boatner, who was the last and highest bidder; and to whom formal transfer and conveyance of the property was made and recorded. There is nothing whatever in the act of sale to indicate that Boatner was purchasing for any other than himself. And when the auditor of the state came to confirm the sale, which he did on the 10th of March, 1875, two years and four months after Boatner's purchase at the tax offering, he did so by formal act fully and absolutely conveying the property to him, his heirs and assigns, forever; no mention being made that he had acted for any one else in purchasing at the tax sale. It is true that just before the auditor acted, to wit, on the 2d of February, 1875, Boatner had executed

an act of sale of the property to Mrs. Jones, so that the auditor's confirmation of his title inured to her benefit. In his sale to Mrs. Jones it is recited that he sells, transfers, and delivers to her all his right, title, and interest in and to the property, describing it fully, not warranting the title, but selling such title as he had for the consideration of \$1,250, acknowledged to have been received. Again is no mention made of his having bought the property originally for any one other than himself. This sale was not merely a quit-claim deed. While warranty was excluded, it was a formal conveyance, amply sufficient in terms to transfer the property as from one owner to another. While it was an act under private signature, it was duly acknowledged before the recorder of the parish, and admitted to registry in the conveyance records. Called as a witness for plaintiffs, Mr. Boatner testified that in the purchase of the Elmly plantation at tax sale he acted as the agent of Mrs. Jones and her children; that the taxes were paid out of the proceeds of the sale of succession property, and that in transferring the plantation to Mrs. Jones he received no other consideration than the ratification by her individually and as agent of the succession property he had sold to obtain funds to pay the taxes. Seasonable objection to this testimony was made on behalf of the mortgage company on the familiar ground that parol evidence is inadmissible to affect, alter, or change title to immovable property, that written evidence only can be received to affect the ownership of such property, and that the rights of defendant company could not be jeopardized by such testimony. The objection being overruled, exception was made, and a bill reserved.

There was error in this ruling. The testimony should not have been received as against defendant company, and we can permit no effect to be given to it. There is nothing in the record to impugn the regularity and legality of the tax sale to Boatner. It must stand as a valid acquisition of the property by him. Const. 1868, art. 118. It divested whatever title or interest the estate of Charles Jones and his heirs had in the Elmly plantation, and the prescriptions invoked by the mortgage company in aid of the tax title must be sustained as against both plaintiffs. *Barrow v. Wilson*, 39 La. Ann. 409, 2 South. 809; *Gee v. Clark*, 42 La. Ann. 918, 8 South. 627; *Stille v. Shull*, 41 La. Ann. 816, 6 South. 634; *Stackhouse v. Kuntz*, 41 La. Ann. 415, 6 South. 666; Rev. Civ. Code, art. 3543. Any creditor having an interest that prescription should be acquired by his debtor may plead it. Rev. Civ. Code, art. 3466; *Giddens v. Mobley*, 37 La. Ann. 900; *Larhet v. Hogan*, 1 La. Ann. 330; *Succession of McGill*, 6 La. Ann. 342.

As to the contention of F. S. Jones that his mother's purchase from Boatner must be considered as having been made for, and inuring to, his benefit to the extent of his interest as

held, since she was holding at the time the capacity of tutrix to him, and therefore could not acquire an interest adverse to him, if it have any force at all, it can be asserted only as against her in a contest between them. See Rev. Civ. Code, art. 1146; *Bland v. Lloyd*, 24 La. Ann. 603; *Pagett v. Curtis*, 15 La. Ann. 451; *Carter v. McManus*, Id. 641. It cannot be held to have any force or effect as against the mortgage company, who acted on the faith of the public records, which showed title in Mrs. Jones alone. *F. S. Jones*, by permitting her title from Boatner to remain of record unchallenged for years after he had reached his majority and after his mother had ceased to be his tutrix, is estopped to assert an interest antagonistic to those who had acted on conditions he himself contributed to bring about. *Davis v. Greve*, 32 La. Ann. 420; *Thompson v. Whitbeck*, 47 La. Ann. 49, 16 South. 570; *Lacassagne v. Abraham*, 48 La. Ann. 1160, 20 South. 672; *Chaffe v. Farmer*, 34 La. Ann. 1017.

Judgment affirmed.

(51 La. Ann. 731)

STATE v. HAINES. (No. 13,100.)

(Supreme Court of Louisiana. March 20, 1899.)

RAPE BY HUSBAND—EVIDENCE—SEVERANCE—ABSTINENCE OF JUDGMENT—BILL OF EXCEPTIONS.

1. The husband of a woman cannot himself be guilty of an actual rape upon his wife, on account of the matrimonial consent which she has given, and which she cannot retract.

2. To hold a husband charged with rape upon a woman who is his wife, or to convict him, it must appear that the carnal knowledge of the woman constituting the rape was accomplished through a man other than the husband, and that the husband procured it to be done, or assisted the other in the execution of their common purpose.

3. But where the "other man" in the case, demanding a severance, is tried first, and acquitted, the prosecution against the husband fails, since he cannot be guilty of raping his own wife.

4. The "face of the record" in matters pertaining to motions in arrest of judgment does not mean merely the face of the indictment. It embraces the record of the case as made up to that point.

5. To have a mere note entered on the record, "Bill of exceptions reserved," is, in a criminal case, no bill whatever. And it is not good practice, and not warranted by law, for the clerk only to sign papers drawn as bills of exception. Act No. 113 of 1896 does not authorize it. Bills of exception in criminal trials should be signed by the trial judge.

(Syllabus by the Court.)

Appeal from judicial district court, parish of St. Martin; Felix Voorhies, Judge.

Solini Haines was convicted of crime, and appeals. Reversed.

James E. Mouton and Martin & Voorhies, for appellant. Milton J. Cunningham, Atty. Gen., and James Simon, Dist. Atty., for the State.

BLANCHARD, J. This man was indicted for rape. The woman was his wife. That

he is guilty of a heinous offense against her, a jury of his countrymen have so said. They called it rape, qualifying their verdict, however, so as to "save his neck." From a sentence by the court to imprisonment for life, he appeals. The question presented is unique and novel. Can a husband commit rape upon a woman who is his wife? That he can procure the commission of the crime upon her, or aid and abet its being done, and thus, under our law and criminal practice, make himself liable as principal along with the actual perpetrator, is clear. But in this case the actual perpetrator—the one who in and by his own person had carnal knowledge of the woman, who performed the act of sexual intercourse, and who was named and identified by the prosecutrix as having performed it—was acquitted. Solini Haines, present accused, and Deslré O. Thibodeaux were jointly indicted for rape upon the person of Rose Moreaux. They were properly charged as principals. *State v. Prudhomme*, 25 La. Ann. 522. Thibodeaux demanded a severance, which was granted, and, being tried first, was found not guilty. The indictment did not aver the woman to be the wife of Haines, but proof of this fact abundantly appeared in the preliminary proceedings leading up to the trial, and at the trial itself. The acquittal of Thibodeaux left Haines, the husband, alone charged with the crime of rape, and he was convicted. After acquittal of the man who actually violated the person of the woman, the husband being present, aiding and abetting, is there any longer a basis, a predicate, a foundation, upon which to rest the prosecution of the husband? This is the question in the case. While the husband is indicted as a principal, he could be guilty of the crime of rape, in so far as his wife is concerned, only on the supposition and proof that he procured the offense to be committed upon her by another, or aided or abetted that other in so doing; for, if he were the one who forcibly, and against her consent, performed the sexual act upon her, there was, and could be, no rape. This is so because the husband of a woman cannot himself be guilty of an actual rape upon his wife, on account of the matrimonial consent which she has given, and which she cannot retract. 2 Archb. Cr. Prac. & Pl. 158. Therefore, while this husband is charged with rape on a woman who is his wife, to hold him, or convict him, it must appear that the carnal knowledge of the woman, or act of intercourse with her, was accomplished through a man other than the husband, and that the husband procured it to be done, or assisted the other in the execution of their common purpose. Thibodeaux was "the other man" in this case. There is no pretense that any other than he and Haines are implicated. The woman charges no one else. The act was done at Thibodeaux's house. She was well acquainted with Thibodeaux. She was kept, against her will, at his house, all the day following the night on

which the deed was committed, and then driven by him in a buggy to her father's house, where she made her home. There is thus no question of his identification as the man who was with her husband when the rape was accomplished. The woman's testimony was that the husband held her down by the throat while Thibodeaux performed the sexual act. The husband, then, to be guilty of this charge of rape must necessarily have been the aider and abettor of another. The real principal in a case of this sort is the man who actually performs the act constituting rape, who had carnal knowledge by and through his person with the person of the woman. The husband could not be this actor, for sexual intercourse by him with his wife, even effected by violence, and against her consent, would not, in law, be rape. Not being the principal in this sense, but being present, aiding and abetting, he must be viewed as an accomplice in the crime of another man.

Our law declares that all parties present aiding and abetting in the commission of a felony may be indicted, convicted, and punished as principals. But, while this is so, the common-law distinction is not to be lost sight of. This distinction at common law found expression in degrees of guilt. "A principal in the first degree," says Blackstone (Comm. bk. 4, p. 34), "is the actor or absolute perpetrator of the crime; and, in the second degree, he is who is present aiding and abetting the act to be done." Our law has done away with this distinction so far as charging the crime and punishing it, but the reason upon which it rests remains, and must be applied in a case like the instant one. To make a man a principal in the second degree, there must be a principal in the first degree; that is to say, there must be one who does the act or thing without which there is no crime, and with respect to the doing of which the other, or principal in the second degree, was present, aiding and abetting. If there be no principal in the first degree, no one who does the act or thing constituting the crime, there can, of course, be no principal in the second degree. The principal in the first degree is the one who actually commits the criminal act. By his act he is guilty, without reference to the act of the other, or principal in the second degree; but the latter cannot be guilty of crime unless the former actually perpetrates the act. One cannot be guilty of aiding and abetting the perpetrator of a crime without its first being shown that the crime has been actually committed by another. *Mulligan v. Com.*, 84 Ky. 232, 1 S. W. 417; *Bowen v. State* (Fla.) 6 South. 459; *State v. Antoine*, 42 La. Ann. 945, 8 South. 529. If Thibodeaux performed the act which constituted rape upon the person of the wife of Haines, and the latter was present, aiding and abetting, both are guilty as principals of the crime. But if Thibodeaux, on that occasion, which is the only one charged, did not

do the act, then it was not done, and Haines cannot be convicted. It is true it is for the jury alone to determine whether or not the act was done, and by their verdict on the trial of Haines they said it had been done. By whom? Not by Thibodeaux, for, on the previous trial, the jury said he did not do it; that Rose Moreaux was not raped at the time laid in the indictment by him. If Thibodeaux did not do it, and the husband did, the conviction of the latter is faulty, for the husband cannot, per se, be guilty of raping his wife.

The case stands thus: (1) Thibodeaux exonerated from the charge by the verdict of not guilty as to him. (2) Haines declared, by the verdict of guilty as to him, to have committed the crime of rape upon Rose Moreaux. (3) Rose Moreaux was, at the time of the act, the wife of Haines. We are constrained to hold that this conviction cannot stand. The case as to Haines fell with the acquittal of Thibodeaux. It would be different if Haines had forced Thibodeaux by threats and violence, against his will and consent, to have sexual intercourse with the wife, who, herself, through menace and coercion, exerted on part of the husband, had been forced to yield. In such case the husband alone might well be found guilty of the crime, and his unwilling instrument of its accomplishment acquitted. But the case at bar is altogether different. Everything negatives any suggestion that the jury acquitted Thibodeaux on such ground. It is not pretended that they did.

The motion in arrest of judgment should have been sustained. By the bill of exceptions taken to the contrary ruling, the question herein discussed was properly brought before us. From the record of the case as then made up, from the proceedings of the trial up to that point, appeared the defect, the error, the inherent weakness, the intrinsic cause which vitiated the verdict, and arrested judgment upon the same. The point made by the state that the ruling of the trial judge on the motion in arrest of judgment cannot be reversed because such motion was not based upon errors patent upon the face of the record, is not considered well taken. The "face of the record" does not mean merely the face of the indictment. It embraces the record of the case as made up to that point. "A motion in arrest of judgment is not limited to the indictment, but may be made where there is error in any other part of the record." *Knobloch, Cr. Dig.* pp. 42, 43, citing 1 Bish. Cr. Proc. § 1285, and *Whart. Cr. Pl.* § 759.

We find in this transcript what purport to be bills of exception reserved by defendant to other rulings of the court. One of them is a mere note, made by the clerk, as follows: "Bill of exception reserved," and found at the close of the judge's ruling denying a motion to quash. Two others are drawn in the proper form of bills of exception, but signed

only by the clerk. We take this occasion to say that this is not good practice, and not warranted by the law. There is no sanction for it in Act No. 113 of the Acts of 1896. Bills of exception taken on the trial of criminal causes should be regularly drawn, and either state the facts, or have annexed to them the statement of facts taken down by the clerk pursuant to Act No. 113 of 1896, and should in all cases be signed by the judge, and filed by the clerk. The bill taken to the ruling of the judge denying the motion in arrest of judgment is the only one in this record that comes up in proper shape. It was signed by the judge. For the reasons assigned, it is ordered, adjudged, and decreed that the verdict of the jury herein be set aside, the judgment and sentence based thereon annulled and avoided, and that the accused be discharged from custody.

(51 La. Ann. 809)

TRAHAN v. SIMON et al. (No. 12,986.)¹
(Supreme Court of Louisiana. Feb. 6, 1899.)

REAL PROPERTY OF SUCCESSION—SALE TO PAY DEBTS—REVOCATION.

The real property of a succession having been sold for the purpose of paying debts of the deceased, a single legatee is without interest to institute suit for the revocation of the sale on the ground that same was made to a person interposed for the administrator of the estate, if the purchase price is paid in cash, the amount of the appraisement in the inventory bid, and the proceeds yielded are insufficient to pay the indebtedness of the deceased.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Iberia; Felix Voorhies, Judge.

Action by Paula Trahan against Josephine Simon, tutrix, as administratrix, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Lewis L. Bourges, for appellant. Foster & Broussard, for appellees.

WATKINS, J. This suit is brought by the plaintiff in her own right and as the wife of Robert N. Bush, who joins her for the purpose of aiding and authorizing her, alleging: That by the will of Pierre Abadie, deceased, she was instituted a residuary legatee of an undivided one-half of all the property he owned at his death, both real and personal; and that at the death of the testator, in 1882, he left, among other property, the following real estate, viz. two certain improved city lots in Iberia, having a front of 96 feet front on Julia street by a depth of 152 feet, valued at \$4,000; also movable property, valued at \$330; and outstanding accounts in favor of the deceased, who was a physician, valued at \$1,742; and all of which are particularly described in an inventory of the estate of the deceased. That by virtue of said legacy she became the owner of one undivided one-half of said prop-

erty immediately after the death of the testator, and should have been put in possession immediately after the will was probated, as she had been formally recognized as legatee by an order of court. That, instead of so doing, Charles Clerc, Sr., in his capacity of administrator of said succession, caused said real estate, and movable property also, to be advertised for sale on the 7th of August, 1882, and caused a pretended sale thereof to be made to Etienne Clerc for the sum of \$2,120; and, on the 12th of February, 1893, only six months afterwards, said pretended adjudicatee reconveyed same to Charles Clerc, Sr., for the sum of \$2,000, on terms of credit; and her averment is "that both of these sales are simulations, fraudulent sales." That the pretended adjudicatee and purchaser were brothers, and that the former was only a person interposed to take title for the latter, who, being administrator of the estate, was, in law, incapacitated to buy the property belonging thereto; and that the said purchaser was "unable to pay \$2,120 cash, and then sell for \$2,000 on twelve months' credit." That said transaction was not a sale, but an attempt to deprive petitioner of her rights, and, consequently, null and void. She claims further that Charles Clerc, in his capacity of administrator of the succession of Pierre Abadie, is indebted unto her in the just and full sum of \$871, on the ground that he failed to collect the aforesaid accounts, or show that it was impossible to collect them; said claims amounting to \$1,742, one-half of which belonged to petitioner as legatee of Pierre Abadie. She avers that said claims were good, valid, and collectible at the time of the testator's death. She further avers that Pierre Abadie owed no debts at the time of his death, and that Charles Clerc is justly indebted unto her in the further sum of \$2,000 for the rent of the aforesaid property from the 7th of August, 1882, at the rate of \$125 per annum. The prayer of petitioner is that defendants be condemned to pay her the sums above enumerated, and recognize her as owner in fee simple of the aforesaid property, without any demand being made for the annulment or rescission of the sale as either simulated or fraudulent. In limine the defendants, by counsel, filed a motion to compel plaintiff to elect whether her action was a revocatory action or one in nullity; and she thereupon elected to declare same an action for the nullity of the sales mentioned. Defendants then filed a peremptory exception of no cause of action and no right of action. The defendants, for answer, deny that said property was acquired through fraud or through an interposed party; and aver that same was sold for cash, at public auction, in pursuance of an order of court, to pay debts of the estate of Abadie; and that the proceeds thereof were distributed on the administrator's account; that said estate was hopelessly insolvent, the debts thereof amounting to a large sum over and above the value of its assets; and that the plaintiff was not entitled to have any legacy left her paid until the

¹ Rehearing denied March 7, 1899.

debts of the deceased had been first satisfied. Tutrix further avers that, her husband having become the bona fide and lawful purchaser of said property, for value, at the time, long after the administrator's final account had been filed and homologated, and he had been discharged from his trust, and the affairs of the succession had been wound up, the plaintiff is barred and estopped from attacking same, or asserting her ownership thereof. She denies any responsibility or liability to the plaintiff for or on account of said claims and accounts of the deceased, for the reason that same were worthless, and uncollectible, after diligent efforts had been made to realize upon them. She further avers that the plaintiff has no standing in court to have the nullity of said sale decreed, because she did not tender back nor offer to restore the amount of the purchase price paid for the property, and which was employed in the payment of debts of the succession of which she claims to be a legatee. In the alternative, the defendants set up a reconventional demand for the cost of betterments, taxes, and insurance expended, aggregating the sum of \$3,000. Upon the foregoing issues the case was tried, and a judgment rendered in favor of the defendants rejecting the plaintiff's demand, and from this judgment, the latter has appealed. In this court the defendants and appellees, by counsel, appear, and answer the appeal, and pray that the judgment of the lower court be affirmed, and that the sum of \$50 be awarded for a frivolous appeal.

From the evidence it appears that Abadie died in 1882, leaving a will and some property, and particularly that described in the petition; the whole of the testator's estate being donated to two legatees, one of whom is the plaintiff. The appraisalment of the real estate which is described in the inventory is \$1,800, that of the movable effects is \$326.50, and the rights and credits \$1,645; the whole aggregating \$3,772. The testator was a physician. The real estate was sold for cash, under an order of court to pay debts, on the 7th of August, 1882; and the price bid therefor was the full amount of the appraisalment in the inventory. The tableau of debts of the deceased shows that the amount of his indebtedness on open account was \$704.87, and that the privileged charges against the estate aggregated \$469.43. In addition to this, he owed two notes of \$600 each, payable, respectively, at 12 and 18 months, to the order of Charles Clerc, and they were subscribed by Abadie, and secured by mortgage; the whole aggregating the sum of \$2,374.30. This tableau was duly homologated by a judgment of the court, and the administrator was ordered to pay the debts enumerated upon the same. The evidence shows that the open accounts due the deceased for medical attention and services were valueless and uncollectible, thus rendering the succession insolvent. Consequently, in any view that can be taken of the matter, the plaintiff, asserting on-

ly the claim of a legatee, discloses no interest to be subserved by this suit; for, if the sale complained of as being a fraudulent simulation were annulled, and the property restored to the succession, nothing could be accomplished thereby. She would be compelled to restore the purchase price before she would be entitled to dispossess the vendee and purchaser at the succession sale. She is also confronted with the defendants' reconventional demand of \$3,000 expended in taxes, insurance, etc., since their purchases were made. The sale, having been made for cash, which has been expended in the payment of debts by the administrator in conformity with an order of court, cannot be treated as a simulation. On the face of the papers the facts are against the plaintiff, as they show that Etienne Clerc bought for \$1,800 and sold for \$2,000; making a clear profit of \$200 on the transaction. At the time of the sale to Etienne Clerc, Charles Clerc was the mortgage creditor of the deceased, Abadie, to the extent of about \$1,400, and after the sale this mortgage was canceled. The judge a quo entertained the opinion that the plaintiff's demand was unfounded, and we concur in his conclusion. The plaintiff having prosecuted only a devolutive appeal from the judgment rendered, a case of damages for a frivolous appeal is not made out. Judgment affirmed.

(51 La. Ann. 624)

STATE v. PICTON. (No. 13,056.)

(Supreme Court of Louisiana. March 7, 1899.)

CRIMINAL LAW—EVIDENCE—CONFESSIONS— ACKNOWLEDGMENT OF GUILT.

1. Defense sought to exclude certain testimony on the ground that it involved a confession of guilt by accused. Exclusion was claimed on the ground that the confession was brought about by threat of prosecution if settlement of moneys embezzled was not made. *Held* not a case of confession of guilt admitted to the jury without proof of its voluntary character.

2. There is a broad distinction between the mere admission of inculpatory facts and a confession of guilt.

3. Acknowledgment of facts tending to establish guilt differentiated from confession. A damaging fact may be admitted without any intention to confess guilt.

4. Where a person only admits certain facts, from which the jury may or may not infer guilt, there is no confession.

(Syllabus by the Court.)

Appeal from criminal district court, parish of Orleans; Joshua G. Baker, Judge.

William C. Picton was convicted of embezzlement, and appeals. Affirmed.

J. H. Ferguson and Henriques & Dunn, for appellant. Milton J. Cunningham, Atty. Gen., and Robert H. Marr, Dist. Atty. (Chandler C. Luzenberg, of counsel), for the State.

BLANCHARD, J. From a conviction for embezzlement and a sentence of 18 months at hard labor defendant appeals. At the time of the commission of the offense with

which he is charged, the accused was rate clerk of the Southern Pacific Railway Company. As such, it was part of his duty to receive money for freight sent over the lines of the company prepaid, and the averment of the bill of information is that he embezzled certain funds so received, placing the amount at \$7.39. He relies for reversal upon what is claimed to be an erroneous ruling of the trial judge in admitting the testimony of Fay, Pettigrew, and Wermuth, witnesses for the prosecution, who testified to certain conduct and statements of the accused after the shortage in his accounts was discovered, but before any formal charge of violation of law had been preferred against him. The contention of defendant is that the object, intent, and scope of this testimony was to show that defendant had confessed and admitted his fault to Fay, assistant manager of the Southern Pacific Company, and therefore "one in authority." The objection was to any such statement or admission or confession on the ground that, if made, the same was occasioned and brought about by undue influences, and through threats or promises made by said Fay, by means of which defendant was induced to admit a shortage in his accounts, and to agree to settle same, in order to avoid publicity and escape prosecution. All of the testimony relating to this feature of the case was taken down in writing, and comes up in the record as part of the bill of exceptions. From it we learn that the accused had been for some years in the employment of the Southern Pacific Company; that within a day or two of the end of October, 1897, he suddenly left his position, and for several days his whereabouts were unknown to his employers; that an investigation of his accounts followed, and a shortage was discovered; that, this becoming known, Mr. Givens, a brother-in-law of his, called to see Fay, manager of the company, and, stating he understood defendant was in some trouble, asked that the matter be kept quiet until it could be investigated, and inquired if defendant would be given an opportunity to go over the accounts, to which Fay replied he would; that shortly afterwards Givens, Ferguson, and Kingston (the two latter friends of the accused) called to see Fay, who had some conversation over the telephone with Ferguson about the matter; that the object of this visit was to arrange an amicable settlement of the shortage, to the end of satisfying the claim of the company, and relieving the defendant of the apprehension of prosecution; that several interviews on the subject were had by these parties with Fay; that the latter insisted the entire shortage, amounting to something like \$2,000, should be made good, and that if it were, so far as he and the company were concerned, the prosecution would not be pushed; that if it were not settled a vigorous prosecution would follow; that the matter was talked over between these parties and defendant and his wife; and that defendant,

at his wife's insistence and accompanied by her, and upon the advice of his brother-in-law, Givens, called upon Fay at his office on two occasions. Defendant's version of what took place when he called to see Fay is, in substance, as follows: That he had been informed of the threat of prosecution if the matter was not settled; that, to avoid publicity and for the sake of his family, he went to see Fay; that he told the latter he was innocent, and not guilty, and that the shortage was the result of a series of mistakes; that he asked to see the list of items of the alleged shortage, and the same was shown him; that Fay suggested the terms of a settlement, which were that he (defendant) should pay \$1,000 cash, and give his notes, secured, for the balance, payable in monthly installments of \$25; that he told Fay he would look into the matter, and let him know; that there was no understanding between him and Fay as to immunity from prosecution in the event of settling the shortage, but the conversation with Fay was induced by the threat of prosecution, which had been communicated to him, together with the promise of no steps being taken to prosecute if settlement were made; that, when he had these conversations with Fay, he (the accused) was not under the authority of Fay, nor in the employ of the Southern Pacific Company, and had not been for over two months, and was in the service of a Mr. McGuire; and that while neither Fay, nor other parties representing the company, had told him they could stop the prosecution, he (defendant) knew things had been hushed up before. Manager Fay's version of what took place between defendant and himself is, in effect, as follows: That defendant and his wife came to his office as the result of a previous appointment made by his (defendant's) brother-in-law; that he (Fay) sent for Wermuth, in the employ of the company, and Pettigrew, who was agent of the security company that had gone on defendant's bond; that these parties came, and defendant asked Wermuth to show him the statement of the shortage, which he did, and he and Wermuth had some conversation about the shortage; that, since defendant claimed the shortage was due to mistakes, it was offered him to go over the accounts, and point out the mistakes, and the services of a man to assist in the investigation were tendered him; and that he did not avail himself of the offer to examine the accounts, nor did he offer any explanation as to how the mistakes occurred, but did aver at both the interviews his innocence of the charge of taking the company's money. The witnesses Wermuth and Pettigrew testified substantially as did Fay, with more or less of detail.

As laying a foundation for the objection to the evidence of Fay, Pettigrew, and Wermuth, the defense put Givens, the brother-in-law, and Ferguson and Kingston, friends of the accused, on the stand before the judge (the jury having been retired, at request of

counsel for defendant), to prove their conversations with Manager Fay relative to the shortage, the threat of prosecution if not settled, their efforts to arrange for a settlement, etc., and the fact that they communicated these things to the defendant. The trial judge ruled the testimony of Fay, Pettigrew, and Wermuth to be admissible, on the grounds that the objection went rather to its effect than to its admissibility; that the real question presented was whether any such threat or promise had been made to the accused as would be likely to cause him to tell an untruth for fear of the threat, or from hope of profit from the promise; and that, if what had taken place could in any sense be regarded as a confession, then, necessarily, its admissibility as evidence would depend upon the circumstances under which it was made. He then goes on to say the testimony objected to did not, to his mind, suggest that, at the time the accused saw Fay, anything he said there was caused either by threat or inducement; that defendant went voluntarily to get a statement of his shortage and to go over his accounts; that Fay not only consented to his going over the accounts, but offered him assistance in the work; that that portion of defendant's testimony in which he speaks of an offer to compromise by the payment of \$1,000 in cash and balance in notes did not go to the jury; that the testimony of the defendant, made part of the bill of exceptions, corroborates Fay as to what was said between them; and that thus the objection is not as to the truth of the statements, but on the ground that defendant's visit to Fay was caused by threats of prosecution. "I was asked," he says, "to exclude this evidence because it was induced by threats, and therefore likely to be untrue, when at the same time, and as a basis for its exclusion, the defendant testifies that it was true, and but repeats Fay's statement as to what took place. As this interview was sought by defendant, all that occurred, and not detached parts, was, in my opinion, evidence proper for the consideration of the jury, when the facts showed that the defendant was in a position to speak, and when opportunity was offered and assistance tendered him to show where he had made the errors claimed."

While we may not concur in all the judge says in support of his ruling, we agree with him in the main. The testimony sought to be excluded was properly received. We do not regard this as a case of confession of guilt admitted to the jury without proof of its voluntary character. We look in vain in the narrative of what took place for a confession or admission of his guilt by defendant. On the contrary, he steadfastly asserted he was innocent of the charge. A statement or declaration, to amount to a confession, must be inculpatory, and not exculpatory, in its nature. 6 Am. & Eng. Enc. Law (2d Ed.) 521, 522. A confession is limited in its precise scope and meaning to the criminal act

itself. It does not apply to acknowledgments of facts merely tending to establish guilt, since a damaging fact may be admitted without any intention to confess guilt. These are criminal admissions, rather than confessions. *Id.* There is a broad distinction between the mere admission of inculpatory facts and a confession of guilt. Where a person only admits certain facts, from which the jury may or may not infer guilt, there is no confession. *Covington v. State*, 79 Ga. 690, 7 S. E. 153. The acts and conduct of a party at or about the time when he is charged to have committed a crime are receivable as evidence of a guilty mind, and while, in weighing such evidence, ordinary caution is required, such inferences are to be drawn from them as experience indicates is warranted. 3 Rice, Ev. p. 503; *Id.* pp. 500-502, § 318; *Blish. New Cr. Proc.* §§ 1253, 1254; *Clark, Cr. Proc.* 511; *Whart. Cr. Ev.* § 679; 6 Am. & Eng. Enc. Law (2d Ed.) 557.

There was no confession of defendant, and, being none, there was no basis for urging exclusion of the testimony because brought about by threats of prosecution on the one hand, or immunity from prosecution on the other. That defendant's conduct, demeanor, silence in some things, acquiescence in others, in his interviews with Fay, was damaging to his case, there can be no doubt. But the facts showing this were competent to go to the jury, from which it was their province to draw such inferences, or make such deductions, as they thought proper. It has been held that the rule of inadmissibility of a confession procured by threat or promise does not apply to admissions not involving the existence of a criminal intent. In *People v. Parton*, 49 Cal. 632, it was said: "An admission of a fact, not in itself involving criminal intent, is not to be rejected as evidence (without preliminary proof) merely because it may, when connected with other facts, tend to establish guilt." In *People v. Le Roy*, 65 Cal. 613, 4 Pac. 649, this language appears: "The point most relied on by counsel is that the court below erroneously admitted in evidence certain statements made by defendant to the witness Lees. It is claimed that those statements were not voluntarily made, but were extorted from the defendant by means of threats or promises. * * * However this may be, it is a sufficient answer to say that the statements made by defendant, concerning which the witness for the prosecution was permitted to testify, did not constitute a confession admissible only after proof that it was made voluntarily. A 'confession' is a person's declaration of his agency or participation in a crime. The term is restricted to acknowledgments of guilt. The statements of defendant given in evidence were not acknowledgments of his guilt. On the contrary, in his statements he all the time denied his guilt. The matters admitted by him, however, while not in themselves involving his

guilt, did, when connected with other facts, tend to prove it. But proof of such was competent." This ruling of the California court seems peculiarly applicable to the case at bar. See, also, *People v. Hickman*, 113 Cal. 80, 45 Pac. 175; *McLain v. State*, 18 Neb. 154, 24 N. W. 720. We are constrained to hold defendant was properly convicted, and the judgment appealed from is accordingly affirmed.

(51 La. Ann. 875)

BARLOW et al. v. HARRISON et al.
(No. 13,021.)¹

(Supreme Court of Louisiana. Feb. 6, 1899.)

**FRAUD—BURDEN OF PROOF—OLOGRAPHIC WILL—
FORGERY—EVIDENCE.**

1. The law presumes against fraud. Where acts are susceptible of two constructions, one consistent with honesty and fair dealing, and the other odious and criminal, the burden of proof is on the one who charges the latter, and wishes the court to think that the odious and criminal one is true.

2. In a suit to have an olographic will decreed null on the ground that it is not in the handwriting of the deceased, and is a forgery, the weight of the testimony to justify a judgment annulling the will should make it appear with some certainty that the will is a forged paper.

3. The presumption of regularity and honesty is sustained by the weight of the testimony.

4. This was the conclusion arrived at by a jury of the vicinage, who saw and heard the witnesses, and had special opportunity to judge of their credibility and character. It was adopted by the supreme court, as the basis of the judgment.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Caddo; A. D. Land, Judge.

Action by W. W. Barlow and others against John R. R. Harrison and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

J. Henry Shepherd and D. T. Land, for appellants. T. F. Bell and Leonard & Randolph, for appellees.

BREAUX, J. This was a suit brought by plaintiffs, collateral heirs of defendant's late wife, against defendant and his second wife, to annul, as forged, her last will, made in the olographic form; also, to have decreed null the proceedings leading to and including the judgment attacked for forgery. The sister of the plaintiffs and wife of the defendant died in July, 1890, leaving no children. Their only child, a daughter, died many years ago. The will attacked was admitted to probate in July, 1891. In this instrument, it appears, Mrs. Harrison, since deceased, instituted Dr. John R. R. Harrison, defendant here, her universal legatee. He is an old man,—75 years next March. She was about 66 years of age at the date of her death, and they had lived together as husband and wife about 40 years. During that time, the evidence shows, they got along together well enough, although, as relates to

the limited interest of each, there does not seem to have been much sympathy between them. She superintended the few acres of crop, and even, at times, worked in the field, and kept her revenues separate from those of her husband; and he, as we take it, was equally as independent with his means. Two of her brothers resided near. They, we infer, were not always on friendly terms with their sister and brother-in-law. In January, 1868, Dr. Harrison, to escape the payment of debts, executed a dation en paiement to his wife, in satisfaction of her asserted paraphernal funds. There were also introduced original instruments, being: A private instrument of transfer, or counter letter, from Mrs. N. P. Harrison to the defendant John R. R. Harrison, dated February 10, 1868; a sale from Mrs. N. P. Harrison, authorized by her husband, to Elizabeth May, dated November 28, 1871, being a private act acknowledged before an officer; a promissory note, signed "N. P. Harrison," in favor of John R. R. Harrison; act of sale by Mrs. Harrison to Posey, and another act by the same vendor to Denson. The will attacked was introduced, and also another act of sale to Posey. Plaintiffs affirm that the different acts of sale made in 1871, 1878, 1885, and 1889 are signed by Mrs. Harrison and her husband, John R. R. Harrison, and that the signatures to these acts are genuine and alike,—written by the same person; but plaintiffs urge that the counter letter and transfer dated February 10, 1868, a private act relied on by defendants, and the promissory note introduced, are not genuine, but forgeries; that the three documents in 1868, 1874, and 1888 (i. e. the counter letter, the note, and the will) are written by the same person, in favor of defendant John R. R. Harrison, are not genuine, and not signed by witnesses, while the acts bearing the genuine signature of the late Mrs. Harrison are all authentic acts; that there is a marked difference between the signatures to the public act and the private instruments. The plaintiffs, through counsel, pointed out in the brief and at bar in what respect there is a difference. After pointing out the difference, plaintiffs specially urge that Mrs. Harrison signed her name "N. P. Harrison," and the family record shows that her Christian name was "Narcissa," while the document of date June, 1888, introduced by defendants as the last will and testament of Mrs. Harrison, was signed by Narcissus P. Harrison. Oral testimony was introduced to sustain plaintiffs' theory of the case. Opposed to this testimony, defendants introduced a number of witnesses who were as emphatic and positive regarding the genuineness of the will as plaintiffs' witnesses were in testifying to facts and circumstances going to show that it was not the genuine will of Mrs. Harrison. The jury returned a verdict for defendants. From the verdict of the jury and the judgment of the court plaintiffs prosecute this appeal.

There is a difference, as contended by plaintiffs, in the signatures to the different acts.

¹ Rehearing denied April 7, 1899.

If minute distinctions in the signatures and handwriting shall be held as controlling while carefully examining the different signatures and the handwriting, it may well be that the will would not stand as the genuine will of the late Mrs. Harrison. Signatures and handwriting change as one grows older. There is sometimes a marked difference between signatures of the same person signed at dates not far distant one from the other. Handwriting changes with increasing years, infirmity, and habit. In view of these changes, one not an expert should hesitate, upon examination of signatures, in pronouncing a signature or handwriting a forgery, by comparison, without having seen the person write or sign his name, unless there is a marked and conspicuous difference between the genuine signature and the signature evidently not genuine. This mode of proof is not specially favored by commentators and courts. "It is worth little." Best, Ev. § 247. The opinion of the experts is not by any means convincing. They were bank officers, and doubtless had reasonable skill in judging of handwriting in their business. There were mistakes made in identifying signatures. The result is that their opinion, given in the utmost good faith, is none the less not satisfactory and conclusive. The two brothers of the testatrix testified that the will is not in the handwriting of their late sister. Opposed to this, other witnesses, who have seen her write and sign her name, recognized the handwriting and the signature as her handwriting and signature.

The fact that the testatrix signed "Narcissus P. Harrison," instead of "Narcissa P. Harrison," is invoked as strange, and as one of the grounds for which the will should be annulled. We infer from the acts in evidence that she usually signed only the initials of her name. It may well be that one signing a solemn act of last will would be prompted to sign at least one of the surnames in full. Why she signed "Narcissus" instead of "Narcissa" is one of the perplexing questions here involved. It may be that, being aged when she signed, and seldom signing her name, she thus wrote it under the impression that it was one of her Christian names. There is testimony of three witnesses going to prove that the name "Narcissus" was regarded as the proper name of the testatrix.

Plaintiffs charge that it is not reasonable to presume that Harrison, with knowledge that his wife left a will in his favor, would not, shortly after her death, make search for it; that, even after testatrix's brothers commenced to trouble him about the property, he did not make a search for the will. Defendant's position, as we take it, is that he placed reliance upon the counter letter he held, and, in consequence, gave himself no concern about a will. It does not appear that he had any knowledge of the will; and, if there was indifference on his part, it would not, in our judgment, give rise to a presumption that he had planned the confecting of a will on being

informed that his counter letter was worthless. The facts relating to the finding of the will have a bearing upon the question here involved. The defendant Harrison testified to explain how he found the will. To some extent, at least, his testimony is corroborated by other witnesses. The presumption urged by plaintiffs as arising from the acts which led to the finding of the will is not by any means conclusive. They are at least susceptible of two constructions. We adopt the construction of regularity and proper conduct.

As relates to the counter letter or attempted acknowledgment of the late Mrs. Harrison, made with the view, as sworn to by Harrison, defendant, of protecting him from a dation en paiement he executed to shield his property from creditors, signed by her and two witnesses, the testimony presents an issue of the most serious character. We met with no difficulty in arriving at a conclusion, save as to the signature of one of the attesting witnesses, Lewis Everett. The letter "e" was omitted. We have given attention to the attending circumstances, and it may be, after all, that this signature is a genuine signature. The fact is doubtful, but they do not lead to the certain conclusion claimed by the plaintiffs, upon whom is the burden of proof. It may be that this witness left out this letter from his name. The fact, unexplained, would not, in our opinion, justify us in reaching the conclusion that it is a forgery.

Counsel dwelt with energy and clearness upon other grounds of attack against the will. Although each has been carefully considered, we do not, in terms, narrate them, as we think they are covered by the following propositions, indicating our conclusion: The suspicious circumstances charged are, in our view, met by the facts, shown, that 41 years defendant Harrison and his late wife lived together as man and wife, on terms, so far as the record discloses, of sympathy and good will. Years ago they mourned the loss of their only child, aged 16 years. The testimony should be positive, clear, and direct to give ground enough to find forgery committed or instigated by an old man under the circumstances here,—counterfeiting the handwriting and signature of the mother of his only child,—while, on the other hand, the parties, brothers of the late Mrs. Harrison, who are plaintiffs (one, at least, who had received a donation of some value), did not always manifest the regard due by a brother to his sister. The two brothers who are plaintiffs in the suit were in Shreveport when the will was probated, years ago. They had been duly notified, and yet they did not appear before the court to complain of the nullity of the will on the ground which they now urge. They are not estopped, nor is their action prescribed, but none the less some significance grows out of the fact that they did not, in court, complain of the wrong of which they had knowledge at the time.

One of the witnesses upon whose testimony

the court acted, and probated the will, on the trial swore in direct opposition to the testimony he gave on the application to probate the will, and sought to justify his inconsistency as a witness by reason not sustained, but refuted, by other testimony. The jury heard the witnesses; a number testifying in favor of the genuineness of the will, and of the other instrument of writing introduced, and others of a different view. They determined that the weight of the testimony sustained their genuineness and validity. Their verdict was sustained by the judgment of the district court. We have found no ground upon which to disturb their verdict. For reasons assigned, the judgment of the district court is affirmed.

(51 La. Ann. 694)

STATE v. ROBINSON. (No. 13,025.)¹
(Supreme Court of Louisiana. Feb. 20, 1899.)

HOMICIDE—DECLARATIONS OF DECEASENT.

The testimony of third persons as to what accusations the wounded man made against the accused while under arrest, and in his presence, is incompetent as hearsay; same being neither dying declarations, nor part of the res gestæ.

(Syllabus by the Court.)

Appeal from criminal district court, parish of Orleans; James C. Moïse, Judge.

James Robinson was convicted of murder, and appeals. Reversed.

Isaac F. Carter, for appellant. Milton J. Cunningham, Atty. Gen., Robert H. Marr, Dist. Atty., and Joseph E. Generelly, Asst. Dist. Atty., for the State.

WATKINS, J. The defendant was indicted, tried, and convicted of the murder of one Paul Valentine, and prosecutes an appeal from a death sentence. He principally relies upon three bills of exceptions which his counsel reserved to the refusal of the trial judge to sustain his objections to the admission in evidence of the declarations of three witnesses who were introduced on behalf of the state. The three bills being identical, and the three witnesses having testified to the same transaction, it will be necessary to discuss but one of them. The recitals of the bills are: That the state sought to prove by Officer Felix Vauquelin and two or three other persons "certain statements made by the deceased after the defendant had been arrested, and carried to the bedside of the deceased in the custody of the police force of the city of New Orleans, as to whether or not the prisoner was the party who shot him." That to this testimony defendant's counsel tendered the objection "that the extent of the wound received by the deceased had not been ascertained, and was not known to be dangerous or mortal, and that no one had put him on his guard as to the nature and character of the wound." "That noth-

ing but a dying declaration, properly executed in the manner presented by law, could or should be admitted as evidence. The proof, according to the coroner's certificate, being to the effect that the deceased lived three days after the shooting occurred, and no dying declaration was made or taken. Inasmuch as dying declarations are made in view of the certainty of death, and the immediate facing of a Supreme Judge, who knows all things, serious objection is raised to putting in evidence any statement made by him, other than a dying declaration, properly executed in the manner and form required by law; and, especially, after having been fully advised of impending death." The trial judge prefaced his assignment of reasons for admitting the testimony objected to over the objections of defendant's counsel with the following extract from the statement of one witness, viz.: "Q. Did Valentine [the deceased] make any statement in this man's [the prisoner's] presence, or did he identify him as the man who shot him? A. He said, 'Jim, you shot me for nothing.' Q. You are certain of that? A. Yes, sir. Q. What did this man [the prisoner] say? A. This man said, 'I never shot you, Paul,' and Paul said, 'Yes; you shot me.' Q. He denied it? A. Yes, sir; he denied it." He also annexes the following extract from the statement from the testimony of another witness which was objected to, viz.: "Q. Were you present when this man was brought before Valentine? A. Yes, sir. Q. Did Paul Valentine identify him as the man who shot him? A. Yes, sir. Q. Was Paul Valentine positive about it? A. Yes, sir; he repeated it several times. Q. This prisoner was present at the time? A. Yes, sir; he repeated it two or three times: 'Jim, you shot me.' He [the prisoner] said: 'No, Paul, I didn't; you made a mistake.' Paul said: 'You are the one who shot me.' Q. And he denied it? A. Yes, sir." The judge states that there were three other persons who were present and heard that conversation, and that all of them made their statements over the objection of defendant's counsel. He also made an extended extract from the testimony of the defendant as a witness in his own favor, and concludes his reasons, which are very brief, with this observation, viz.: "The evidence was not offered as a dying declaration, nor was it an attempt to prove by silence an acquiescence in statements made in his presence while under arrest. It was a conversation between the deceased and the prisoner; a charge and a denial being its entirety."

The objection to this testimony is that the statements of the state's witnesses are hearsay, the purport of same being a reputed recital of statements made by the deceased in their presence. The testimony was not admissible as the dying declaration of the deceased, because he was not at the time in articulo mortis. He lived three days after the shooting occurred, and was not advised at the time

¹ Rehearing denied March 20, 1899.

that death was pending or inevitable; and hence the sanctity of an oath cannot attach to it. The judge correctly held that this evidence was not offered as a dying declaration. Its introduction is not attempted to be defended on the ground that it was part of the *res gestæ*, because that would have been manifestly incorrect, as neither of the witnesses were present, or heard or saw any part of the transaction. The proposition of the judge is that the testimony of these police officers was the mere recital of a conversation which occurred between the deceased and the accused in their presence. Evidently, the repetition by a witness of the statement of another is hearsay. He merely repeats what the other said in his hearing. And it is by this kind of evidence that it is proposed to prove the identity of the defendant as the assailant of Paul Valentine, in order to fasten the guilt of his homicide upon him. This is all the more manifest when we consider the fact that the defendant is stated to have stoutly denied the accusation of Valentine in the course of the interview; for it was most certainly not the purpose of the state, in introducing these witnesses, to prove the defendant's denial of Valentine's accusation. This occurrence immediately succeeded the arrest of the defendant, who was found at his own house soon after the shooting of Valentine took place, and only one block distant therefrom. The shooting took place at a late hour of a dark night, and therefore the question of identity was an important, and possibly a difficult, one. On this state of facts, the question is whether the testimony was admissible. We do not think it was. There can be no doubt of the correctness of the proposition that statements made by an accused person in the course of a conversation between him and the party he is charged to have assailed are competent testimony, and that proof of such statements may be admitted against him as a confession; but we are aware of no rule that will allow the introduction of parol testimony of third persons to establish the fact that the party assailed made accusations against the accused in the course of that conversation which may be used as evidence against him. And this case well illustrates the correctness and propriety of rejecting such testimony, because the defendant was charged with murder, and is under a sentence of death; and the fact that the party assailed has since died, and could not give his own evidence, cannot justify an alteration of the rule. This testimony must be regarded as that of Paul Valentine; and if he were living, and had been put on the stand as a witness for the state, he certainly could not have been permitted to relate what accusations he made against the accused, as proof of his identity. In *State v. Diskin*, 34 La. Ann. 919, it was distinctly held by our immediate predecessors that the admission, as evidence to be considered by the jury, of the statement of the deceased made in the presence of the accused, but not as a dy-

ing declaration, was illegal, and vitiated the verdict. In that case the court, speaking through Mr. Justice Fenner as its organ, said: "The evidence was to the following effect: After the accused was arrested on this charge, and while in custody, he was conveyed to the bedside of John Driscoll, the man killed, who was then lying wounded at the Charity Hospital. A brother of the wounded man was also present, who was a corporal of the police. The wounded man said to the prisoner: 'Myles, you hit me and shot me for nothing. Own up.' Whereupon Corporal Driscoll immediately said to the prisoner: 'Be quiet. Keep still.'" Upon this state of facts the court made the following observation, viz.: "It is not pretended that the declarations of the wounded man were made under a sense of impending dissolution. They were admitted solely on the ground that they were made in the presence of the accused, and to establish his implied admission of the truth thereof, because of his silence and failure to deny. Implied admissions from tacit acquiescence of the defendant in the statements of others made in his presence only result when the circumstances are such as afford him an opportunity to act or speak, and would naturally call for some action or reply from a person similarly situated. Mere silence while a party is held in custody under a criminal charge affords no inference whatever of acquiescence in statements of others made in his presence. He has the undoubted right to keep silence as to the crime with which he is charged, and is not called upon to reply to or contradict such statements. Under such circumstances, it is held that the statements so made are not admissible against the prisoner, because they do not even tend to support the hypothesis of acquiescence. *Com. v. McDermott*, 123 Mass. 440; *Com. v. Kenney*, 12 Metc. (Mass.) 235; *Com. v. Walker*, 13 Allen, 570; *Bob v. State*, 32 Ala. 560; *Whart. Cr. Law*, § 696." The facts of that case are quite similar to those of the instant case, and the principle announced is of unquestionable correctness. But for a much stronger reason should the rule there stated be applied in this case, because the statements of third persons were admitted as evidence for the purpose of showing what the wounded man said to the defendant while he was under arrest, and in his presence. This statement was used as positive, affirmative evidence against the defendant; and notwithstanding he did not remain silent, but made an earnest and vigorous protest against the accusations of the wounded man,—not once only, but repeatedly, and in the presence and hearing of several witnesses.

Our conviction is clear, and quite decided, that the testimony of these several witnesses was incompetent and inadmissible, and was erroneously permitted by the trial judge to be heard by the jury, and that the overruling of the objections of defendant's counsel thereto was and is reversible error. It is therefore

ordered and decreed that the verdict of the jury, and the sentence and judgment thereon based, be set aside and annulled; and it is further ordered and decreed that the cause be reinstated, and remanded to the court below for a new trial in accordance with law and the views herein expressed.

(51 La. Ann. 719)

MAYOR, ETC., OF ALEXANDRIA v. O'SHEE et al. (No. 13,047.)¹

(Supreme Court of Louisiana. Feb. 20, 1899.)

TAXATION—PROPERTY DEDICATED TO PUBLIC USE.

1. The dedication of the property claimed by defendants to public use was made to appear by evidence conclusive enough to exclude the idea of private ownership.

2. The property having been laid off and dedicated to public use, the assessor was without authority to assess it for taxes, and the tax collector without authority to sell it for taxes.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Rapides; Edwin G. Hunter, Judge.

Action by the mayor and council of Alexandria against James O'Shee and Ira W. Sylvester. Judgment for plaintiffs. Defendants appeal. Affirmed.

Horace H. White, for appellants. John C. Ryan and White & Thornton, for appellees.

BREAUX, J. Plaintiffs sue to annul two tax sales, and a conventional sale, made by one of the defendants to his co-defendant, of a half interest in the property. This area of the land is $1\frac{1}{4}$ acres, situated on the southwestern border of Alexandria. Plaintiffs aver in their petition, in substance, that Alexander Fulton, in 1814, dedicated to the town 200 feet for the public use as a street, known as "Tenth Street." Defendants plead as a bar to plaintiffs' suit that plaintiffs are estopped from suing, for the reason that the property they seek to recover was twice placed on the assessment roll, under the assessment to "unknown owner" for the year 1893 and for the year 1894, the assessment being ample to identify the property; that when the property on this assessment was offered for taxes plaintiffs remained silent, and permitted the property to be sold for taxes, under which they are its owners; that they are further estopped from the fact that for a long series of years plaintiffs did not object to parties fencing in and occupying a long strip of the 200 feet they claim; and that these acts or omissions to assert title negated any claim on the part of plaintiffs. This exception was referred to the merits, and thereupon a plea of prescription was filed, and defendants, in their answer, invoked their possession for a period of over four years under the following titles: (1) By the sale under assessment to "unknown owner," April 13, 1894, to O'Shee, duly recorded; (2) by tax sale under assessment to "unknown owner,"

June, 1895, to Sylvester; (3) by sale of O'Shee to Sylvester, and by sale of undivided one-half interest from Sylvester to O'Shee. They claim the taxes they have paid, and damages.

The town of Alexandria was incorporated, and its area, as set forth in the charter of incorporation of that date, measured 13 arpents front, more or less in front on Red river, with a depth of 13 arpents, more or less. Alexander Fulton laid off the town, and, it is claimed by plaintiffs, dedicated the land. There was a plat of survey referred to in the charter as on file in the office of the parish judge. That plat is lost. The plat of survey in evidence shows that originally the town was bounded in front by Red river, west by Jackson street, east by Carson street, and on the south and rear by Tenth street, and that there were nine squares measuring from east to west, and the same number measuring from north to south, including, in all, 878 squares. The streets all measure about 54 feet in width, except Carson street, measuring about 100 feet. The blocks, the map in evidence shows, are over 200 feet square. One of the witnesses testified that he assisted McCrummins, parish surveyor in 1835, in surveying the town, and that Tenth street, the width of which is in contest here, was 200 feet wide, and that all the property within the survey was corporation property, dedicated to the town, and that it was intended for a street and pleasure ground. The surveyor made a map of his survey, the witness said, and there remains in his possession a portion, taken from the original, on which the rear boundary appears as "Commons, 200 feet," as written on the map. This map was introduced in evidence. The testimony of this witness is in some particulars corroborated by other testimony. A Mr. Hilton, a very old gentleman, testified that he had seen the original map of Alexandria, as originally laid off, and that it embraced within its limits Tenth street as claimed by plaintiffs. Plaintiffs called witnesses who denied the rights of the town in general terms. The judgment was for plaintiffs. The defendants appealed.

The question of dedication vel non is the important issue in the case. Owing to the loss of maps and papers, it was necessary to have recourse to oral testimony to prove their contents. The plat to which the charter refers was lost. The weight of the secondary evidence admitted on account of the loss shows, we think, that Tenth street was 200 feet in width, and that from the first it was intended that it should have that width, and it was always considered public property, owned by the corporation. The maps in evidence, and the testimony regarding them, prove, in our judgment, that the town was originally divided into squares and streets, as described in the Brighthurst map, in evidence, save that this map does not show an extension of the rear line beyond the 53-foot limit claimed by plaintiffs as being the width

¹ Rehearing denied March 20, 1899.

of Tenth street; but a number of witnesses testified that the street, according to the memory of the oldest inhabitants, embraced the 200 feet now claimed, and this is, we think, confirmed by the map, sustained by testimony enough, in view of the lost original map, annexed to the charter of 1818. We think there is force in defendants' theory that Alexander Fulton, in laying off the town by division into squares of equal dimensions, as indicated by the map, found it not possible to keep up the uniformity of the lots and include the space of land now in contest. For that reason, Tenth street was left with the width claimed, and it was designated on the old maps as "Commons." In our judgment, the land in contest was owned by the one by whom the town was laid off, and the street was left by him as indicated by the maps, sustained as to their correctness by secondary testimony.

Defendants insist that the plans of a town or city must distinctly show that the lots were appropriated to public uses, and as public places, in order to justify the inference that the original owner intended to set apart the land for the use of the public. In the case before us we think it is reasonably certain that such was the intention of the original owner. No one has claimed the land. There never was an "unknown owner" of the property since the town was laid off. The case here is easily differentiated, in our view, from the cited case of *Crossman v. Vignaud*, 14 La. 173, in which it was held that an open space was private property, that had been used as an alley as public for upward of 30 years, but it was not shown to have been designated as such on the plan of the town, or by any destination to public use. Here, we conclude, the maps and the testimony show a designation of intention of leaving the open space at the time for use of the public. Whether it was left open for a side street, pleasure grounds, or commons, the use, as we take it, was for the public, and which right the public have not lost. This being our view, it remains evident that the assessment of the land was an absolute nullity, and that the title which the tax collector undertook to place in the name of the defendants was also a nullity, as well as the subsequent sale pleaded by them. It is therefore ordered, adjudged, and decreed that the judgment appealed from is affirmed.

(51 La. Ann. 470)

MONROE BUILDING & LOAN ASS'N v. JOHNSTON, Sheriff, et al. (No. 13,015.)

(Supreme Court of Louisiana. Feb. 20, 1899.)

INJUNCTION—DISSOLUTION—DAMAGES—VENDOR OF MACHINERY—PRIVILEGE—ENFORCEMENT.

1. When the injunction has ceased to be operative before the suit is tried, and the party enjoined has, by third opposition, obtained the proceeds of the property he sought to subject to his execution when it was enjoined, the court, in dissolving the injunction,

is not warranted in imposing on plaintiff in injunction the maximum of 20 per cent. damages, under article 304 of the Code of Practice.

2. The unpaid vendor of machinery has the right to seize and sell the machinery, although it may have been attached to, and has become part of, the immovable that is mortgaged. *Carlin v. Gordy*, 32 La. Ann. 1285; *Walburn-Swenson v. Darrell*, 22 South. 310, 49 La. Ann. 1044.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Ouachita; W. F. Millsaps, Judge ad hoc.

Action by the Monroe Building & Loan Association against D. A. Johnston, sheriff, and others. Judgment for defendants. Plaintiff appeals. Modified.

Hudson, Potts & Bernstein (C. J. Boatner, of counsel), for appellant. A. A. Gunby, for appellees.

MILLER, J. The appeal is by plaintiffs from the judgment condemning them to pay damages caused, it is claimed, by an injunction issued by them to restrain the sale of property under the writs of one of the defendants, the plaintiffs having a special mortgage on the property. The defendants the J. A. Fay & Egan Co. had furnished the Ouachita Excelsior Saw & Planing Mills certain machinery, which, attached to the mill plant, became immovable by destination. The debt for the machinery being unpaid, the Egan Company obtained judgment for the debt, with privilege on the machinery, and were about selling the machinery under their execution, as they had the right to do. The plaintiffs, the Monroe Building & Loan Association, were creditors, with a special mortgage on the mill property, the mortgage including the machinery, subject, of course, to the privilege of the vendor. The plaintiffs enjoined the sale of the machinery. Subsequently the property was seized and sold under the writ of the Monroe National Bank, and the Egan Company, on their third opposition, claimed and were paid all the proceeds of sale realized from the machinery. After all this, the injunction suit came on for trial, and the plaintiffs' injunction was dissolved, with \$250 damages as the fee of the defendants in injunction, and from that judgment the plaintiffs appeal.

The basis for the injunction was that the plaintiffs, mortgage creditors of the mill company, apprehended that their security, i. e. the mortgage on the entire mill property, would be depreciated by a sale of the machinery separate from the plant of the mill company. But it is clear the Fay Company had the right to seize and sell the machinery they had sold, and on which they had a privilege for the unpaid price. *Carlin v. Gordy*, 32 La. Ann. 1285; *Walburn-Swenson Co. v. Darrell*, 49 La. Ann. 1044, 22 South. 310. The judgment of the lower court, therefore, properly dissolved the injunction. Nor do plaintiffs question in this court the judg-

ment dissolving the injunction. Their complaint is of the allowance of \$250 damages for the attorney's fees.

The injunction was wrongfully issued, but subsequently the defendants in injunction obtained, on their third opposition, the proceeds of sale of the machinery they had sold. The injunction, as an interference with defendants' privilege, and consequent right to the proceeds of the machinery, had ceased to operate when the injunction was dissolved. The third opposition had accomplished all that could have been obtained by the execution of the Egan Company enjoined by plaintiffs. Damages on the dissolution of the injunction are given on the theory that the injunction has stayed the enforcement of the rights of the execution creditor, the defendant in injunction. Code Prac. art. 304. In this case the injunction stayed the defendants' execution only for a brief time, and they waived their right to proceed on the execution by filing the third opposition, on which they obtained the proceeds of the machinery. The defendants cannot claim the maximum damages permitted by the Code on the dissolution of injunction, when, before the dissolution is decreed, the right to the execution is waived, and the fruits of the execution have been realized in another mode. In view of the fact that defendants were enjoined from the enforcement of a legal right, and thus compelled to employ counsel, and in view of the operation of the injunction for a limited time, i. e. until defendants resorted to the third opposition, in our opinion an allowance of \$150 for the fee of the attorney for defendants would be proper. It is therefore ordered, adjudged, and decreed that the judgment of the lower court be amended so as to allow \$150 attorney's fee instead of \$250, in which respect, i. e. allowing \$250, it must be, and is hereby, reversed and avoided, and in other respects the judgment be, and is hereby, affirmed, with costs of the lower court to be paid by plaintiffs in injunction; those of the appeal by defendants.

(51 La. Ann. 497)

STATE v. DEVALL (No. 13,067.)

(Supreme Court of Louisiana. Feb. 20, 1899.)

CRIMINAL LAW—JURY—SUMMONING—CUSTODY—SEPARATION—CONSTABLES.

1. It is competent for constables to act for the sheriff, on his designation, in executing the orders that official is directed to carry into effect. Code Prac. art. 765.

2. And in such case they have authority to act throughout the extent of their respective parishes. Code Prac. art. 1160; Rev. St. § 633; State v. Boitreaux, 31 La. Ann. 189.

3. Thus acting, they may legally summon tales jurors, and are competent officers of the court to have in charge a jury in a criminal case, pending consideration of the verdict.

4. Lodging jurors overnight in three communicating rooms, doors between open, other doors locked, the officer in charge present in the rooms, no outside communication with the jury, is not a separation, in the legal sense, vitiating the verdict.

5. Besides citizens discharging important

public functions, jurors are human beings, entitled to have their wants, necessities, comforts, and well-being consulted and provided for. (Syllabus by the Court.)

Appeal from judicial district court, parish of East Baton Rouge; H. F. Brunot, Judge.

Richard J. Devall was convicted of manslaughter, and he appeals. Affirmed.

L. D. Beale and G. K. Favrot, for appellant. Milton J. Cunningham, Atty. Gen., and H. N. Sherburne, Dist. Atty., for the State.

BLANCHARD, J. This was an indictment for murder, followed by a conviction for manslaughter, and a sentence of 20 years at hard labor. Defendant appeals.

The grounds for reversal, set forth in a bill of exceptions taken to the ruling of the trial judge denying a motion for new trial, are: (1) That V. M. Moran, who acted as deputy sheriff in summoning the tales jurors, was not a sworn deputy sheriff of the court; (2) that the said Moran and A. A. Miller, who had charge of the jury after the case was submitted to them, were not sworn officers of the court; (3) that there was a separation of the jury after submission of the case to them, and before the verdict was returned. The testimony adduced on trial of the motion is annexed to and made part of the bill of exceptions.

Moran and Miller were both duly elected, commissioned, and qualified constables of the parish of East Baton Rouge, and both had been designated as deputy sheriffs, and employed for some time in that capacity by the sheriff of the parish. It does not appear that the oath of office as regular deputy sheriffs had been administered to them, but it does appear that such oaths as special deputies at election precincts had been administered to them the preceding November. In their capacity as constables of the parish, it was competent for them to act for the sheriff in executing the orders that official was directed to carry into effect. Code Prac. art. 765.

Constables have authority to act throughout the extent of their respective parishes, and are empowered to execute all orders, decrees, and judgments which judges and justices of the peace may direct to them. Code Prac. art. 1160; Rev. St. § 633. They may, in their official capacity, or with the sheriff's delegated authority, act for the sheriff, within the limits of the parishes in and for which they are elected as constables. State v. Boitreaux, 31 La. Ann. 189.

Constable Moran, therefore, acting as deputy sheriff, was a competent officer of the court to summon the tales jurors in this case; and he and Constable Miller, also acting as deputy sheriff, were competent officers to have the jury in charge pending their consideration of the verdict to be returned.

After a criminal case is submitted to the jury, they are to be kept together, under the charge of an officer, in such a way as to be secluded from all communication with other

parties, until they have agreed on a verdict, or it appear that it is impossible for them to agree. Whart. Cr. Pl. (8th Ed.) § 727. In this statement of the law three essentials appear: (1) The jury to be kept together, (2) under charge of an officer, (3) secluded from all outside communication. Were these essentials observed in the instant case? We find they were. The jury were kept together. They were, overnight, locked in three communicating rooms,—communicating with each other, and the doors between open, and the other and outside doors locked. They were in charge of a sworn officer, a constable of the parish, who was acting as deputy sheriff, and had been deputed by the sheriff to take and have them in charge, and who remained with them all the time. Where they were thus kept in the custody of the officer was a convenient place, and the testimony shows no outside influence reached them. Hence, it must be held, for the purposes of this trial, that they were beyond the reach of outside influence.

The case of *State v. Foster*, 45 La. Ann. 1176, 14 South. 180, cited by defendant, is not in point. There the jury did actually separate, and no officer was with either of the two separated sets of jurors during the night. The rooms occupied by the two sets, ten in one room, two in another, were not communicating, nor were the doors affording ingress and egress to and from such rooms locked. Neither is *State v. Warren*, 43 La. Ann. 828, 9 South. 559, in point. There four of the jurors were conducted out of the building by the sheriff, leaving the other eight in the jury room, unattended by any officer in charge. And so with *State v. Costello*, 11 La. Ann. 283, and the other authorities relied on by defendant. They are not apposite. There was actual, undoubted, undisputed separation of the jury in those cases, and, properly, the verdicts were held vitiated.

We do not think lodging the jurors, in the instant case, in the three communicating rooms, doors between open, a separation of them in the legal sense, vitiating this verdict. They had access to one another, and were in easy reach and hearing all the time. It was a keeping of them together, in the purview of the law. Besides citizens discharging important public functions, jurors are human beings, entitled to have their wants, necessities, comfort, and well-being consulted and provided for; and the recognition of this furnishes alike the reason and motive of the sheriff in providing the accommodations supplied by the three communicating rooms, with supper and breakfast at the restaurant below. In the absence of any showing of communication with them by outside parties, we decline to hold that what he did in this respect merits the judicial condemnation which would result from setting aside this verdict because of it. It is not a case justifying the presumption of misconduct and abuse. Judgment affirmed.

25 So.—25

(51 La. Ann. 442)

STATE v. CARTER et al. (No. 13,055.)

(Supreme Court of Louisiana. Feb. 20, 1899.)

CRIMINAL LAW—CONTINUANCE—WITNESS—CROSS-EXAMINATION—REDUCING TESTIMONY TO WRITING—APPEAL.

1. A continuance on the ground of absent witnesses was properly refused, as the defendants had not complied with Act No. 67 of 1894 (there were six of their witnesses present).

2. The refusal to permit defendants to cross-examine a witness sworn on behalf of the state was not error. The witness was called to the witness stand in error, and had not been examined at all as a witness in chief.

3. A witness may be examined in rebuttal of an alibi, and the state was not bound to offer the testimony (offered in rebuttal) on the examination in chief.

4. The refusal to permit the testimony objected to to be reduced to writing is not reversible error, where it is manifest that the testimony would not add anything to the question raised.

5. A witness, unless proper foundation is laid for admitting testimony, cannot confirm his testimony by swearing to statements previously made to third persons out of the presence of the accused, and on this ground only the trial court's ruling is not sustained.

6. Error in describing the property charged to have been stolen is not timely when urged after the verdict.

(Syllabus by the Court.)

Appeal from judicial district court, parish of St. John the Baptist; Emile Rost, Judge.

Norris Carter and others were convicted of larceny, and Norris and Buddy Carter appeal. Reversed.

Hamilton N. Gautier, for appellants. Milton J. Cunningham, Atty. Gen., and Robert J. Perkins, Dist. Atty. (J. L. Gaudet, of counsel), for the State.

BREAUX, J. An information was filed against Norris Carter, Moses Ruffin, Buddy Carter, Mel Preston, Arthur Reed, Walter Tanner, and Walter Banks, charging them with having committed petty larceny. On motion of the district attorney, a nolle prosequi was entered as to Walter Banks. He was afterwards called and examined as witness in the case. A severance, on motion of their counsel, was granted to Norris and Buddy Carter. They (Norris Carter and Buddy Carter) were then put on their trial, found guilty of larceny, and sentenced to 12 months' hard labor in the penitentiary.

The judge refused to order a continuance applied for by the accused on the ground of the absence of witnesses. To this refusal the accused took a bill of exceptions, and the ground of the bill presents the first question for our decision. The defendants, through their counsel, in their bill of exceptions set forth that their witnesses had been served with subpoenas, and should have been present. The district judge's reasons are that the defendants did not comply with act No. 67 of 1894, and that in their application for a continuance they failed to allege that there were no witnesses present who could testify

to the same facts as would the absent witnesses; that it follows, if they had been present, and had testified, their testimony would have been cumulative. The continuance was refused. As relates to the act of 1894, defendants, through counsel, insist that the words "each side" mean as many sides as there are accused. The statute limiting the number of witnesses in criminal cases sets forth that in all criminal cases on final trial each side shall summon no more than six witnesses, unless, on formal application, it is made to appear that an additional number is required to meet the ends of justice. The intention of this statute certainly was to lessen the number of witnesses in each case. The decrease of the number of witnesses would not amount to much, if each accused had a right to as many as six witnesses. The defense consists of two accused, jointly charged with larceny, and representing "a side" of the case. The question cannot, in our judgment, be treated as though there had been a severance. If we were to grant the contention of the defendants, it would be, as relates to this question, as if each had been separately tried. In that case, in the language of the statute, the state would have the right to as many witnesses as each defendant, in order to meet "each side," or each case. That, we take it, was not the intention in enacting the law. Moreover, the defendants have no cause to complain on this ground, for the reason that they did not set forth in their affidavit for a continuance that the testimony sought by them was cumulative. It is well settled that a continuance on the ground of the absence of witnesses is properly refused when it does not appear that the testimony is not cumulative. The accused failed to swear that there were no witnesses in court who would swear to the same facts. The action of the trial court in denying the motion for a continuance will not be reversed without showing that the court has abused its discretion. We have not discovered in this case that the court abused the discretion with which it is intrusted.

In the second bill of exceptions the accused complained of the court's ruling in refusing to permit them to cross-examine a state witness, duly sworn. It appears that the witness called by the state, immediately after she had been sworn, declared that she knew nothing of the case. She was thereupon withdrawn by the state. She, it seems, had been called in error. The defendant then requested to cross-examine the witness. The court refused to permit him to cross-examine the witness, but reserved to the defendant the right to call the witness for the defense. The witness not having been examined at all in chief, there was no ground for the cross-examination. It is difficult to discover wherein the defendants have been prejudiced, inasmuch as they were at liberty to call her as their witness. Besides, the witness had not testified against the accused at all. "The

opposite party may cross-examine a witness to any facts stated in his direct examination. Without this, there is no ground for cross-examination." "Whenever any witness has been examined in chief, the opposite party has a right to cross-examine." 3 Rice, Ev. p. 335. "Cross-examination relating to cumulative matters and immaterial issues is largely within the discretion of the court, and its ruling is not subject to review." *State v. McGee*, 36 La. Ann. 206; *State v. Allen*, 37 La. Ann. 687.

The narrative contained in the third bill of exceptions shows that defendant examined witnesses to prove an alibi. The plaintiff called a witness in rebuttal to disprove the alibi. Counsel for the defendant objected to the testimony. The court overruled the objection, and admitted the answer, as it is made to appear that the testimony was in rebuttal (i. e. "to the effect that the accused were present at the commission of the offense,"—quotation from the bill of exceptions), we are not of the opinion that the ruling was incorrect.

The fourth bill of exceptions was taken to a ruling of the court allowing a witness to testify that he had reported the killing and stealing of the animal to the one in whose charge it was at the time. The judge, in his relation of the facts, incorporated in the bill of exceptions, shows that the witness was asked to state all he knew about the case, and that, in answer to the question, the witness said that he went next morning after the theft is charged to have been committed to notify the owner's agent that the calf had been killed by accused; that the testimony was objected to as made out of the presence of the accused. We have given our closest attention to the ruling, and have found it impossible to agree with our learned brother of the district court. It is well settled that a witness cannot corroborate his statement as a witness by his own declaration as a witness that he, on a former occasion, had made the statement to another, and a third person, out of the presence of the accused. It is not shown that the testimony of this witness was attacked. As we take it, no foundation was laid for admitting this testimony. Going into particulars, it is in evidence that Walter Banks, the witness, was indicted jointly with Norris Carter and his son; that on proper motion on part of the state a *nolle prosequi* was entered on behalf of Banks; and that afterwards he (Banks) was called as a witness, and testified against the accused, who were convicted. We quote, as relates to the facts, the following statement from the brief filed by the attorney general and other counsel, to wit: "Mrs. Dodson had charge for Mr. Chaffe of the cow and the bull calf, which latter was the subject of this larceny. Walter Banks is the nephew of Norris Carter, one of the accused. He had been working for Mrs. Dodson. He had been charged as a principal in this larceny, but the case as

to him was *nolle prosequi*. When examined as a witness, he was asked to relate what he knew of the case. He stated, among other things, that the next morning he went to notify Mrs. Dodson that the calf had been killed by his uncle and his cousin." No objection was made by the defense to this evidence. On redirect examination he was asked to repeat what he told Mrs. Dodson. In justice to the prosecution, we will add the following, which we have not succeeded in finding in the transcript. It is doubtless true as a fact, but it is also true that we have not found it of record, although we searched for it, viz.: "This was an eyewitness to the killing and the stealing of the calf. Mrs. Dodson had been the cause of the affidavit being made against the accused." If Banks was one of the principals,—as we take it he was,—he could confirm his own testimony by proof of former statements made by him, according with those made at the trial, if his credibility had been attacked either on cross-examination or by independent evidence. Even in this case the question is much controverted. *Rosc. Cr. Ev.* p. 98. Here, there is not a word going to show that his credibility was attacked, either on cross-examination or by witnesses called for the purpose; but, should it be taken that his testimony is that of a witness, and not that of an ex-principal, then, the following applies: When evidence has been offered tending to show improper motive or recent fabrication on the part of a witness, former statements made by him may be offered to sustain his statements at the trial. There is not a word of record showing that the least attack was made to assail the testimony of the witness. The rule quoted from *Roscoe* and then *Beck* is always regarded as controlling. In *Beck* we find a long list of decisions, both state and federal, among them *Conrad v. Griffey*, 11 How. 480. The charge, in our judgment, was correct, and the verdict responsive to the charge.

The ground of defense that there was a lack of description of the animal stolen came too late after verdict, and it also was properly overruled. In our opinion, all the rulings were correct, except the ruling permitting the witness to testify, over objection made, as to his prior statement to a third person. This view renders it necessary to remand the case for another trial. It is therefore ordered, adjudged, and decreed that the verdict, sentence, and judgment appealed from be annulled and set aside as not good in law, and that the defendants be remanded in custody, subject to the orders of the trial court.

(51 La. Ann. 528)

SUCCESSION OF BURKE. (No. 12,887.)

(Supreme Court of Louisiana. Feb. 20, 1899.)

CHARITABLE BEQUESTS—VALIDITY.

1. A clause in a will, by which the testatrix, after making a number of legacies, de-

clared: "After these bequests have been made, the remainder of my estate I desire my executors to use for any charitable institution they may select, or think of benefiting, to perpetuate my memory," does not fall under the provisions of Act No. 124 of 1882, and has, as to its validity, to be tested by the general rules of the Revised Civil Code touching testamentary dispositions. So tested, it cannot stand.

2. The testatrix did not designate who should be her residuary legatee, but intended that the residuum of her estate should remain in her "succession" until her executors should select some existing charitable institution (not one to be formed), who, on such choice being made, would become her residuary legatee, entitled to demand at once the whole of the residuum, and thereafter to administer in right of ownership, not trusteeship. The testatrix did not intend to confer upon the executors a continuing power of administration of the residuum, either before or after they should have made a choice of the object of the testatrix's bounty, but intended that they should make a selection, and, on making the same, their power should be exhausted. The power and duty of selection were personal to the three particular persons appointed as executors, and could not be delegated by them to others, nor exercised by others to be substituted in their place. There would be no legal means of forcing the executors to make the selection in the event they should be unwilling to make a choice, or unable to agree upon one. The bequest was not broad enough to cause it to be classed as a bequest for general charitable purposes, and at the same time it was not specific enough to make it to be made to apply to any particular person or corporation.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frederick D. King, Judge.

In the matter of the succession of Mrs. Honoria Burke, widow of William B. Ringrose, a petition was filed by Thomas Henry Burke and others to have a certain provision of the will declared void, and to share in the estate as heirs. The petition was granted, and the executors appeal. Modified.

Mrs. Honoria Burke, widow of William B. Ringrose, died in the city of New York on the 19th of October, 1897, leaving a last will and testament in holographic form, which was probated in the civil district court for the parish of Orleans, in which parish the deceased had her domicile. Robert L. Strong, John H. Conniff, and M. D. Lagan were appointed as her testamentary executors with full selsin. The testatrix, after making a number of bequests, closed her will with the following clause: "Now, after these bequests have been made, the remainder of my estate I desire my executors to use for any charitable institution they may select, or think of benefiting, to perpetuate my memory." On November 15, 1897, Thomas Henry Burke, William J. Cline, Jennie Cline, wife of Eli Barnett, and Patrick Calkin, united in a petition, in which they declared that they, together with the children of Margaret Cavanaugh and William Martin, and her sister, Mrs. Mary Martin, were nearest of kin and the sole surviving and living heirs at law of the deceased; that the said clause of her will was absolutely null and void, uncertain, vague, and meaningless, as well as in direct and positive violation of

the prohibitory provisions contained in articles 1519, 1520, and 1521 of the Revised Civil Code, which articles expressly prohibit substitutions and fidel commissas; that said clause should be reputed not written; that, if allowed to stand, it would not be carrying out the last wishes of the deceased, but instead would be substituting the will and judgment of the executors, all of which was contrary to good morals and the provisions of the Revised Civil Code governing last wills and testaments; that, after payment and distribution of all the legacies provided for and particularly set forth in said last will, the residue of the property left by the deceased belonged to them as the nearest of kin and heirs at law of said deceased, and they were entitled to the same in the proportions fixed by law. In view of the premises, they prayed that the said clause delegating to the executors the disposal of the residue be declared to be absolutely null, void, and of no effect, as well as in positive express violation of the provisions of the Revised Civil Code prohibiting substitutions and fidel commissas, and that said last will be ordered executed as if said clause were not written therein; that they be adjudged and decreed to be the sole living and only heirs at law, and as such entitled to inherit in the proportions fixed by law the residue of the estate of the deceased, and to the exclusion of all others; that, after the payment of the legacies named in the will, they, as such heirs, be put in possession of the estate of their said deceased relative. On January 4, 1898, the same parties, joined by William Martin and his sister, Mary Martin, wife of John Thornton, filed a supplemental petition, in which they reiterated the allegations and prayer of the original petition, and set forth certain parties as being, with themselves, legal heirs of Mrs. Honoria Burke. They alleged that the will of the deceased, if not void on the grounds of vagueness and indefiniteness, was null and void, as being in direct violation of the prohibitory provisions of articles 1519, 1520, and 1521 of the Revised Civil Code, and especially upon the ground that the said clause failed to make any distribution of the residue of the estate of the deceased. Service of this petition was accepted by the executors on December 31, 1897. On January 10, 1897, on motion of G. W. Flynn, attorney of the petitioners, suggesting that he had withdrawn as counsel for Miss Louisiana Cline, Mrs. Eli A. Barnett, W. J. Cline, William Martin, and Mrs. Mary Thornton, it was ordered that the suit for the annulment of the claim of the will bequeathing the residue, so far as the same applied to above-named parties, be discontinued, leaving the petition to stand in the name of Thomas H. Burke and Patrick Calkin. On January 12, 1898, the executors answered, pleading, first, the general issue. They specially denied that petitioners were the heirs at law of the deceased, and, as such, would be entitled to the residue of the estate of Mrs. Honoria Burke, even if said will was null and void, as alleged; but they de-

nied that said will was null and void, as alleged, or for any of the reasons alleged. On May 23, 1898, Mark Calkin, John Burke, Mrs. Honoria Burke, widow of Patrick Dooley, Margaret Burke, wife of John F. Begley, Mrs. Mary Burke, wife of P. J. Costello, intervened in the suit, alleging themselves to be legal heirs of Mrs. Honoria Burke. They prayed to be so decreed, and that the last clause of her will be decreed null and void on the same grounds which had been set up by the original parties, and that they be decreed to be entitled to the residue of her estate in the proportion fixed by law. The executors answered this petition under pleadings identical with those in the original answer. The district court rendered judgment against the executors in favor of Thomas H. Burke, Patrick Calkin, Mark Calkin, Mrs. Mary Burke, wife of P. J. Costello, Mrs. Honoria Burke, widow of Patrick Dooley, Mrs. Margaret Burke, wife of John F. Begley, and John Burke, decreeing null and void and of no effect, and reputed as not written, the concluding clause of the last will and testament of Mrs. Honoria Burke, and recognizing and decreeing the said parties in favor of whom judgment was rendered to be the nearest of kin and the sole living representatives of the deceased, entitled to inherit the residue of the estate of the deceased in the proportions fixed by law to the exclusion of all other relatives. The executors appealed.

Rice & Montgomery, for appellants. George W. Flynn, for appellees.

NICHOLLS, C. J. (after stating the facts). The executors maintain in this court that the will of the deceased is valid independently of the provisions of Act No. 124 of 1882, but that it is saved by the provisions of that act, if otherwise it would be open to successful attack. The act in question makes it lawful for any one to make a donation *inter vivos* or *mortis causa* of any description of property, and to any amount, to trustees for educational, charitable, or literary institutions, whether already existing at the time of the donation or thereafter to be founded. It provides that the donor of said property shall have the right to prescribe the number of trustees, the causes for which any trustee should cease to be such, the manner in which vacancies, however happening, should be filled, and the manner and formalities according to which the trustees should meet and transact business. It provides that the donor shall have the right to prescribe the manner in which the property donated shall be administered, and the objects to which it, or any part thereof, or the revenues thereof, should be applied, provided that the property donated could not be made inalienable, but the donor thereof shall have the right to provide in what manner and under what circumstances the trustees should be empowered to sell the same, or any portion thereof, or to change any investment once made. It pro-

vides that the trustees named in the act of donation and their successors and substitutes, or such of them as are willing and may accept the trust, shall, upon complying with the laws of the state relative to the organization of corporations for literary, scientific, religious, and charitable purposes, constitute a body corporate with the power of continuous succession and unlimited duration, and with all the powers conferred upon corporations by said laws or by custom, provided, however, that the requirement of said laws as to the number of persons necessary for the formation of a corporation shall not apply to such trustees, and provided, further, that if any of the trustees will not or cannot accept the trust, then such of those named as are willing may accept, and in the manner prescribed in the act of donation proceed to fill the vacancies up to the required number. It provides further that, whenever there is an entire failure of the trustees to accept, then the governor of the state may name a number of persons equal to the number named by the donor, who shall fill the places of, and be vested with all the powers conferred upon, the trustees by said donor. It further provides that said board of trustees shall administer the property intrusted to them in conformity with the directions contained in the act of donation, and should have all the powers needed in such administration, but cannot mortgage nor encumber the donated property except as might be prescribed in the act of donation; and that the trustees shall be entitled to no remuneration for their services, unless expressly granted in the act of donation. It provides that the board of trustees shall have the power to accept and administer other donations *mortis causa* or *inter vivos* from the same and other donors, and to apply the same as might be prescribed in the subsequent act of donation; the administration of such subsequent act of donations to be governed by the directions contained in the subsequent act of donations. It provides that the provisions contained in the Revised Civil Code or other laws of this state relative to substitutions *fideli commissa* or trust depositions shall not be deemed to apply to, or in any manner affect, donations made for the purposes and in the manner provided by the act; and that all laws or parts of laws conflicting with the provisions of this act are repealed in so far as regards the purposes of the act, but not otherwise. The district court was of opinion that the act of 1882 was not applicable to this case; that the testatrix did not make a donation to trustees for a charitable association, to be by them administered as a body corporate in accordance with her directions; that the donation was made to executors whose duties were defined by law, and who, while performing such duties, were officers of court; that in no sense were they trustees as named in the act or in the will of the deceased; that they had no property to administer as a body

corporate for a charitable association; that the only mandate or direction which they received from the will of the testatrix was to deliver the remainder of her estate to an unknown third person, a charitable association whom they might select.

Referring to the terms of the will, the court said: "The plain, common-sense interpretation of the clause in question and of the intention of the testatrix is that she bequeaths the remainder of her estate to her executors, with an order or mandate to them to give it to any charitable institution they might select, or think of benefiting. It is clear that the testatrix did not bequeath her estate to any charitable institution by name, in any city, state, or country; nor did she give it to trustees named by her, or to the trustees of any known charitable institution, or one to be founded. The testatrix bequeathed her property to her executors, to be by them held until they selected any charitable institution; then to deliver it to such institution so selected. The will is not valid because of uncertainty. The test to be applied is, could any court or any charitable institution compel the execution or execute the mandate of the testatrix if the executors chosen by her refused to select or refused to think of benefiting any charitable institution, or one or all of them were to die before they made the selection? No court could compel the executors, on its own motion, to execute the trust, and no charitable organization has any interest to invoke the process of the court, and, if any one of the executors, with the uncertainty of life hanging over all, should die before the three should agree, the mandate could never be executed. The bequest is uncertain and indefinite." If the will is to be considered made to any charitable institution by the testatrix, and is not invalid by reason of uncertainty, it is still invalid because the choice of the charitable institution was left to three executors, third persons. Our law prohibits "the custom of willing by testament by the intervention of a commissary or attorney in fact," and declares that the institution of heir and all other testamentary dispositions committed to the choice of a third person are null, even should that choice have been limited to a certain number of persons designated by the testator. Rev. Civ. Code, art. 1573; *Fink v. Fink*, 12 La. Ann. 301. Holding that the clause of the will of the deceased did not fall under the provisions of Act No. 124 of 1882, the district court proceeded to test its validity by the application to it of the general rules of the Civil Code, and, having done so, reached the conclusion that under such a test it was not valid. It was of the opinion that it was violative of the prohibitory provisions of the Code touching substitutions and *fideli commissa*; that it was void for uncertainty, and void for having left the selection of the beneficiary of the testatrix's bounty to a third person, in violation of article 1573 of the Re-

vised Civil Code. While the executors repudiate the idea that by the bequest in question they have had cast upon them either the ownership of, or an interest in, the residue of Mrs. Burke's succession, and deny that the attack made upon it on the ground that it is violative of the provisions of the Civil Code prohibiting substitutions and *fidel commissa*, is well founded, we are not certain that we understand with precision the construction which they place upon the will, and upon their rights and duties under it. We understand them to contend that the disputed clause of the will is, in reality, a bequest for charitable purposes; that while it does not directly order that a corporation should be founded to carry out the wishes of the testator, and it does not appoint them as trustees thereof, or trustees at all by name, yet it is the evident intent that they should be trustees, and they are authorized under the act of 1882 to have themselves organized into a corporation, and administer the property left; that while they were not directed, and would not be authorized under such administration, to deal directly with the ascertainment of individual cases calling for charitable assistance, and go themselves to their immediate relief, yet they were charged with a continuing power and duty to turn portions of the fund in their hands over from time to time to different charitable institutions, which they would select, to be by the latter applied to charitable purposes, and that the persons to be so relieved by them were intended to be and were the objects of the bounty of the testatrix; that they would not be authorized or warranted, under the will, in selecting some particular charitable institution, and turning over to it at once all of the residue of the succession in their hands, and, on obtaining a receipt therefor, be discharged, on the strength of such receipt, from all further responsibility under their trust; that, were they to attempt to do so, legal remedies would be at hand to undo such action, and to cause a proper and legal execution of the wishes of the testatrix; that, as under a bequest so written as to be unquestionably a bequest for charitable uses, uncertainty as to the particular individuals who, under it, would obtain relief, would not militate against the validity of the bequest, nor would the power and duty of making the selection of such persons do so. So, in the present case, the uncertainty as to what particular persons would be ultimately benefited by the will of the testatrix, and the selection of the particular institution which should be charged with the duty of directly ascertaining and selecting proper objects for charitable relief, and actually distributing the funds would not detract from the legality of the clause attacked. Under this construction (if we correctly apprehend it) a double administration would be needed before the poor and needy could or would be reached: First, an administration by the executors, and, next, an ad-

ministration by the governing boards of the different charitable institutions selected by the executors.

An examination of the will shows that the declared object of the bequest was "to perpetuate the memory of the deceased," but in a direction indicated by her; that she did not direct the creation of any corporation to carry out her wishes, nor refer to her executors at all as trustees; that she did not make any allusion at all to individuals requiring assistance; that they would only be reached and afforded aid consequentially as the result of funds furnished by the executors to some charitable institution which would undertake itself to dispense it to particular individuals, and not by virtue of direct bequest to the parties themselves. We do not understand the will to have cast upon the executors the ownership of the residue of her estate, or any interest in it, with the ownership to shift afterwards to some other person by the force of the bequest. We understand her intention to have been to leave the residue of her estate in her "succession" until the executors should have made choice of some particular existing charitable institution (not one to be thereafter formed), which institution, upon such choice being made, would become her residuary legatee, and entitled to demand at once possession of and control over the whole fund. We do not think the testatrix intended that her executors, either acting individually or as a corporation, should have a continuing power of administration of this residuum after their selection of a legatee. We think, on the contrary, the testatrix intended to charge her executors with the single specific duty of making the selection of a residuary legatee, and that upon the performance of this precise duty their power over the whole matter would be exhausted. We are of the opinion that the disposition and control of this fund by this selected institution after it would be placed in its hands would be in virtue of ownership, not trusteeship. The testatrix did not make a legacy of the residuum of her estate to persons needing and entitled to receive charity, although, as said by this court in *City of New Orleans v. Hardie*, 43 La. Ann. 255, 9 South. 12 (in commenting upon a bequest of Collin J. Nicholson), "they were surely to be benefited by it" if carried out. The bequest was to some existing charitable institution which was to be selected by the executors. We do not think the bequest in question falls under the provisions of Act No. 124 of 1882. Its validity or invalidity has to be tested by the application to it of the general rules of our law touching testamentary dispositions. So tested, we do not think it can stand. The bequest is so specific as to withdraw it from being classed as a bequest for general charitable uses, and at the same time so general as not to permit it to be made to apply to any particular person or corporation as the legatee of the deceased. The testatrix did not designate any one as her residuary legatee, but left the selection of the legatee to the choice of her

executors. This she could not validly do. The right and duty of making this choice were evidently personal to the three particular persons named. Not only could these not be delegated by them to others, nor exercised by parties to be substituted in their place should they refuse to perform the duty, but there would be no legal means of forcing them into making a selection in the event they were unwilling to do so, or were unable to agree upon a choice. We are of the opinion that the deceased died without leaving a residuary legatee, and that the residuum of her succession passed at her death to her legal heirs. Rev. Civ. Code, arts. 886, 1709. We understand the executors to concede that the parties in whose favor the district court rendered judgment are, in fact, legal heirs of the deceased, and will not, therefore, deal with that question; but it is evident from the pleadings that there are other legal heirs, who are not before the court. Who, and how many, they are, we do not know; nor do we know the proportion in the succession the different heirs would be entitled to receive. In view of that fact, we think that portion of the judgment which recognized the parties to be the only legal heirs of the deceased to the exclusion of all others, and which fixed the proportion which those parties were to receive in the succession, should be, and the same is hereby, set aside, leaving the rights of the heirs to be hereafter settled and determined; and that, as so altered and amended, the judgment of the district court be, and the same is hereby, affirmed. Costs of both courts to be borne by the succession.

On Application for Rehearing.

(March 7, 1890.)

WATKINS, J. This is a controversy respecting the validity of one clause in the last will and testament of the deceased, which is expressed in the following words, viz.: "Now, after these bequests have been made, the remainder of my estate I desire my executors to use for any charitable institution they may select, or think of benefiting, to perpetuate my memory." It was contested upon the grounds: (1) That it was merely a direction to the executors named in the will to use the remainder of the estate for some unknown and indefinite object or person; (2) that same was not a bequest, within the meaning of the law, under which the executors could claim title to the property; (3) that it was meaningless, and in direct contravention of the prohibitory provisions of the law, and must be reputed, not written. After a careful examination and study of the will, and making an application thereto of the authorities, we were unanimously of the opinion that the aforesaid disposition was illegal and void, and that the deceased died without leaving any residuary legatee, and that, consequently, the residuum of her succession passed, at her death, to her legal heirs. It is now contended that the

aforesaid disposition bequeathed the remainder of her estate "to her executors," with an order or mandate to them to give to any charitable institution they may select, within the meaning of Act No. 124 of 1882; and that such a disposition should receive a liberal interpretation, because it was a legacy destined to pious uses, and can be executed. *State v. McDonogh's Ex'rs*, 8 La. Ann. 216. But the difficulty is that the will does not designate any charitable institution as donee, but leaves that selection to the executors named. Under its terms, they are given the power to act, or to refuse to act altogether. Under this view,—a perfectly unavoidable one,—there is no donee named at all in whom a title could or did vest; and the irresistible conclusion is that the said disposition is null, and that the residuum must go to the legal heirs of the deceased. Rehearing refused.

(51 La. Ann. 486)

WILLET v. ANDREWS et al. (No. 12,977.)

(Supreme Court of Louisiana. Feb. 20, 1890.)

PETITORY ACTION—EVIDENCE—TITLE TO MAINTAIN—DEATH—PRESUMPTION.

1. In petitory action, plaintiff must recover on the strength of his own title, not on the weakness of his adversary's.

2. If the case fails on the weakness and insufficiency of his showing title, it ought to end there and then, and consideration of the title presented by defendant, and of the special defenses urged, becomes unnecessary.

3. A son claiming inheritance from father alleged to be dead must prove his death, or make out a case from which death may be legally presumed, else he fails on the issue raised as to his acquisition by inheritance.

4. The death of an absentee, who is less than 100 years, is not to be presumed.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Grant; M. F. Machen, Judge.

Action by Charles H. Willet against M. D. Andrews and others. Judgment for defendants, and plaintiff appeals. Modified.

Robert P. Hunter, for appellant. Horace H. White and William C. Roberts, for appellees,

BLANCHARD, J. This is a petitory action. Plaintiff sues to be declared the owner of 161.63 acres of land on Big creek, in the parish of Grant. A part of the town of Pollock is situated on the land, and on a tract immediately adjoining is located an extensive saw-milling plant, giving employment to hundreds of people, and being the seat of one of the largest lumber manufacturing industries in the state. It is as the result of the location of the mill at this point that the town of Pollock has sprung into existence. In the olden time, before the building of the railroad on the line of which the mill is established, and before Pollock became a town, the land in controversy had very little market value. It was of the character known as "long-leaf" pine lands, with fine timber upon it, valuable if accessible to a mill, but almost valueless if not.

In consequence of a part of the town being upon it, the land is alleged and shown to be now worth several thousand dollars, whereas in the former time there is testimony to show it was once traded for a pistol, and on another occasion for a pony. The enhancement of its value, while a source of profit to its holders, is, it would seem, the origin likewise of something in the nature of trial and tribulation, as this suit demonstrates. Plaintiff's case is that he purchased the land from Elias B. Parker on the 19th of April, 1893; that some errors in this act of sale were later, in the same year, duly corrected by another writing executed between the parties; that Elias B. Parker inherited the land from his father, Peter D. Parker, who is alleged to be deceased, and of whom, it is averred, Elias was the sole and only heir; that Peter D. Parker inherited it from his father, Levi B. Parker, deceased, whose sole and only heir he is averred to have been; and that Levi B. Parker entered the land from the government of the United States, and became the patentee thereof. Due registry and inscription of all these muniments of title is alleged. Certain of defendants, to wit, Malvina Dawden, Wiley Walker, J. Emmet Walker, James B. Wilmot, Thomas J. Walker, T. R. McDowell, E. Marrus, James M. Rucker, John H. McNeely, Arthur Guinn, and James Bonnett, appeared in the case, and by answer, after denying plaintiff's pretensions, set up title in themselves, as follows: That Levi B. Parker, deceased, entered the land from the United States government in 1860; that patent issued to him in 1861; that, after the death of Levi B. Parker, his surviving widow, Sinah Parker, and his son, Peter D. Parker, sold the land about the year 1862 to Howard McKnight; that McKnight, on January 22, 1880, sold it to Mrs. Malvina Riley (now Dawden); that an error of description in this act of sale was afterwards corrected; that J. H. McNeely acquired a portion of the land on August 9, 1890, at sheriff's sale, in the suit of G. W. Bolton against Uriah Riley, who was the former husband of Mrs. Malvina Riley (now Dawden); and that later, to wit, on April 30, 1891, the said McNeely acquired from the then Mrs. Uriah Riley a certain interest in the land, which is described. After this sale from Mrs. Riley (now Dawden) to McNeely, the latter sold part of his holding to certain of the defendants herein, to wit, J. B. Wilmot and Wiley Walker, and Mrs. Riley sold to the other defendants, or to those from whom they acquired their holdings. These defendants averred possession through themselves and the authors of their titles for more than 30 years, and pleaded the prescriptions of 10 and 30 years. Certain of defendants who were cited, to wit, Dan White, Thomas Shafer, M. D. Andrews, Sim Thomas, John W. McClure, Dan Mead, Oscar Hammock, and John Williams, made no appearance and filed no answer. The case went to trial as to them on default duly entered. The judgment of the court a quo rejected plaintiff's demand out-

right as to those defendants who had set up title, and rejected it as in case of nonsuit as to those who, while cited, had filed no appearance and set up no title. In other words, plaintiff's title as presented was decreed deficient, and that set up by certain of the defendants sufficient. The pleas of prescription were not passed upon. Plaintiff appeals.

If a plaintiff in a petitory action succeeds, it must be upon the strength of his own title, not upon the weakness of his adversary's. Has the plaintiff herein made out such a showing of ownership as entitles him to recover, unless defendants' title prove the stronger and better? We do not think he has. That part of his case relating to his vendor's (Elias B. Parker's) acquisition of the land sued for by inheritance from his father, Peter D. Parker, fails of proof. Peter D. Parker's death is not shown. Not only is it not shown, but no sufficient facts and circumstances are exhibited warranting even the presumption of his death. But, if dead, it is by no means certain that he (Peter D. Parker) was at the time of his death the sole surviving heir of Levi B. Parker, his predeceased father. Levi B. Parker had, in 1860, acquired the land by entry, followed, in 1861, by patent from the United States. He took possession, made some improvements, and lived upon it with his family until 1863 or 1864, when he removed to Concordia parish, opposite Natchez, Miss., taking his family with him. He and three of his children died there, on Lake Concordia, in 1864, and another son appears to have died about that time, in Natchez. This left, surviving, his widow, Sinah Parker, a son Peter D. Parker, then about 22 years of age, another son, Marr Parker, and a daughter, Elmira, then 10 or 12 years of age. These four returned to Big Creek, near their old home, where the son Marr Parker died. The mother, with Peter D. Parker, and the girl, Elmira, then, about the year 1865, removed to the state of Texas. Before the family removed to Concordia parish, Peter D. Parker, then a youth of about 20 years, contracted marriage with Mary Blackman, a girl living in the same neighborhood, and the couple lived together as man and wife from the date of their marriage, May 14, 1862, until October, 1863. About the latter date the husband seems to have left her permanently. Considering herself abandoned, hearing nothing from her husband, and believing him to be dead, the wife, a number of years later, contracted a second marriage with a man named Cooper. She still survives, and was a witness in the case. After Peter D. Parker abandoned his wife, in October, 1863, a son was born to her in January, 1864. This son is the Elias B. Parker from whom plaintiff claims to have derived title. When Peter D. Parker left his wife, in 1863, he is supposed to have gone with his father and the family to Concordia, though the wife, in her testimony, speaks in one place of his having gone off to the war, and

in another of his having "just went off to the Yankees and left me." But the evidence otherwise establishes that it was about this time Levi B. Parker removed to Concordia, and it is shown that the son Peter D. Parker went along with the family. There is nothing to show the wife ever saw Peter D. Parker after he left her, in October, 1863, though he returned to the same neighborhood from Concordia parish, and remained there some little time, before emigrating, with his mother and sister, to Texas. The record discloses nothing of a positive character concerning the Parkers after they left for Texas. What became of them is not known. Peter D. Parker, at the time of the emigration, was not over 23 years of age, and his sister, Elmira, not over 12 years. There is nothing to indicate the age of the mother, Mrs. Sinah Parker. At the time this case was decided in the court below, June, 1898, 33 years had elapsed since Peter D. Parker removed to Texas. But adding these to the 23 years of his age when he left would show him, if living, to be now only 56 years old,—an age at which death, as the district judge properly held, could not be presumed, 'under any ordinary circumstances. A similar calculation shows his sister, Elmira, if living, to be only 45 years of age at this time, and the nonpresumption of death applies with even more force as to her. The land in controversy having been acquired by Levi D. Parker during his marriage with Sinah Parker, the same fell into the community of acquets and gains, so that, as widow in community, she owned an undivided one-half interest in the land. This interest, it is claimed by defendants, she conveyed, as did Peter D. Parker his interest, to Howard McKnight, just prior to their departure for Texas. As to this there is vigorous opposition on part of plaintiff. But leaving this phase of the controversy out of consideration for the time being, if Mrs. Parker did not dispose of her interest to McKnight, then she owned it at the time of her departure for Texas. There is no proof of her death, as there is none of the death of Peter D. Parker, or the daughter, Elmira. If Mrs. Parker, the mother, be still alive, she, of course, owns (unless the conveyance to McKnight be held good) her half interest in the property, and no part of it has descended by inheritance to either Peter D. Parker, or his son Elias B. Parker. If Peter D. Parker be alive, his inherited interest in the property (unless conveyed to McKnight or some other vendee) is still in himself, and his son Elias B. Parker has as yet no inherited interest in and to the same, and, having none, could convey none to plaintiff. As to the daughter, Elmira, if alive, she, of course, holds her interest. She was a minor when the conveyance to McKnight is said to have been made, and did not join in the same. If she is dead, when did she die? Had she married and borne children before her death? If dead, did she die before or

after her mother's death, supposing the latter to be dead? These are pertinent questions to ask, and they are not answered by the record. Mrs. Elizabeth McKnight, a reputable witness, widow of Howard McKnight, to whom it is claimed by defendants the Parkers sold the land before going to Texas, testifies that some six or eight years after they went to Texas her husband received a letter from a man claiming to be the husband of Elmira Parker, making inquiry about the land, its value, etc. There is no sufficient proof warranting the court in holding any of these parties dead, and we must necessarily so hold before we could decree plaintiff entitled to recover, if he be otherwise entitled to recover,—as to which we express no opinion, none being necessary to the determination of the case as presented, in the view we take of it.

Nothing beyond rumored reports of the death of Mrs. Sinah Parker, Peter D., and Elmira is disclosed by the evidence. The wife of Peter D. Parker had heard these reports, and believing them, and justifying herself by the lapse of time and the nonappearance of her husband, and no information from him or concerning him, she married again. But this circumstance adds nothing to the weight of the rumors relative to his death. She simply "believed he was dead strong enough to marry again." This is her language. She "took what she heard to be true, and never heard anything to the contrary." There was one witness, Mrs. L. A. Bryan, who testified the family all had chronic diarrhea when they left for Texas, and that the members of the family who had died at or near Natchez succumbed to that disease. But it by no means follows that because Mrs. Parker, her son Peter, and her daughter, Elmira, were suffering from the ailment mentioned when they left for Texas, that they died of it. Mrs. Bryan testifies to reports she heard of the death of these parties after reaching Texas. But whence came these reports, how originated, through what channels disseminated, etc., she, as well as all other witnesses examined touching the fact of death, could say nothing. A witness by the name of Cotton, the brother of Elias B. Parker's mother, says he heard the reports relative to the death in Texas of Peter D. Parker. Further than this, knew nothing whatever about his death. Willet, the plaintiff, testifies to going himself to Texas; went into three or four counties; went "where they said he had gone [meaning Peter D. Parker], in Shelby county." Who "they" were who said this, he does not enlighten us. Continuing, he says: "I went to the place where they said Peter Parker was, and where they said he died. This was Cherokee county. This was in 1884. I did not find Peter Parker there. I saw a cousin, or said to be a cousin, of his. I inquired for Peter Parker. He told me that Peter Parker had come in there, and his mother along, I understood him to say, in 1864, or 1865. He said they both died

there. He told me that Peter Parker had told him the little girl had died before they got to Texas. The man's name was Mitchell, a cousin on the mother's side." The foregoing is all the testimony the record contains relative to the death of the three members of the Parker family who emigrated to Texas. From it we are asked to assume their deaths. To do so would be to give effect to rumors and reports, vague and uncertain, and to testimony purely hearsay. The man Mitchell, the cousin in Texas, was not called as a witness, nor was any effort made to take his testimony. If Peter D. Parker died in Cherokee county, it would seem that some one might have been found there who could testify to his death positively. Mitchell, the cousin, did not tell plaintiff he personally knew of the death of Parker, confining himself merely to saying he and his mother had died out there. How he knew this does not appear, and we cannot supply it by conjecture. In *Martinez v. Succession of Vives*, 32 La. Ann. 305, it was held the death of an absentee who is less than 100 years old is not to be presumed. It must be legally established. This doctrine is fully borne out by the authorities there cited. We must hold the evidence fails to establish the death of these parties, and with this failure plaintiff's case falls.

It would appear that in "the sixties" two Peter Parkers figured in that section of the country now comprising the parishes of Grant and Catahoula,—another besides the Peter D. Parker whose life we have been tracing. This other one seems to have lived and died in Catahoula parish. That he is dead is fully established by the testimony. He appears to have developed too great a propensity for "gathering where he had not sown," and on this account he was, soon thereafter, called upon to make his exit, by the hempen process, from this terrestrial life. He was hanged for horse stealing, just after the close of the war, on Funny Louis creek, in Catahoula parish. "Judge Lynch" seems to have issued the warrant. But beyond doubt he was not the Peter D. Parker who married Mary Blackman in 1862, and whose son Elias B. Parker, plaintiff's vendor, is. In *Rowson v. Barbe* (La.) 25 South. 139, a petitory action very recently decided, and not yet officially reported, it was said: "Plaintiffs, advancing to the attack on defendant's possession as owner, find themselves repulsed and beaten back at the threshold by the weakness of their own line. They retire discomfited, without having developed the weakness, if any, of defendant's position. They must show, before the possessor can be put on his defense, a legal title to the premises in dispute. In this view of the case, it is unnecessary to consider the various objections urged against defendant's showing of title, and equally unnecessary to review the several grounds, including prescription, urged in support of her title." It was then held that, plaintiffs having failed because of the weakness and insufficiency of the

title they presented, it ended the case, and it was error for the trial judge to go further, and pass judgment rejecting the defense of prescription set up in the answer; this, on the ground that the case fell before consideration of the defense began. The doctrine and ruling of the court in that case are approved, and, as far as applicable, will be permitted to govern the instant case. The district judge properly held the case to be against the plaintiff on the issue of the inheritance of the property by his vendor from Peter D. Parker; that, the latter not having been shown to be dead, it could not be determined that the son Elias B. Parker had acquired anything from him by inheritance. The case should have ended there and then by a judgment of nonsuit against plaintiff, and without passing upon the special defenses set up in defendants' answer. Indeed, while defendants, on whose behalf answer was filed, set up title in themselves, and invoked the law of prescription in support thereof, they did not pray for the judgment of the court on the title thus presented, nor on their plea of prescription. They merely asked rejection of plaintiff's demand, and for judgment for the value of improvements erected on the property, and for the taxes paid by them, in case of eviction. It, therefore, becomes necessary to amend the judgment of the court a qua. For the reasons assigned, it is ordered, adjudged, and decreed that the judgment appealed from be so amended as to reject plaintiff's demand, as in case of nonsuit, as to all the defendants, and to dismiss his action, with costs of the lower court. It is further ordered, etc., that in other respects the aforesaid judgment be avoided and reversed, and that there be judgment of nonsuit on the remaining demands of defendants' set up in their answer, including prescription, costs of appeal to be borne by those appellees in respect of whom the judgment is amended in part and reversed in part.

(51 La. Ann. 608)

STATE v. DENNIE. (No. 13,050.)

(Supreme Court of Louisiana. March 7, 1899.)
INTOXICATING LIQUORS — LICENSE — SALOON ON STEAMER.

1. The owner of a liquor saloon on board a steamer, running on navigable streams between the city of New Orleans and Madisonville, Old Landing, and other points, cannot be compelled by the local authorities, other than those of the home port, to pay a license tax for selling spirituous liquors.

2. The license payer, for the business of retailing liquors, owes one license to the state, and license taxes to the local authorities of the home port of the steamer, and not a license at every other landing in the course of the voyage.

(Syllabus by the Court.)

Appeal from judicial district court, parish of St. Tammany; Robert R. Reld, Judge.

Albert Dennie was convicted for selling liquors without a license, and appeals. Reversed.

Horace R. Upton and Benjamin M. Miller (William S. Benedict, of counsel), for appellant. Milton J. Cunningham, Atty. Gen., and Duncan S. Kemp, Dist. Atty., for the State.

BREAUX, J. The defendant was indicted in the parish of St. Tammany for selling and retailing spiritous and intoxicating liquors without his having previously taken out a license from the police jury, town, or city authorities. It appears that the defendant was the owner of the bar on board the steamboat *New Camella*, plying regularly between New Orleans and ports in the parish of St. Tammany. The record discloses that defendant sold liquor by the glass at the bar, while the boat was landed, to persons who came on board; that he paid no license, except the United States internal revenue license as retail liquor dealer; that a license as retail liquor dealer was assessed against him by the assessor of St. Tammany parish; that, in case of accident to the bridge of the Louisville & Nashville Railroad, the boat, when called, carried passengers between points in Louisiana and points in Mississippi; that she had not performed such service within the past 15 months, and since the defendant had been engaged in business on her. During the trial, plaintiff offered in evidence the license issued to the steamer by the United States collector of customs of the port of New Orleans to engage in the "coasting trade" for one year, from April 2, 1898, together with certificate from the collector of customs setting forth that a vessel licensed for the coasting trade is entitled by law to employment in any of the navigable waters of the United States. The district court refused to admit the evidence, stating that the boat was engaged in trade between ports in Louisiana; that, in consequence, it was irrelevant to show a license to navigate in any of the navigable waters of the United States; that there was no question raised as to the boat being licensed by the United States to engage in trade on the waters in different states. Defendant states, as a fact, that there was no evidence introduced to show that the police jury of St. Tammany parish had adopted an ordinance requiring the payment of a license to retail liquor. In the application for a new trial no mention is made of the want of proof of license issued by the parish of St. Tammany. Among the grounds urged in the application for the new trial were that no parish license is by the law required for the sale of liquor on board a vessel engaged in trade between different points in different parishes of Louisiana, and that no parish license is by law required for the sale of liquors on board a vessel licensed by the laws of the United States to engage in commerce between the ports of the different states. It appears of record that defendant had paid an internal revenue license to the general government to carry on the business in which he was engaged. The defendant

was tried by the court, and condemned to pay a fine of \$305, and costs, and, in default of payment, to imprisonment for a period of three months. From the verdict and sentence the defendant presents this appeal.

With reference to the ruling excluding the license and certificate issued by the collector of customs, we agree with our brother of the district court. It was not, as correctly held by him, the trade for which license had been obtained which fixed the status, but the traffic in which she had been engaged within the limits of the state, exclusively, during more than 12 months prior to the finding of the indictment. To illustrate: Permission to do an act is not equal to the deed itself. One may have a license to practice his profession in different places, and yet it would not be evidence of his practicing in these places, particularly in presence of the positive evidence to the contrary. The steamer was running regularly between New Orleans and ports in St. Tammany parish,—extent of trade to which the license and certificate issued by the United States officer would not have added anything, had they been admitted, as relates to the issues here; but, for reasons hereafter stated, the license was admissible on another ground, and that is to prove the home port of the steamer.

This brings us to the ground, urged by defendant, of the want of proof of a license to sustain the conviction. The record on appeal does not disclose that evidence showed that the police jury had ever adopted an ordinance requiring the payment of a license. No note of evidence was taken in the cause. It does not appear, in the statements forming part of the bills of exception, that any objection was urged on the ground that no ordinance had been adopted requiring the payment of a license of retail liquor dealer. The question is settled by repeated decisions, in the absence of a note of evidence or objection properly certified, and the court will presume that the judge proceeded on proper evidence. *Harrison v. His Creditors*, 43 La. Ann. 91, 9 South. 15, and authorities therein cited. We quote from *Black on Judgments*: "Where nothing whatever is shown, if evidence were necessary to have authorized the particular decision complained of, it will be presumed that the evidence was before the court, and that it fully justified the conclusion reached. If a party rely upon the fact that there was no evidence in a case, where evidence was necessary, he must establish it by a proper bill of exceptions, or he will fail." *Black, Judgm. § 271*. This being a criminal case, the facts are not before us, unless brought up in the manner required by the rules of appeal governing such cases.

We take up for decision defendant's next ground of defense: The license law makes no provision for a license tax for the sale of liquor on board a vessel. The fine was imposed under section 910 of the Revised Statutes, in which a penalty is fixed against those

who retail spirituous or intoxicating liquors without previously obtaining a license from the police jury. The statute is in terms general, and is broad enough, we think, to include those who sell liquor on board of vessels within the territorial limits of the taxing power. The business is specifically named, whether conducted on land or on a boat. The fact that the business of selling or retailing liquors is not carried on in a particular place does not change the nature of the business. It does not, when carried on on board of a vessel, essentially differ from similar business on land. We all know that a barroom on a water craft is similar, as relates to its business, to a barroom on land; and we can conceive of no good reason for holding that one is subject to a license tax, while the other is not, if there is no law exempting either. It is quite true that no occupation is licensed, unless specifically enumerated by law. Here no distinction is made in the statute as relates to the place where the liquor is retailed. It embraces all retailers of liquors. But in argument defendant asserted that the home port of the steamer *New Camella* is in New Orleans, and that only one license can be exacted for carrying on his business, and that it can be collected only at the domicile or home port of the vessel. As relates to the vessel's home, it was not, in our judgment, in the parish of St. Tammany. The testimony shows that she carried freight and passengers between New Orleans and different points in St. Tammany. There are no ports in St. Tammany at which officers of the general government are stationed to issue licenses and register vessels, and she was neither registered in that parish nor had a situs within its limits. While, in our judgment, a license can be exacted of all retailers of liquor on boats plying exclusively on the streams of this state (we purposely avoid expressing our opinion in cases of the business of barkeeping on boats running to points out of the state), only one state and one parochial or municipal license can be exacted, for the controlling reason that the state is limited to one, and the subordinate political divisions are without power to exact more than one license for any one occupation. From the necessity of things, payment of a license at the domicile of a steamer, to the state and to the local authority, must operate as a protection against the exaction at any other place; otherwise, the license law would have the effect of a prohibition, which was not contemplated when the license statute was enacted.

Our view, in this matter, relates exclusively to the business of conducting a barroom on steamers engaged in carrying freight and passengers in good faith, and on which refreshments for the passengers and employes are usually deemed proper. Now, it is evident that defendant's business was not carried on by him within the limits of the parish of St. Tammany, and that this parish is without right to collect a license on business having

its situs in New Orleans, the domicile of the steamer, and, of necessity, of defendant's business. These being our views, we have not found it necessary to pursue the subject further, and pass upon decisions bearing upon other points not needful to a decision of the case. It is therefore ordered, adjudged, and decreed that the verdict, sentence, and judgment of the court, appealed from, are annulled, reversed, and avoided, and the demand made of the defendant for a fine and penalty rejected.

(51 La. Ann. 706)

STATE v. FRIERSON. (No. 13,061.)

(Supreme Court of Louisiana. March 20, 1899.)

HOMICIDE—SELF-DEFENSE—HOSTILE DEMONSTRATION—CHARACTER—THREATS—INSTRUCTIONS—HARMLESS ERROR.

1. Evidence of threats made by the deceased, though communicated to the accused, and evidence of the violent and dangerous character of the deceased, are not admissible, unless foundation be laid by proof of an overt act or hostile demonstration by the deceased. *Held*, the ruling of the district judge, excluding evidence of threats, was not erroneous.

2. Though the state has proven facts tending to show a previous difficulty between the deceased and the accused, that will not render admissible evidence of hostility and threats of deceased against the accused. *Held*, the state having sought to prove a common design of the defendants charged as principals affords no ground to admit evidence of threats.

3. The court, having properly excluded all evidence of threats, properly declined to instruct the jury on the assumption that evidence of threats had been admitted. *Held*, the district court could properly decline to take facts, urged by the defense, as basis for explaining to the jury what constituted an attack or hostile demonstration.

4. An instruction was given hypothetical as to the facts referred to, and correct as relates to the law. *Held*, the assailant in a difficulty is not injured by the instruction that the aggressor cannot interpose the plea of self-defense in his behalf.

(Syllabus by the Court.)

Appeal from judicial district court, parish of St. Tammany; Robert R. Reid, Judge.

Henry Frierson was convicted of manslaughter, and he appeals. *Affirmed*.

Benjamin M. Miller, for appellant. Milton J. Cunningham, Atty. Gen., and Duncan S. Kemp, Dist. Atty., for the State.

BREAUX, J. The defendants, William, Henry, and Joseph Frierson, were indicted for taking the life of John Peterson. It appears that on the day of the homicide the accused and a few others met the deceased and his party on the railroad track, near Pearl River, and, immediately after meeting the deceased, the accused shot and killed him. Five bills of exceptions set forth the points involved in this case. The first bill was taken to the refusal of the district judge to admit testimony offered by defendant to prove threats made by the deceased against the defendant a short time prior to the homicide,

which had been communicated to accused. The second and third bills were taken to the court's refusal to instruct the jury as requested by the accused. The fourth bill was taken to the charge of the court, and the last or fifth bill was to the court's ruling denying a new trial to the accused.

As relates to the first bill, witnesses for the defendant testified that, just prior to the homicide, he and those with him met the deceased and the parties with him, and the deceased then said, "Is that Joe Frierson?" at the same time cursing him. That appellant threw his left hand up, and towards the breast of Peterson, the person killed, and said, "You stop!" but that the deceased did not stop, and that thereupon the accused pulled his pistol and waived it, saying, "Look here! look here!" That the deceased then said, with an oath, "You; I know you, too," stepped back, put his hand in his hip pocket, exclaiming several times, "Look out, boys! I've got him! I've got him!" The defendant swore that, believing from Peterson's actions that he was about to pull a pistol and shoot him or his brother, he fired three shots at him, and Peterson fell. The foregoing was principally the testimony of the defendant in his own behalf. The other witnesses for the defendant gave substantially the same account of the shooting. In behalf of the state, witnesses testified that the deceased left his pistol at home, and that he usually did not carry a pistol. His body was searched one or two hours after the shooting, and no pistol was found. These witnesses also testified that the deceased was carrying a sidesaddle at the moment he met the defendant. Witnesses for the state, testifying as to the occurrence at the time of the homicide, contradict the accused as a witness and the other witnesses for the defense. They heard no conversation between the deceased and the accused before the shooting. The first witness who testified said that the two crowds met, and, without anything being said, the deceased was shot, and the other testimony of the state is corroborated in this respect. The defense charge that the witnesses for the state had been drinking on the day of the shooting, and that they were under the influence of liquor to a degree rendering them incapable of observing and stating correctly all that happened at the time of the killing. The position of the defense in argument is that the district judge does not deny the truthfulness of the testimony of defendant's witnesses, but that, on the contrary, he, it may be well inferred, believed the account of the shooting given by defendant's witnesses. The district judge made the following statement, which forms part of the bill of exceptions: "The evidence, in the opinion of the court, entirely failed to show any overt act or hostile demonstration on the part of the deceased towards the accused, or any of his party, at the time of their meeting, which resulted in the homicide. The testimony of

Henry Frierson, the only one of the accused convicted, distinctly showed him to be the aggressor at the time of the homicide." In another bill, in which the facts are narrated, the trial judge states that there was a severance of witnesses, but the three accused were necessarily present. "The court gave very little weight to the testimony of John McQueen and Elijah Frierson, and none at all to Sol Bilbo. This witness was apparently strongly biased, and his willingness to testify to any circumstance favorable to the accused was apparent." The defendants, William, Joseph, and Henry Frierson, were put on their trial. William and Joseph were acquitted. Henry was found guilty of manslaughter, and sentenced to four years' service in the penitentiary. Henry appeals from the verdict and the sentence.

With reference to the first point in the case, we are not convinced that the trial judge erred in excluding the testimony offered to prove threats made by the deceased against the accused. It is well settled that circumstantial threats may be admissible in evidence, if the facts warrant their admission. In order that they may be admitted, it must be shown that the person slain by some act evinced the intention of carrying out his threat. It must appear that there was an overt act; that the defendant was in imminent danger. But in this case there was no proof of an overt act. The weight of the evidence negatives the asserted attack by deceased, and it proves that defendant, not the deceased, was the assailant. The accused made the only hostile demonstration. The statement of the accused and of his witnesses, regarding the words of the deceased, and the motion of his hand towards his pocket, in which it appears there was no pistol, is not only not corroborated by the witnesses in behalf of the state, but is contradicted by their testimony. But the defense urges that this evidence is weakened and discredited by proof of the fact that the witnesses had been drinking, and that it does not outweigh the evidence of the defendant regarding the occurrence just prior to and at the time of the shooting. The testimony of record does not prove that all the witnesses were under the influence of liquor. One only was under its influence, it appears, and, even as to this witness, it does not prove that his condition was such as to prevent him from correctly noticing all that transpired. If the defense's view of this testimony should be taken as accurate, the evidence on the part of the accused does not prove, with any degree of certainty that the defendant, on the day of the killing, was attacked by the deceased. This, manifestly, was the opinion of the trial judge in excluding the testimony, and we have not found that he erred.

Two men, each in company of a few others, coming from opposite directions, meet by chance on the highway. One is unarmed, and incumbered with a saddle he is carrying, while the other, brandishing his pistol, says to him, "Stop!" and he does not stop. There is not

in this mere refusal to stop any hostile demonstration, such as to justify the taking of human life, or to warrant an accused in believing that his life is in danger, because of some threats he asserts had been made by the deceased.

Appellant contends, upon another ground, that the evidence of threats made by the deceased should have been admitted. Counsel's insistence is that the state attempted to prove a premeditated intent upon the part of the defendants to kill or make an attack upon the deceased, and the state introduced evidence to the end of proving this intent; that, in consequence, as we take it, the question before the jury was not alone whether the deceased committed an overt act towards the defendants, but that the state, by the evidence of hostility towards the deceased, cast a presumption into the scale against the defendants, which entitled the defendants to prove that the deceased cherished hostility towards them. In the absence of proof of an overt act, this evidence was not admissible. The testimony to show existing enmity was irrelevant. "The rule is, general threat, enmity, ill will are all inadmissible, unless proof be first given that there was an overt act of attack, and that defendant was in imminent danger." Whart. Cr. Ev. p. 757.

The second bill of exceptions taken to the refusal of the district judge to give the charge requested by the defendants is not insisted on, as the instructions requested had been sufficiently given in the general charge. The bill being abandoned by the defense, we take up the next bill of exceptions.

The defendants requested the court to instruct the jury that "a threatening act or hostile demonstration is such an act or demonstration as is calculated to induce, in the mind of the person to whom the same is directed, the belief that an assault is about to be made on him, or a weapon drawn for the purpose of assaulting him. The motion of the hand towards the hip pocket, in a manner calculated to induce the belief that the person making the motion is about to draw a weapon, may be considered a threatening act or hostile demonstration, when considered in connection with proof of the dangerous and violent character of the person making such motion, or in connection with threats, or a prior assault made by him against the person towards whom the motion is directed." This instruction the court refused to give to the jury, and the court included in the bill the statement that it had excluded all testimony of threats or dangerous character of the deceased, and that, in the general charge, the court instructed the jury as to what constituted a hostile demonstration. The defense concedes that the evidence of threats by the deceased, and of the violent character of the deceased, which they insist was admitted by the court, was not admitted, however, by the court to prove his threats and dangerous character. The court states that no such evidence was admitted for any pur-

pose. If the court erred in making this statement, it remains as a fact that the accused has had the benefit of the evidence, although it was inadmissible,—a fact of which he can scarcely be heard to complain. If the judge is in error in his statement made part of the bill, we have not found that he (the accused) has any cause to complain, as his cause has not been prejudiced by testimony heard, though it appears at one time to have been excluded by the court, and subsequently admitted for another purpose. Under the circumstances, it affords no ground for a reversal of the verdict. If evidence be admitted in error, or for another purpose, then proof of threat will not supply the absence of violent assault, and give to the accused the right to have the jury instructed as if a violent assault had been made.

This brings us to the fourth bill of exceptions to the court's charge, as follows: "If the jury believe from the evidence that, at the time of the killing, the defendants, or any one of them, was the aggressor in the difficulty, the plea of self-defense cannot be interposed in his or their behalf." In our judgment, the charge was not erroneous. The defendants were prosecuted as principals, and as having "acted together, aided and assisted each other," in carrying out a common design. The charge must be taken in connection with the case, and, in that view, the words of the charge are to be taken *secundum subjectam materiam*; that is, with reference to the nature of the action. The evidence shows, if any one had cause to complain when the charge was delivered, it was not the appellant. As to him, the court, we think, stated the law correctly. He did the shooting, and the affair was between him and the deceased, and, if he was the aggressor, the plea of self-defense could not, in law, be of any avail to him.

The fifth bill of exceptions was taken to the ruling of the district judge overruling the motion for a new trial. The grounds were all contained in the bills of exceptions upon which we have already passed, save the ground that the court erred in admitting evidence that the defendants had fled from arrest. This ground was abandoned on appeal. We reiterate, in answer to the recapitulation in the brief of the able and energetic counsel, upon which he asks the reversal of the judgment, as follows:

"That [urged counsel for accused] evidence of threats made by deceased against the life of the defendants, and communicated to defendants before the homicide, and the violent and dangerous character of the deceased, should have been admitted: (a) Because [said counsel for the accused], while the evidence produced on trial proves the commission of an overt act and hostile demonstration of the accused,—that which we have in substance before stated,—the evidence did not show the necessity of the extreme action taken by the defendant, or cause for apprehending great danger to his person. (b) Because [counsel said further] the state had laid the foundation for

the introduction of such evidence by defendants by attempting to prove a conspiracy on the part of the defendants against deceased in a previous difficulty with two of the defendants." In our judgment, the attempt of the prosecution to prove that defendants had confederated to carry out a common design, and evidence of a previous difficulty connected with the design, as we understand, did not have the effect of laying a foundation to admit evidence of threats, in the absence of proof of the "apparentcy" of the danger.

(2) "Because the district court erred in refusing to give the charge requested by defendants, defining a threatening act or hostile demonstration." There was no exception taken to the general charge. In the absence of such an exception, under repeated decisions, we must take it that the charge, as stated by the trial judge, was sufficient, and covered this objection, as relates to the attack.

(3) "Because the district judge erred in charging the jury as requested by the state and excepted to." After a careful review of this ground, we conclude: The evidence revealed that appellant alone, of the three indicted, acted. As to him, it follows that the charge was not erroneous.

We have, as carefully as we could, reviewed the proceedings of this case, and have not found ground to conclude that the accused can be relieved. Therefore the judgment appealed from is affirmed.

(51 La. Ann. 693)

STATE v. JACKSON. (No. 12,010.)
(Supreme Court of Louisiana. March 20, 1890.)

CRIMINAL LAW—APPEAL—RECORD.

The transcript containing neither bill of exceptions, motion in arrest of judgment, nor assignment of errors, and there being no error apparent from an inspection of the transcript, the judgment appealed from will be affirmed.

(Syllabus by the Court.)

Appeal from criminal district court, parish of Orleans; James C. Moise, Judge.

Henry Jackson was convicted of assault, and appeals. Affirmed.

Henry Jackson, in pro. per. Milton J. Cunningham, Atty. Gen., Robert H. Marr, Dist. Atty., and Joseph E. Generally, Asst. Dist. Atty., for the State.

WATKINS, J. On information, the defendant was prosecuted on the charge of feloniously committing an assault upon one August Pere, by willfully shooting at him; and, the jury of trial having returned a verdict of "Guilty as charged," he was sentenced by the court to imprisonment in the state penitentiary for a term of five years, and from that verdict and sentence he prosecutes this appeal.

The transcript contains no bill of exceptions, assignment of errors, or motion in arrest of judgment, and there is no error ap-

parent from an inspection of the record. Defendant's counsel has favored the court with no brief in support of his appeal. Under the circumstances, we will follow the rule announced in *State v. Potter*, 83 La. Ann. 795, and affirm the judgment. Judgment affirmed.

(51 La. Ann. 727)

ANDERSON v. THOMPSON et al. (No. 12,959.)

(Supreme Court of Louisiana. March 20, 1890.)

CORPORATIONS—ESTOPPEL TO DENY EXISTENCE.

The act of incorporation of a manufacturing company was erroneously drafted under Act No. 36 of the Acts of 1888, instead of, as it should have been, under section 681 et seq. of the Revised Statutes. The promoter and organizer of the company changed his position, and sought to attack his own acts as a charter member and president of the company. *Held*, that he was estopped; that the incorporators, as relates to those with whom they have contracted, cannot question the incorporation of a company it was possible to incorporate (though it may be a nullity as to third persons). A company which the charter members attempted to incorporate, and which has acted as a corporation, having, in appearance, at least, full power and authority to act,—a power and authority which induced others to enter into contract with it and invest money for the benefit of the company,—is binding upon its promoters and organizers.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frank A. Monroe, Judge.

Action by J. S. Anderson against Dr. W. Thompson and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Buck, Walshe & Buck, for appellant. W. F. Brewer and Parkerson & Tobin, for appellees.

BREAUX, J. Plaintiff, claiming that he is defendant's partner, and not a shareholder of the Independent Ice Company, seeks to treat the latter as a mere fiction, and asks for a judgment dissolving the partnership, and decreeing the parties, respectively, owners of the property in proportion to their respective interests. The fact is that, in 1896, plaintiff engaged in organizing a corporation under the provisions of Act No. 36 of 1888, for the purpose of "purchasing, manufacturing, and selling" of "ice and distilled water." To this end he and four others appeared before a notary public, and signed an act of incorporation. This act was published as required by law. Plaintiff soon after spent about \$5,000 in buying necessary machinery and in putting up the plant. Plaintiff avers that those who signed the act of incorporation with him did not subscribe to any stock; that no list of subscribers to stock was ever recorded in the mortgage office, as required by section 686 of the Revised Statutes. Plaintiff avers, further, that, in that condition of affairs, he met defendant in the case. They agreed that, with a capital of \$15,000, \$5,000 subscribed by plain-

tiff, and \$10,000 by defendant, they would carry on the business under the name of the corporation. To the defendant was accorded the right of organizing a board of directors. The original incorporators, in order to enable defendant to accomplish this, resigned, and others were elected in their place. Under the name of the Independent Ice & Distilled Manufacturing Company, Limited, plaintiff and the defendant carried on the business of making and selling ice. The concern prospered. It appears on the minutes of the company that in April, 1893, J. S. Anderson, L. Lederle, L. R. McCartney, George Bonning, Louis C. Jacob, per proxy, held a meeting for the organization of the company, and that every one present agreed to take stock. The capital of the company was fixed at \$50,000. Anderson produced at the meeting a copy of a charter he had selected, being the best out of several he had studied. This charter was afterwards signed before a notary. Plaintiff was elected president and general manager. Another meeting of the board was held in the following May, and the details of the business received the board's attention. At another meeting held later, in the same month, it appears that some of the members resigned, and others were elected in their place, in accordance with the agreement entered into between plaintiff and defendant. The defendant was elected president of the company, and plaintiff the superintendent and general manager. Afterwards differences arose between plaintiff and defendant, and the former does not appear to have attended any of the meetings of the board of directors. We are informed in behalf of plaintiff that he desired to increase the capacity of the plant, but that defendant was unwilling to incur further expense to that end; that they had bought secondhand machinery, with the view of increasing the capacity of the works. After defendant's refusal to increase the plant's capacity by adding other machinery, plaintiff concluded to, and did, sell, at a profit. Another cause of difference was plaintiff's demand for the payment of salary for services as manager. Plaintiff retained some of the collections and the proceeds of the machinery he had sold. Defendant, in return, also drew an amount for his individual account. The differences resulted in the defendant calling a meeting of the board, at which a resolution was adopted discharging plaintiff as an employé, and seeking to exclude him from participating in the firm's affairs. It was then that the suit before us for decision was brought. He alleges, substantially, that defendant's acts are cause enough for terminating the asserted partnership and for liquidating its affairs. Defendant pleaded, by way of exception, that plaintiff, being one of the organizers of the company, was estopped from denying its existence, and, in consequence, his petition disclosed no cause of action. The court admitted evidence on the trial of the exception,

sustained the exception, and dismissed plaintiff's appeal. From that judgment plaintiff prosecutes this appeal.

While we are impressed by the fact that plaintiff did, in good faith, all in his power to organize a corporation, he committed the error of organizing it with only four others, when six should have been the number, as the corporation was a manufacturing company, under section 683 of the Revised Statutes, and not a corporation organized under the act of 1888, "for the purpose of carrying on any lawful business or enterprise not otherwise specially provided for." Again, he neglected having the list of subscribers recorded in the mortgage office; and, lastly, he was in error in dealing with subscribers who did not pay for shares or give an equivalent therefor. These would afford the best grounds to grant the prayer of plaintiff's petition, if presented by a third person. The plaintiff is not only not a third person, but, from the first, he was the promoter and organizer of the company, and received benefits from the business. It is evident that plaintiff always treated the charter as binding until he discovered that he and defendant could no longer agree. It was, as we take it, only then that he sought legal advice, and discovered that there had been an oversight committed in organizing his company. Though the charter was a nullity, the business was carried on in a corporate name, and plaintiff, its promoter, consented to the proposal of defendant to put in a comparatively large amount in order to sustain its corporate existence. In a board meeting of the company, the defendant was placed in nomination for the presidency by plaintiff, and was elected, and he (plaintiff) accepted a position under the charter at the same time. As far as the record discloses, these were all exclusively corporate actions. Defendant, in all this, properly enough, so far as we know, sought to prosecute his own interest, and in this we judge that he met with some degree of success in a financial point of view. The plaintiff, as we gather from the evidence, is not in a position to maintain that defendant was not induced to act upon the assumption of corporate existence of the company the plaintiff had organized, and of which he was president at the time that defendant also became a subscriber, as before stated. The evidence does not disclose that defendant knew of the invalidity in the charter. Plaintiff, as a witness, said that defendant insisted on going on under the name of a corporation, in order that he might be relieved from any liability beyond his subscription. Such was the understanding, we are informed, between plaintiff and defendant. This being the condition, as between plaintiff and defendant, it must be held binding. Plaintiff chose to agree to this stipulation, and bind himself, we may say, and from it he has received benefits. He cannot be released without violating the plain principles of rea-

son and good faith. *Curtis v. Meeker* (Ill. Sup.) 43 N. E. 399. Moreover, he cannot question the legality of his charter of incorporation, and of the company he attempted to incorporate, and which, under his administration as an officer, has acted as a corporation. It is therefore ordered, adjudged, and decreed that the judgment is affirmed.

(51 La. Ann. 736)

**BOARD OF ALDERMEN OF OPELOUSAS
v. NORMAN et al. (No. 13,051.)**

(Supreme Court of Louisiana. March 20,
1899.)

NUISANCE—WHAT CONSTITUTES—ABATEMENT—SUPPRESSION BY MUNICIPALITY—CATTLE YARDS.

1. The fact that a particular use of property is declared a nuisance by a town ordinance does not make it such unless it is in fact so, and is embraced within the common-law or statutory idea of a nuisance.

2. The thing or act complained of must come within the legal notion of a nuisance, and, where it does not, no authority to remove or abate is derived from the ordinance declaring it a nuisance.

3. But where a thing or act complained of is a nuisance, or must necessarily become such, a municipal corporation may, in the exercise of the police power, make regulations for its suppression and prohibition.

4. Open cattle yards and pens within the corporate limits, where cattle in numbers are congregated and kept for feeding and fattening purposes, held to belong to that class of things which "must necessarily" become nuisances, and may be abated under a general prohibitive ordinance declaring it a nuisance to so keep cattle within the corporate limits. (Syllabus by the Court.)

Appeal from mayor's court of town of Opelousas; S. L. Hebrard, Judge.

John R. Norman and John A. Haas were each convicted of violating an ordinance of the town of Opelousas, and both appeal. Affirmed.

Kenneth Ballillo, for appellants. Lucius G. Dupré, for appellees.

BLANCHARD, J. The board of aldermen of the town of Opelousas adopted the following ordinance: "Resolved, that from and after this date it shall be considered a nuisance for any person or persons to keep or feed horned stock in a quantity of twenty-five or more, for marketing, shipping, or any other purpose, within the corporate limits of the town of Opelousas. Be it further resolved, that any person or persons violating this ordinance shall be fined twenty-five dollars and costs for the first offense, and one hundred dollars and costs for the second offense; said fine and costs to be collected by the mayor in the same manner that other fines and costs are collected." Affidavits charging violation of the ordinance were made against defendants, warrants issued, they were arrested, tried before the mayor's court, convicted, and fined \$25 each. Both appeal. For the purpose of appeal their cases are consolidated by consent.

25 So.—28

The appeal is based on article 85 of the constitution of 1898, under which the appellate jurisdiction of this court extends to all cases in which the constitutionality or legality of any tax, toll, or impost whatever, or of any fine, forfeiture, or penalty, imposed by a municipal corporation, shall be in contestation, whatever may be the amount thereof. The contention of appellants is that the municipal authorities exceeded their power in adopting the ordinance in question, that the same is ultra vires, and that the fine imposed under its provisions is illegal and unconstitutional. The contention of the town authorities is that the ordinance and its enforcement is a proper exercise of the police power in respect to the protection of the health, safety, and comfort of the inhabitants of the town. It will be observed that the keeping and feeding, itself, of horned cattle, within the corporate limits, is not declared by the ordinance a nuisance, and prohibited; but the keeping and feeding of cattle in numbers is. It is declared that such keeping and feeding of cattle in numbers aggregating 25 head or more is a nuisance. The ordinance, as to the keeping and feeding of cattle in such numbers within the corporate limits, is thus prohibitive, not regulative. Just there comes in the objection and contention of defendants. They dispute the power to enact a prohibitive ordinance on this subject. They acknowledge the power to enact a regulative one. In such a case as this, the jurisdiction of this court is confined to an inquiry into, and determination of, the question of legality or constitutionality of the ordinance imposing the fine, and for this purpose both the fact and the law of the case are open to examination and decision. But the extent to which this examination into the facts may go does not include the evidence on which the mayor's court founded its judgment as to the infraction vel non of the ordinance. With the facts of the case, in this sense, tending to show guilt or innocence of the accused, we have nothing whatever to do. *State v. Callac*, 45 La. Ann. 29, 12 South. 119; *State v. Dean*, Id. 441, 12 South. 489; *State v. Fourcade*, Id. 721, 13 South. 187. The examination, therefore, which we shall make of the facts of this case will be limited accordingly.

It appears that defendants have a pen or pens located within the corporate limits of the town; that the number of cattle kept there was, usually, from 100 to 150 head; that these cattle were kept there for the purpose of feeding and fattening; that the pens are in close proximity to a cotton seed oil mill, from which cotton seed meal or cake and hulls are procured for feeding the stock; that the pens are distant not more than 300 or 400 feet from private residences; that they drain into a small stream or bayou, which runs through a part of the town; that the waters and banks of this stream are, and liable to be, unwholesomely affected by

the same; that the pens are not kept in such condition as to prevent this; that there are no appliances for the removal of the urine and droppings of the cattle kept there, and the pens are not so arranged that the droppings and urine can be removed daily; that, where cattle are kept standing on the ground, it is impossible to remove the urine, which more or less becomes absorbed into the soil; and that it is not practicable to deodorize urine where cattle are fed on the ground. We construe the ordinance to mean that no person or persons shall keep 25 or a greater number of cattle in any one place, at a given time, within the corporate limits, and to declare the keeping of 25 head, or a greater number, in any one place, a nuisance. We are asked to declare it beyond the authority of the municipality to enact such an ordinance. We cannot do so. In saying this we fully appreciate that the fact that a particular use of property is declared a nuisance by an ordinance of a city or town does not make that use of property a nuisance unless it is in fact so, and is embraced within the common-law or statutory idea of a nuisance. Wood, Nuis. § 744. It is fully conceded that the thing or act complained of must come within the legal notion of a nuisance, and, where it does not, no authority to remove it is derived from the ordinance declaring it a nuisance. *Id.* § 744, and note. But where a thing or act complained of is a nuisance *per se*, or must necessarily become a nuisance, a town or city may, in the reasonable exercise of the police power, make regulations for the suppression and prohibition of the same. When the thing sought to be abated is clearly a nuisance, one affecting or liable to affect the health of the town, the abatement may be made by the authorities of such town. The possession of very extensive powers for the abatement of nuisances detrimental to public health and safety exists, as part of the police power, in municipal corporations. *City of New Orleans v. Wardens of Church of St. Louis*, 11 La. Ann. 245; 1 Dill. Mun. Corp. § 141. Wherever protection to the lives, limbs, health, comfort, and quiet of the citizen and to his property is needed to be extended, there the police power reaches; and in respect of acts such as that complained of herein it rests upon the principle embodied in "*Sic utere tuo, ut alienum non lædas*,"—an accepted maxim, alike of the civil law and the common law. Open cattle yards and pens, located and maintained, as these are, within the limits of an incorporated town, where cattle in numbers are kept for a long period of time, to be fed and fattened for market, belong, we think, to that class of things which "must necessarily" become nuisances. It is within the ordinary experience of every observant man who has had opportunities for judging that they do, and the facts of the case at bar show that the pens in question are such. They are not safeguarded by the conditions, appliances, equip-

ment, etc., to prevent their becoming offensive, to obviate the noxious exhalations and noisome smells incident to such places, nor even to minimize the same. The drainage from the pens pollutes the stream which runs through the town, and is liable to affect the health of the locality. So we think it established that the particular use of the property in question, declared by the ordinance to be a nuisance, is "in fact" as well as in law a nuisance. Being such, the police power of the municipal corporation, operating through the ordinance attacked, and its enforcement, reaches it, and abates it. It being shown that the pens, as now located, arranged, equipped, and maintained, are nuisances, it is no argument against the ordinance to say that under proper arrangement, equipment, and regulation the use to which the property is now put may become innocuous and unobjectionable. See 1 Am. & Eng. Enc. Law (2d Ed.) p. 65. If it be possible for these pens, harboring a large number of cattle, to be put in such condition as not to affect injuriously the health, the comfort, the quiet of the town, and they are so put, a case will be presented with respect to which the ordinance may, perhaps, have no application, and, were such a case now before us, a different result might be reached. We find no sufficient grounds for disturbing the judgment appealed from, and the same is affirmed.

(51 La. Ann. 740)

MOORE v. DREW. (No. 12,980.)

(Supreme Court of Louisiana. Jan. 23, 1899.)

PRINCIPAL AND SURETY—CONTRIBUTION—NEGLIGENCE.

1. Plaintiff, surety on a 12-months bond, paid it, and sues defendant, co-surety, for one-half of amount so paid; alleging insolvency of the principal and other co-sureties. *Held*, under the facts and circumstances disclosed, equity and good conscience alike preclude his recovery.

2. And in law he must be held responsible both for failure to take timely action, after he had paid the bond, to protect it by means of the property, the purchase price of which, with the vendor's privilege retained, it represented, and for the situation now existing, rendering subrogation unavailing, and preventing recourse against the property to recoup those who have paid it, or might now be held liable on its account.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Calcasieu; S. D. Read, Judge.

Action by C. H. Moore against H. C. Drew. From a judgment for defendant, plaintiff appeals. Affirmed.

Pujo & Moss, for appellant. Williams & Sugar, for appellee.

BLANCHARD, J. The Cane River Lumber Company conducted a sawmilling enterprise at Chopin, in Natchitoches parish. It was not prosperous; became involved in debt

and insolvent. Various creditors brought suits, and recovered judgments for a large amount, in the aggregate; some of the judgments carrying recognition of vendor's privilege and special mortgage upon the property of the company. Executions issued. The property was seized, and, at the sale which followed, was adjudicated to E. F. Wasey on 12-months credit, whereupon Wasey executed a 12-months bond for \$4,610, with the plaintiff, the defendant, and two other persons as his sureties. This was on June 3, 1893. The sheriff assigned this bond to the New Orleans National Bank, the ranking creditor of the insolvent concern. The bond described the property sold, for the purchase price of which, in part, it was given, and stipulated retention of the vendor's privilege. It was not paid at its maturity. Interest thereon from time to time was paid, and extensions had,—under circumstances, however, that did not operate to release the sureties. This continued down to April 2, 1897, prior to which time Wasey, the principal, and Kelsoe and Sandidge, two of the sureties, had become insolvent. This left plaintiff and defendant the only solvent obligors of the bond. The bond had been placed in the hands of attorneys for collection, and on the date last mentioned the plaintiff arranged with the attorneys to take up the bond; paying part of the amount due in cash, and giving his promissory notes for the remainder, at short maturities, which notes he duly met. Subsequently he brought this action against defendant, his co-surety, to recover one-half of the amount he had so paid; alleging the insolvency of the principal and the other two sureties.

On behalf of defendant a plea to the jurisdiction of the court was tendered, on the ground that suit on the 12-months bond should have been instituted in the district court in and for the parish of Natchitoches, since it (the bond) had been given in the course of judicial proceedings there taken. There is no merit in the plea. This is not a suit on the bond, but an action to recover money from defendant, which plaintiff alleges he was obliged to pay on his account, and was rightly brought in the parish of defendant's residence. The exception to the jurisdiction was properly overruled.

The defense on the merits is discharge from liability to plaintiff on account of the bond, for the reason that, by and through the acts and conduct of plaintiff, defendant has been deprived of the right of subrogation to the vendor's privilege, which the bond carried against property of sufficient value to have protected the sureties. In an amended answer, defendant charged, in substance, that by paying the bond plaintiff had merely satisfied his own debt; that Wasey (the nominal principal), in purchasing the property for which the bond was given, acted for the plaintiff; that the latter was the real principal in the obligation, and not merely a surety thereon; and that defendant's obligation

on the bond was that of surety for plaintiff. This amended answer was objected to by plaintiff on the ground that it contained defenses inconsistent with that set up in the original answer, thereby changing the issue. The objection was sustained, and defendant reserved a bill. In the view we take of the case, it is not necessary to pass upon the question of practice here raised.

In June, 1893, shortly after the purchase of the Cane River Lumber Company's outfit by Wasey at sheriff's sale, a new corporation was organized, called the Lake Lumber & Shingle Company, Limited. It became the successor of the old company. Its incorporators were Moore, the plaintiff, Drew, the defendant, George Lock, E. F. Wasey, and J. T. Sandidge. All of these parties were named in the act of incorporation as directors of the company. The capital stock of the corporation was fixed in the charter at \$60,000, divided into shares of \$100 each, to be paid for when issued; and the company was authorized to do business as soon as \$25,000 of its stock was subscribed and paid for. Neither in the act of incorporation, nor in any paper attached thereto, does there appear a list of subscribers to the stock, with the number of shares taken by each. The stock book of the company, however, shows certificates of stock issued to plaintiff for 199 shares; to Kelsoe & Sandidge for 88 shares; to George Lock, a business partner of plaintiff, for 1 share; to E. F. Wasey 1 share; and to defendant, Drew, 1 share. Not a dollar for any of this stock was paid into the treasury of the concern. On the day of the incorporation the board of directors named in the act of incorporation met, and organized by electing George Lock president, J. T. Sandidge vice president, and E. F. Wasey secretary and treasurer. No meeting thereafter of either directors or stockholders was held, until May, 1897, four years later, when a quorum of the directors met; and the secretary, he being one of the three directors at the meeting, informed the other two that suits against the company had been filed by Lock, Moore & Co. and by H. C. Drew. Nothing was done at the meeting. Shortly after the incorporation, Sandidge, vice president, disposed of his stock, as did Kelsoe, and the transfers were made on the books of the company. No other vice president was, however, chosen. Beyond adopting a charter, organizing a board of directors, and issuing shares of stock never paid for, the company did nothing. Wasey executed in its favor in August, 1893, following the incorporation, an act of sale, transfer, and conveyance of the milling outfit and property which he had acquired on June 3, 1893, at sheriff's sale in execution against the Cane River Lumber Company. The consideration was stated to be \$1,020 cash, and the assumption of the 12-months bond he had given, with plaintiff, defendant, and others as sureties. No one appeared to accept this sale on behalf of the company, and no resolution was ever

adopted by the board of directors, or authority given by the stockholders, for this purchase and assumption. No effort whatever was made by the company to run the mill or make use of the property thus conveyed to it. The mill lay idle, in charge of parties who seem to have been employed and paid by Lock, Moore & Co. Lock, Moore & Co. were not subscribers to the concern's stock. What they had to do with the mill, or what interest they had in its affairs, justifying them in the expenditure of money in its behalf, does not appear, except by inference that they represented Moore, the plaintiff herein. Moore, as seen, was the principal stockholder of the company, and he was owner of more than one-third of the shares representing the capital stock of Lock, Moore & Co., Limited, a large lumber manufacturing concern of Calcasieu parish. Lock, the senior member of the latter company, was apparently only nominally connected with the Lake Lumber & Shingle Company; for there was issued to him only one share of its stock, of the par value of \$100,—enough, however, to make him eligible to the presidency of the concern, to which, as we have seen, he was chosen. This Lake Lumber & Shingle Company seems to have been a mere paper corporation, under the guise of which the mill property was really held by Moore, the plaintiff, or by Lock, Moore & Co. for him or for themselves. If this be so, what he or they expended for its keep, and which was afterwards used as the means for effectuating its formal transfer to them, was his own debt, or theirs. At the time the plaintiff paid the 12-months bond which is the basis of this action, the company was the apparent owner of the property upon which the vendor's privilege retained in the bond rested. It was the holder of record of the title, and, if any force attaches to the act of conveyance by which it acquired the title, it [the company] was bound for the debt which the bond represented, by reason of its assumption thereof. Plaintiff took up this bond on the 2d of April, 1897. He thereby became subrogated to the rights attaching to the same, including the vendor's privilege. He could at once have proceeded against the property on which the privilege rested, to enforce the same. He did not do so. Instead, we find that Lock, Moore & Co., his own business firm, filed on May 1, 1897, a suit against the Lake Lumber & Shingle Company claiming a judgment for \$3,609.08, moneys avowed to have been advanced to the latter company for the care and preservation of the mill property located at Chopin, and for paying taxes thereon. No privilege on the property for these advances was claimed, if any existed. Only an ordinary judgment was sought. No defense was interposed by defendant company. Judgment by default was confirmed in favor of the plaintiffs in the suit. Execution followed, issued to the sheriff of Natchitoches parish, who seized the mill property at Chopin, duly offered the same at public sale, and

adjudicated it to Lock, Moore & Co., Limited, for the sum of \$4,100.

So that plaintiff's business firm—a company in which he is interested to the extent of more than one-third of its capital stock—became the purchaser, and is now the owner, of the property upon which the vendor's privilege securing the 12-months bond had rested. Notwithstanding the ordinary judgment under which this sale was effected, no steps were taken by the plaintiff, who had taken up the bond, to claim for it or for himself priority of payment out of the proceeds of the sale of the property. And now, after he and his business associates have thus acquired and hold in ownership the property representing the 12-months bond, he sues defendant to recover one-half of the bond itself. He has the property, as well as the proceeds of its sale at the suit of his firm against the lumber and shingle company, of which he was the real head and front, and now seeks a judgment against defendant for half of the amount paid on the bond. Under the facts and circumstances of the case, equity and good conscience alike are against his pretensions in this regard. And in law he must be held responsible both for failure to take timely action, after he had paid the bond, to protect it by means of the property, the purchase price of which, with the vendor's privilege, it represented, and for the situation now existing, preventing recourse against the property to recoup those who have paid it, or might now be held liable on its account. *Rev. Civ. Code, arts. 2161, 2162, 3061; Howe v. Frazer, 2 Rob. (La.) 424; Ledoux v. Rucker, 5 La. Ann. 500; Wilkins v. Bobo, 13 La. Ann. 430; Code Prac. art. 719; Scott v. Featherston, 5 La. Ann. 313; Hen. Dig. p. 1540.*

The transcript contains much that is immaterial to the true issue upon which the case turns, regarded from the court's point of view, and so we have omitted mention of the same herein.

It is therefore ordered and decreed that the judgment appealed from be, and is hereby, affirmed.

On Application for Rehearing.

(March 20, 1899.)

BREAUX, J. Plaintiff urges that the judgment is erroneous, because based upon the supposed facts that the 12-months bond was paid by him on April 2, 1897, and that the property of the Cane River Lumber Company, upon which the vendor's privilege rested to secure the bond, was sold under the judgment of Lock, Moore & Co., Limited, after the bond had been paid. Contending that he (plaintiff) did not pay the bond, and did not get possession of it, until after the sale of the property under the Lock, Moore & Co. judgment, his position is that no transfer and assignment, and no subrogation of rights under the bond, or in and to it, in favor of himself, took place until after execution

of the Lock, Moore & Co. judgment, and hence he was in no position to assert superior claims on the property as subrogee of the bond at the time the lumber company sold it under its judgment. This is utterly untenable. On April 2, 1897, plaintiff paid on the bond \$2,286.20 in cash, and on that day gave his two individual notes—one for \$1,531.67, due July 3, 1897, the other for \$1,552.23, due September 3, 1897—for the remainder. This was a "taking up" of the bond by him, and while, as between himself and the holder of the bond, novation may not have taken place, and the holder may have retained possession of the bond until the last note was paid, it is none the less clear and certain that when he paid the \$2,286.20 in cash he became in law the subrogee of the bond to that extent, and when, in July, he paid the first of the two notes, for \$1,531.67, he became its subrogee to the further extent of that sum. So that when, on August 28, 1897, the Cane River Lumber Company's property was sold, and bought by Lock, Moore & Co. for \$4,100 (being two-thirds of its appraised value), plaintiff, who was the Moore of that firm, stood as the subrogee of the 12-months bond, with its vendor's privilege, for the sum of \$3,817.87 already paid by him in cash on the bond to its holder. Not only that, but his individual note for the remainder of the bond was out, and the note was, at the date of the sale, within six days of its maturity. The man having an interest to take up the bond, and who had done so to the extent mentioned, had certainly a full standing in law to claim the benefit of the vendor's privilege at the time the property was sold, for the full amount he had paid on the bond, and we think, also, for the amount he was responsible for on his remaining outstanding individual note. Yet he took no steps whatever to assert his superior claim for priority of payment out of the proceeds of the property over the ordinary judgment of his business firm.

Again, plaintiff urges error in the judgment, to his prejudice, because the court, in its opinion, inadvertently referred to him as the "present" owner of the Cane River Lumber Company's property. What was meant in that part of our opinion was that plaintiff's firm had bought, and became the owners of, the property. After purchasing and holding it for over 12 months, they sold it to another. So that at this time they do not hold it. But the fact that, after holding it a year or more, they sold it, in no manner alters the situation to the benefit of plaintiff. It remains that his business firm bought the property at the sale under their ordinary judgment, and retained the proceeds of the sale; plaintiff, then subrogated to the bond for \$3,817.87, all the while standing by in silence, and permitting this to be done. And afterwards, when Lock, Moore & Co., Limited, sold the same property to Cooley, they received for their own account its proceeds, \$4,500. Rehearing refused.

(51 La. Ann. 753)

SPENCER et al. v. WELCH et al. (No. 12,995.)

(Supreme Court of Louisiana. March 20, 1899.)

FEDERAL AND STATE COURTS—CONFLICT OF JURISDICTION.

A. sells certain landed property to B., and takes B.'s promissory notes for part of the purchase price, secured by special mortgage, containing the nonalienation clause, on the property sold. B., without paying the notes, sells the property to C., a corporation. Subsequently C., with its property and effects, passes into the hands of a receiver appointed by the United States circuit court. A purchaser of the notes from A., suing in a state court on the notes, praying judgment against the maker, with recognition of mortgage rights, is met by an exception that the property upon which the mortgage securing the notes rests is in the custody of a federal court, and therefore the state court is without jurisdiction to proceed with the suit. Judgment sustaining this exception held to be error. A suit to recover judgment establishing plaintiffs' claim against the maker of the notes, and recognizing their mortgage rights, brings about no conflict of interest so far as the receiver is concerned, and no conflict of jurisdiction so far as the federal court is concerned. When it comes to selling the property under the mortgage and judgment, another question arises not here presented.

(Syllabus by the Court.)

Appeal from judicial district court, parish of St. Martin; Félix Voorhies, Judge.

Action by Charles A. Spencer and others against F. M. Welch and others. From a judgment for defendants, plaintiffs appeal. Reversed.

Williams & Sugar, for appellants. Robert Martin, curator ad hoc, for appellees.

The following opinion, prepared in greater part by MILLER, J., prior to his decease, and acted on and adopted by the court afterwards, was completed and handed down by BLANCHARD, J.:

The plaintiffs appeal from a judgment dismissing their suit on certain promissory notes executed by defendants and secured by mortgage. After the execution of the mortgage, the defendants appear to have sold the property. There is in the record the admission that when the suit was brought the mortgaged property was in the possession of the receiver of the Teche Railroad & Sugar Company, Limited, appointed by the United States circuit court, and held by such receiver as part of the assets of the said company. The defendants, through the curator ad hoc appointed to represent them, on the ground that the property was in the hands of the receiver, excepted to the jurisdiction of the lower court, and the exception was sustained. Hence this appeal. Defendants are in no way connected with the railroad and sugar company, nor is the receiver a party to this suit. No conflict of either interest or jurisdiction arises. The plaintiffs are prosecuting their suit against the makers of the notes, and asking recognition of their mortgage rights arising under an act of mort-

gage containing the pact de non alienando. The proceeding by which the railroad and sugar company and its property were placed in the hands of the receiver could not affect plaintiffs' rights against their debtors, nor the mortgage they granted, except only the obstacle to the seizure of the property arising from its possession by the receiver, an officer of the United States circuit court, whose possession the sheriff could not disturb. The case here does not present the question of any disturbance of the receiver's possession. In so far as the petition seeks a judgment on the notes, with recognition of the mortgage, we can conceive of no reason to question the jurisdiction of the lower court. With such a judgment liquidating plaintiffs' debt and recognizing their mortgage, it will be for them to make the proper application to the United States circuit court for leave to subject the property to the paramount mortgage resting on it when the railroad and sugar company acquired it and when the receiver was appointed. High, Rec. pp. 221-234. It is therefore ordered, adjudged, and decreed that the judgment of the lower court be avoided and reversed, the exception be overruled, the cause remanded and reinstated for trial, and that defendants pay costs of both courts.

(51 La. Ann. 327)

SIMONS v. LEWIS. (No. 12,836.)

(Supreme Court of Louisiana. June 13, 1898.)

SLANDER — EVIDENCE — MALICE — MITIGATION OF DAMAGES.

1. In suits for damages for slander, the defendant is entitled to the modification the words receive from the accompanying statements showing the meaning intended and understood by those to whom the words were addressed. Newell, Defam. p. 292 et seq.

2. On the issue of malice, in such cases, as well as to mitigate damages, testimony is admissible to show the occasion, the sense of wrong, and other circumstances attending and prompting the expressions alleged to be slanderous. Newell, Defam. p. 292 et seq.; Gilbert v. Palmer, 8 La. Ann. 130; Artieta v. Artieta, 15 La. Ann. 48.

3. Under the defense of justification in an action for slander, the defendant is entitled to the mitigation of the damages arising from the fair interpretation of all he said, and the circumstances under which he used the words for which he is sought to be held. Newell, Defam. p. 292 et seq.; 2 Greenl. Ev. § 425.

On Rehearing.

Utterances against a person, while in a state of great excitement, by one who thinks that he has been wronged by that person, are not, in law, justifiable; but the circumstances under which they were made may be considered in fixing damages.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Lincoln; J. D. Barksdale, Judge.

Action by Dan Simons against W. A. J. Lewis. Judgment for plaintiff. Defendant appeals. Affirmed.

Price & Barksdale and Graham & Pearce, for appellant. W. A. Van Hook and J. B. Holstead, for appellee.

MILLER, J. The defendant appeals from a judgment condemning him to pay plaintiff \$500 damages for slanderous words charged in the petition to have been applied by defendant to plaintiff. The plaintiff, answering the appeal, prays that the damages be increased. The words used by defendant, alleged in the petition, are that plaintiff was a thief, rascal, had stolen from defendant, and ought to be in the penitentiary; and the repetition of these and similar expressions is charged. The petition alleges malice, humiliation of plaintiff and his family, injury to his reputation, and the other usual allegations in suits of this character. Judgment is sought against defendant for \$3,250. The defendant first excepted that the petition discloses no cause of action, on the grounds that the words are not actionable; that plaintiff failed to allege good character, or that he had any business or profession, and hence the petition does not show how plaintiff was injured by the words, the basis of his action. The exceptions being overruled, the answer, with the general issue, denied that the defendant had said that plaintiff stole; admitted the words that he had said were that plaintiff as good as stole defendant's goods, but averred these words were used in reference to business transactions of defendant and plaintiff,—i. e. that defendant had furnished plaintiff with supplies to make his crop in 1896; that plaintiff had made way with his crop, trying to place it beyond defendant's reach, and "beat" defendant out of the money due him for the supplies; and that plaintiff had tried to buy from defendant a wagon in the same way, but had been refused credit. The answer averred that all the words, the basis of this suit, were accompanied with the statements of the conduct of plaintiff in parting with his crop without paying for the supplies, and of his attempt to buy the wagon, and that the words were understood by those to whom they were addressed as referring to this conduct of plaintiff, and to the then pending lawsuit of plaintiff's wife to establish her rights to his property to the prejudice of defendant as the husband's creditor. The answer insists that the words used, in the connection stated, and so understood, were not actionable. The answer goes on to admit that defendant had said plaintiff was a thief, a rascal, and ought to be in the penitentiary, but, averring the truth of these words, alleges various acts of the plaintiff as supporting the defendant's charges.

In our view, the exception that the words attributed to defendant, imputing no crime, are not actionable, unless actual damages are proved, was properly overruled. The subject came under discussion in an early case, the decision in which was that if the words imputed moral turpitude, though no crime, they furnished a cause of action, and authorized damages without proof. Our jurisprudence since has been in accordance with the view then expressed. *Miller v. Holstein*, 16 La. 389; *Ferry v. Foote*, 12 La. Ann. 894.

On the other points raised by the exception, we think the allegations that the plaintiff has been injured in his reputation, and that he and his family have been subjected to humiliation and mortification, and have thereby sustained damages, must be deemed sufficient, without the express averment that plaintiff enjoyed a good character, and without any further statement of the method of his injury. Words spoken of another, alleged to be slanderous, to his injury, are to be construed in connection with all that was said, and with due regard to the occasion and circumstances prompting the utterance. It is shown that, in using the expressions in reference to plaintiff, the defendant stated the conduct of the plaintiff in disposing of his crop without paying for the supplies, and made reference to the litigation of plaintiff's wife to establish her right on his property to defendant's prejudice. There is, we believe, no dispute that defendant did furnish the supplies, or that plaintiff, without paying for defendant's supplies, disposed of the crop; nor any dispute as to the wife's suit. We are satisfied that those to whom the defendant used the expressions understood the expressions as intended only to convey defendant's appreciation of plaintiff's conduct in respect to his crop and the suit of his wife. The words alleged to have caused damage to plaintiff, must, we think, be deemed modified by that meaning plainly intended and understood by those to whom the words are addressed. In this view, the injury to plaintiff is not to be measured by the literal force of the words, but by the meaning intended to be conveyed. The law, too, in connection with the element of malice, makes allowance for the irritation arising from the sense of wrong under which the words are uttered. The qualification the slanderous words thus receive, and which tends to exclude or mitigate damages, is recognized in the text-books and in our decisions. *Newell, Defam.* pp. 292, 305, et seq.; *Gilbert v. Palmer*, 8 La. Ann. 130; *Artieta v. Artieta*, 15 La. Ann. 48. Our decision must, however, in the main, be controlled by a feature apart from the qualification to which the defendant is entitled and is allowed.

The defendant, after the admission and explanation of some of the expressions attributed to him, pleaded the truth of the terms, "thief," "rascal," and that he "ought to be in the penitentiary," applied to the plaintiff; and, in support of the justification thus pleaded, the answer alleged various acts of plaintiff, entirely disconnected with his conduct, that prompted the expressions, the basis of this suit. While justification is not confined to the particular acts that led to the expressions alleged to be slanderous, it is none the less true that, if the justification is not sustained by proof, there must be a judgment for damages. Such judgment is the necessary consequence of the failure of the defense. The English rule is that justification must be supported by the same testimony requisite to sustain a conviction for the crime

imputed by the slanderous words, because, under their system, the justification, sustained by proof, serves as an indictment for the crime. Our rule exacts only the testimony requisite to discharge the burden of proof in civil cases. *Newell, Defam.* p. 795, § 43. We have examined the proof submitted in support of this plea of justification. The defense refers to conduct of the plaintiff in the past, and in argument it is contended that the acts relied on to justify defendant belonged to the past, and have been revived by him to sustain charges directed against the defendant's conduct of the present. Slander, however, is supposed to affect a man's reputation; and that is based on his past as well as present conduct. Then, too, special acts may be proved to sustain the general charge; and this case discloses no such lapse of time as would exclude the defense, if there is such limitation of time. But the proof, in our opinion, does not support the defendant's charges. One of these charges (that plaintiff in 1892 took possession of and sold the cow of a neighbor, not accounting to him for the proceeds) is met by testimony to the effect that the sale was authorized by the son of the neighbor, communicated to defendant, under which he acted. With respect to another cow alleged to have been stolen by plaintiff, while there is testimony tending to sustain the charge, there is testimony directly to the contrary. So, with reference to the allegation of defendant that plaintiff appropriated the fence rails of another, the testimony produced by defendant is not, to our minds, satisfactory, while there is positive negative testimony. Testimony of other acts relied on by defendant to sustain his defense were excluded, because not pleaded. We think that, in the justification of the general charge of crime by proof of particular acts, it is requisite that plaintiff should have notice, by suitable allegations, that such acts would be relied upon by defendant. *Id.* p. 650. Other acts of plaintiff, the subject of testimony, we understand are not pressed here. Without going into details of the testimony offered to support the justification, we deem it sufficient to state our conclusion, after a careful consideration, that the testimony fails to establish the charges. Of this conclusion was the district judge, before whom, without a jury, the case was tried.

While the defense of justification fails, we do not understand that the unsuccessful defense affects the measure of damages. The cause of action is not the defendant's pleadings, but the words uttered by him, the basis of the petition. Nor is the defendant precluded by the plea of justification from urging in mitigation of damages the circumstances and occasion that led to the utterance of the words. 2 *Greenl. Ev.* § 426. We thus have the case presented of damages claimed for words literally imputing crime to the plaintiff, but intended and understood as referring to defendant's conduct, not criminal. We have,

too, on the issue of malice, the testimony of the irritation and resentment under which the words were uttered. The law does not exact that there should be the exact basis for the angry feeling that prompts the utterance, but will, according to circumstances, refer the utterance to the resentment of the moment, instead of deliberate malice. The judgment in this case is for \$500; not resting, in our appreciation of this testimony, on any proof of actual damage. While the law and public policy require that slander shall be repressed, and for that purpose allows damages, on the theory of damage to the party the subject of the slanderous expressions, we do not think, under the circumstances of this case, that damages far beyond any conceivable injury should be given. In our view, the judgment should be reduced to \$300. It is therefore ordered, adjudged, and decreed that the judgment of the lower court be amended so as to allow the plaintiff \$300, instead of \$500 damages, and, as thus reduced and amended, the judgment of the lower court be affirmed; the costs of appeal to be borne by plaintiff and appellee.

On Rehearing.

(Feb. 6, 1899.)

BREAUX, J. Defendant and appellant avers that this court erred in allowing damages to plaintiff in the sum of \$500. The judgment rendered was annulled, and a rehearing granted, in order that the court might correct the decree, and render a decree in accordance with the views expressed in the opinion. It is so manifest that the amount heretofore allowed is not the amount intended by the organ of the court, and by the court, that it only remains for us to make a change by reducing the amount from \$500 to \$100, to make it conform with our view, that nominal damages only should be allowed.

We have reconsidered the issues presented in this case after a second hearing, and we a second time arrive at the conclusion that defendant's charges against the plaintiff, in a moment of anger, because of plaintiff's failure to settle with him as he should have settled, are not, as far as the testimony shows, warranted by the facts. The district judge, after having reviewed the facts, said in his opinion: "In fact, after reading over this evidence carefully, I conclude that Simons' conduct, in regard to some of these transactions, is not above suspicion. There is not a preponderance of evidence that would justify me in saying that Simons is proven to be a thief, and ought to be in the penitentiary. Plaintiff has failed to prove by a preponderance of evidence the facts relied on as a justification, and it follows that plaintiff is entitled to damages. How much? No special or actual damage is proven. I believe defendant uttered these words in a moment of exasperation, and under circumstances calculated to exasperate him. As stated once

before, he deservedly stands high, and I do not believe he would deliberately wrong any man. I am satisfied that nominal damages would be sufficient to meet the demands of justice in this case,"—citing a number of authorities in support of this view. We agree with the learned judge of the district court. In our judgment, defendant was unnecessarily hasty in his denunciation of one who had been his debtor for many years, even on the assumption that he was sorely disappointed because of some dilatoriness as a debtor, or intentional default in his promise to pay. There are, however, mitigating circumstances, which were weighed by us heretofore, and to which it is our intention to give effect. For reasons assigned, it is ordered, adjudged, and decreed that the decree heretofore rendered is annulled and avoided. The law and the evidence being with plaintiff, it is ordered, adjudged, and decreed that the judgment of the district court is affirmed, at appellant's costs.

(51 La. Ann. 833)

STATE ex rel. JACKSON et al. v. NEWMAN et al. (No. 13,040.)

(Supreme Court of Louisiana. March 20, 1899.)

CORPORATIONS — SUCCESSORS — IMPLIED POWERS — RIGHT TO HOLD AND VOTE STOCK IN ANOTHER CORPORATION.

1. The New Orleans Gaslight Company can exercise only such powers as were conferred by legislative grant upon the Crescent City Gaslight Company, of which it is the successor, either by express terms or by necessary implication.

2. Implied powers in corporations are presumed to exist only to the extent that may be necessary to enable such bodies to carry out the express powers granted and to accomplish the purpose of their creation.

3. An incidental power may be defined to be one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has merely some slight or remote relation to it.

4. While, under some circumstances, one corporation may not unlawfully acquire holdings of stock in another corporation, such holdings do not partake of the fullness of perfect ownership. They rather come under the head of what Rev. Civ. Code, art 492, describes as "imperfect ownership."

5. Thus, when, under circumstances tolerating it, a corporation, not possessing the express or necessarily implied power to do so, acquires stock in another corporation, it may collect dividends on and sell or dispose of such stock, and yet not have the power to vote it at elections for officials to govern and manage the affairs of the other corporation.

6. For one corporation to take possession and manage the affairs of another corporation is, in effect, equivalent to engaging in a business other than that authorized by its charter; and this is in contravention of the public policy of the state, as established in its fundamental law, and void.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frank A. Monroe, Judge.

Quo warranto by the state, on the relation of James Jackson and others, against Isidore

Newman, Sr., and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Buck, Walshe & Buck, Frank N. Butler, and Frank N. Butler, Jr., for appellants. E. Howard McCaleb and Fenner, Henderson & Fenner, for appellees.

BLANCHARD, J. An election for directors of the Jefferson City Gaslight Company was held November 7, 1898. The board of directors of that corporation is composed of five persons, elected annually by the stockholders. The election is by ballot, and is conducted or presided over by three inspectors or commissioners of election, chosen for the purpose. There were two tickets in the field for directors,—one headed by James Jackson; the other by Isidore Newman, Sr. The Newman ticket was returned elected by the inspectors. Whereupon James Jackson and those running on the ticket with him instituted this proceeding by quo warranto to inquire into said election, and to contest the authority by which Newman and his associates, returned elected, claim the office of directors aforesaid.

Jefferson City was once an independent municipality. Later it became merged into the city of New Orleans, and now forms part of the latter city. When it was an independent municipality, the Jefferson City Gaslight Company was organized, first by notarial charter, and afterwards by legislative enactment, confirming the grants made to the company by the mayor and council of Jefferson City. The time of the expiration of this charter is a subject of contention,—relators claiming it expires March 9, 1899; respondents, that it expires April 15, 1900. But this is not a direct issue in the present controversy, and it is, therefore, not necessary to pass upon it. The New Orleans Gaslight Company and another corporation, known as the Crescent City Gaslight Company, were organized under legislative charters. The former was granted the exclusive privilege of making and vending gas in the city of New Orleans, from the date of its incorporation in 1835, until April 1, 1876, and the latter was granted the same privilege for 50 years from the date of expiration of the charter of the first-named company. In 1870, when the legislative charter of the Crescent City Gaslight Company was granted, the city of Jefferson City had not yet become a part of the municipality of New Orleans. When, later, it and other suburban towns were merged into the city of New Orleans, an act was passed by the general assembly of the state, amending the charter of the Crescent City Company, by which it was declared that the "city of New Orleans," as used in the original charter, should be deemed "to include all parts of the present city of New Orleans, and any additions which may at any time be made thereto," but that it was not the intention of the act to conflict with the existing charter of the Jefferson City Gaslight Company. In other words, while the franchise privilege of the

Crescent City Gaslight Company was extended to cover that portion of the city of New Orleans formerly known as Jefferson City, such privilege was not to attach until the charter rights of the Jefferson City Gaslight Company had expired, or some action was otherwise taken in respect thereto by the two corporations, satisfactory to both, fulfilling the injunction of the law to avoid a conflict with the rights claimed by the Jefferson City Gaslight Company under its charter.

In 1875, just prior to the expiration of the charter of the old New Orleans Gaslight Company, that corporation and the Crescent City Gaslight Company, under authority of law, effected a consolidation, by which the two companies, with all their rights, privileges, property, etc., became merged into one, thereafter to be known as the New Orleans Gaslight Company. In 1882 this company purchased, and has since held, 1,506 out of the 3,000 shares representing the capital stock of the Jefferson City Gaslight Company. This was a majority of the stock of the latter company. Of the 1,506 shares so purchased, 1,491 shares have been, and are, carried on the books of the Jefferson City Gaslight Company in the name of the New Orleans Gaslight Company, 10 shares in the name of A. H. Seward, and 5 in the name of R. M. O'Brien. Seward and O'Brien have been for years past, and are now, president and vice president, respectively, of the New Orleans Gaslight Company. It appears that the right of the New Orleans Gaslight Company to hold and to vote the stock of the Jefferson City Gaslight Company, purchased by it as aforesaid, has not heretofore been challenged. Accordingly, this stock has been voted at recurring elections for directors in the Jefferson City Gaslight Company, and Seward and O'Brien, with James Jackson, F. C. Lorenzin, and W. A. Lorenzin, have been repeatedly chosen as the board of directors of said company, and were the incumbent board at the time the election took place over which the present controversy arose. So that, as holders of the majority of stock in the Jefferson City Gaslight Company, the New Orleans Gaslight Company has exercised a controlling voice and influence in the affairs and in the management of the former company. When, however, the election for directors in November last came on, certain of the minority stockholders filed with the officials named to conduct the election a protest against permitting the New Orleans Gaslight Company to vote the stock held by it, and demanded that the inspectors refuse and reject the vote when tendered. The ground of the protest was that the New Orleans Gaslight Company is without legal right or standing to vote the stock held by it, or to exercise any act of ownership in respect thereof. Seward, president of the New Orleans Gaslight Company, appeared and tendered the vote of the 1,491 shares of stock held by his company. It was offered to be cast for relators herein. The in-

spectors, acting on the protest referred to, declined to receive it. Had this vote been received and counted, it would have elected relators directors of the Jefferson City Gaslight Company for the ensuing term. Without it, the result of the election, as tabulated and returned by the inspectors, showed the election of Newman and others, respondents herein. The president of the New Orleans Gaslight Company duly protested against the action of the inspectors in declining to receive the vote he tendered.

If the New Orleans Gaslight Company had the legal right to vote its stock, then must the vote tendered by its president be considered as cast, and relators held entitled to be recognized as the board of directors of the Jefferson City Gaslight Company. If it did not have the legal right to vote its said stock, then must this proceeding by quo warranto fall, with the resultant effect, impliedly, of recognizing respondents as the true and lawful board of directors of the Jefferson City Company. Whatever authority the present New Orleans Gaslight Company possesses, in respect of its right to acquire and hold personal and real property, is derived from the charter granted by the state to the Crescent City Gaslight Company, of which, as we have seen, it is the assignee and successor. It may exercise only such powers as were conferred by the legislative grant upon the Crescent City Gaslight Company, either in express terms or by necessary implication. Implied powers, in corporations, are presumed to exist only to the extent that may be necessary to enable such bodies to carry out the express powers granted, and to accomplish the purpose of their creation; and an incidental power may be defined to be one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has merely some slight or remote relation to it. *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798. But, in the view we take of the case, it is not necessary to pass directly on the question whether or not the New Orleans Gaslight Company could legally acquire and may lawfully hold stock in the Jefferson City Gaslight Company.

Conceding that, under some circumstances, one corporation may not unlawfully acquire holdings of stock in another corporation, such holdings, we think, do not partake of the fullness of perfect ownership, as defined by the Revised Civil Code (article 491), giving "the right to use, to enjoy and to dispose of * * * in the most unlimited manner." They rather come under the head of what the Revised Civil Code (article 492), describes as "imperfect ownership," which only gives the right of enjoying and disposing of property when it can be done without injuring the rights of others. For instance, when, under circumstances tolerating it, a corporation, not possessing the express or necessarily implied power to do so, acquires stock

in another corporation, it may collect dividends on the same, and may at will dispose of it, and yet not have the power to vote the stock at elections for officials to govern and manage the affairs of the other corporation. This is sustained by both reason and authority, and founded in the public policy of the state. If a corporation, like the New Orleans Gaslight Company, formed to manufacture and sell gas within certain limits of the city of New Orleans, is permitted to acquire a controlling interest in the stock of another gas company, authorized to make and sell gas in another part of the city, and by such controlling interest to practically take possession and manage the affairs of such other corporation, it, in effect, is equivalent to engaging in a business other than that authorized in its charter; and this is in direct violation of the fundamental law. Const. 1879, art. 237; Const. 1898, art. 265. The public policy of a state is manifested by its fundamental law, or by legislation enacted in pursuance thereof; and that it is the duty of the judiciary to refuse to sustain that which is against public policy is beyond cavil. In *Milbank v. Railroad Co.*, 64 How. Prac. 20, it was held by the supreme court of New York that, though a railroad corporation may take title to all kinds of personal property, including stock of other railroad corporations, to secure debts due it, the investment by a railroad company of its corporate funds in the purchase of the stock of another corporation is not necessary in the exercise of any of its corporate powers, is unauthorized, in violation of the statute, and consequently ultra vires; further, that, while a railroad corporation remains the owner of the stock of another corporation, it may collect and receive dividends thereon, and has the right to sell and dispose of the same, but has no right to vote thereon. To the same effect is the ruling of the supreme court of Alabama in *Railroad Co. v. Woods*, 88 Ala. 631, 7 South. 108. See, also, *Railroad Co. v. Collins*, 40 Ga. 582; *Hazlehurst v. Railroad Co.*, 43 Ga. 13; and *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798. The conclusion reached is that the New Orleans Gaslight Company could not legally vote the shares of stock in the Jefferson City Gaslight Company, owned and held by it, either in its own name or in the names of other persons, at the election held for directors on the 7th day of November last, and, not having such legal right, it is without just cause of complaint that its vote was not received and counted. Had it been received and counted, and a different result as to the choice of directors had, the minority stockholders, protesting against its vote, would have had a legal cause of action in the courts to contest the same, and avoid the election thereby brought about; and so the final result would be the same.

We have given consideration to the contention of relators that, because the New Orleans Gaslight Company has been permitted to

vote the stock held by it in past years, the other stockholders of the Jefferson City Gaslight Company are estopped from now denying its right to vote; but we cannot give our assent to this doctrine, as thus broadly insisted on. It is public policy, crystallized into law, which denies it the right to vote, and what is against the law cannot, in such a case as this, be legalized by acquiescence. Estoppels are not favored. Besides, there may have been no particular reason in the past for the minority stockholders to object to the vote, whereas, at the recent election, when the expiration of the charter of the Jefferson City Gaslight Company drew near, and a liquidation of its affairs, perhaps, necessary, there may have been the best of reasons for objecting to the New Orleans Gaslight Company electing a board of directors of its own choosing; especially so, in view of the fact that it claims the right of succession to make and vend gas in that part of the city, and was likely to become a bidder for the property and effects of the outgoing company. That conflicts of interest, in view of this, between the companies, are likely to arise, is not difficult to foresee; and to contend that a board of directors chosen by the succeeding company, especially that part of the board invested with important holdings and powers of administration in the superseding corporation, will be altogether impartial and unbiased in respect to the matters and things over which the clash of interest arises, or may arise, is to expect a little too much of average human nature. So the law wisely removes the temptation. Because, after the expiration of the charter of the Jefferson City Gaslight Company, the New Orleans Gaslight Company claims the right, under the act of the legislature, to make and vend gas in that part of the city of New Orleans, that fact cannot be held to vest the latter company with authority not theretofore possessed with regard to acquiring and voting the stock of the former corporation, and thus controlling its affairs.

Nor do we think that the question of the right of these two gas companies to consolidate, and, as incidental to that right, the question of the authority of the one to acquire the stock of the other, with which it is proposed to consolidate, arise in this case. There is no pretense that any such purpose was in view. The judgment of the court below was in favor of respondents, and the same is affirmed.

BREAUX, J., concurs in the decree.

(61 La. Ann. 115)

WILLIAMS v. BERNSTEIN. (No. 12,903.)
(Supreme Court of Louisiana. Jan. 23, 1899.)

BOUNDARIES—ESTABLISHMENT—ADVERSE POSSESSION—PRESCRIPTION OF ACTIONS.

1. An action of boundary, pure and simple, is not open to a plea of prescription. Rev.

Civ. Code, art. 825. The action may be repelled by showing that the boundary line between the two properties has been settled by judicial decree, or by a survey made by a surveyor in conformity with the requirements of the Revised Civil Code. A line, however, even when established between the parties by such a survey, yields to a demand for the rectification of the same, under an allegation of error, unless the party resisting the rectification should allege and show an adverse possession of 10 years under the erroneous line.

2. The mere fact that parties owning adjoining properties have cultivated land up to a certain line, or up to a certain fence built either by one or both, or built by one and repaired by the other, does not, per se, evidence an adverse possession, or an acquiescence in, knowledge of, or recognition of an adverse ownership or adverse possession. Neighbors constantly run up fences within or beyond the boundary lines, or join fences; doing so with the knowledge and understanding that such acts are merely temporary, and done subsidiarily to, and with reference to, the right of both to ultimately ascertain and fix rights by an action of boundary, or through a formal, legal survey. Until this happens, such land is held in "occupancy," and not in "adverse possession,"—certainly, in the absence of a clear and direct claim advanced of adverse ownership and possession.

(Syllabus by the Court.)

Action by E. B. Williams against Samuel Bernstein. A judgment for defendant was reversed by the court of appeals, and defendant applies for certiorari or a writ of review. Denied.

The plaintiff, Williams, alleging that he and the defendant were owners of contiguous pieces of property, and that the limits and boundaries between them had never been fixed and determined judicially, although one or more ex parte surveys had been made of the line separating the tracts, prayed that defendant be cited; that the court appoint a skilled, sworn surveyor to inspect the contiguous tracts, and to establish and mark the boundaries, and to make procès verbal of his work to the court; and for judgment establishing and fixing the true boundary lines and limits between the tracts. Defendant answered, pleading the general issue. He admitted that plaintiff had purchased a tract of land adjoining his own on the 8th of October, 1872, but averred that the same had been both sold and purchased with special reference to what is called in the answer the "Ragan Survey Boundary Line," forming the division line between the two estates, which had ever since been recognized by all parties in interest. He averred that it would not be possible for the court to adopt the survey made by one Henry under the orders of court, and make the boundary line conform to the same, as by so doing it would give to the plaintiff 306 acres in his tract, or 3 acres more than his title called for, which was for 303 acres. He insisted that this survey should be rejected, and the boundary fixed according to a certain "old hedgerow line" (what that line is, does not clearly appear), but, should another line be adopted, that it should be at a point other than that claimed by the plain-

tiff. Defendant ultimately pleaded in his favor the prescription of 10 years; claiming that plaintiff's action, under the pleadings and facts of the case, was for a "rectification" of boundary, and is prescribed by 10 years on account of adverse possession for that time. The district court rendered judgment in favor of the defendant, decreeing the division line between the two tracts to be that fixed by the survey made by Ragan on the 10th day of August, 1872. Plaintiff appealed to the court of appeals of the First circuit; and that court reversed the judgment appealed from, and rendered judgment in favor of the plaintiff, fixing and establishing the boundary line between the tracts according to the government subdivisions as indicated in the calls of the deed, without reference to any survey previously made by Ragan, and remanded the cause to the lower court, with instructions to order the surveyor to run plaintiff's line on the east according to government surveys and the calls of his deed, and to place permanent posts on said line, which should constitute the true boundary between the two estates. Bernstein, the defendant in the case, then made the present application to this court; praying that, under the provisions of article 101 of the constitution, it requires that the whole record be sent up for its consideration, and the whole matter in controversy be passed upon by it. He annexes to his application the briefs filed by him in the court of appeals, and a copy of the decree of the latter court, which would show, he declares, the issues involved in the case, as well as the questions of law, and the errors alleged to exist in the court's decree. He says that he specially complains that the judgment of the district court is in conflict with the established jurisprudence of the state, which he asserts to be as follows: "Where a boundary between contiguous estates has been fixed by a surveyor, or established and acquiesced in by the owners for over ten years, the right to have it rectified lapses, by express provisions of the Code; and where the contiguous owners hold property under titles from a common author, and one of them has possessed the disputed part for over ten years, under the conditions prescribed in the Revised Civil Code, from articles 3478 to 3498, his title becomes, by legal effect, as absolute and indefeasible, as to that part, as if his deed had included it."

The court of appeals, in deciding the case, uses the following language:

"The material facts necessary to a proper understanding of this case may be briefly stated as follows: The parties both acquired the contiguous estates from a common author, who owned the whole property. The plaintiff's title calls for specific lands, described by government subdivisions as the east half of the west half and west half of the east half of section 19, township 8, range 5, containing 303 acres. The sale to plaintiff was made October 8, 1872, and, according to the

admission in the record, was recorded a few days afterwards. In this deed there are no limitations and restrictions. In the defendant's deed the land is described as follows: 'A certain tract of land, situated in the parish of Natchitoches, in sections 19 and 30, in township 8, range 5 west, containing 90.50 acres, more or less, according to a map made by A. V. Ragan, parish surveyor of the parish of Grant, hereto annexed, and made a part hereof, bounded north by lands of Isaac McMills, on the south by Clear bayou, on the east by Bayou de Glaze, and on the west by land of J. R. Williams.' The court survey indicates that the original section corner can be easily located, and it follows, that, if the case hinged exclusively on the title deed, the case would be with the plaintiff, as there would be no difficulty, under the Code, in fixing the line. The plaintiff having the older title, calling for specific lands by government subdivisions, the lines would have to be run accordingly. Articles 847, 849, Rev. Civ. Code, would conclusively require that his title should prevail, and that a line should be so run as to include the whole area embraced within the calls of his deed. It is clear that the plaintiff's act of sale is not one per aversionem. *Marigny v. Nivet*, 2 La. 498; *Johnston v. Quarles*, 3 La. 90; *Phelps v. Wilson*, 16 La. 185. The only complication that appears in the matter is the fact that the common author was the owner of the remaining portion of section 19, on the east, and appears to have set apart a portion thereof to the defendant; and title to the same was afterwards made to him according to a survey made by agreement of the defendant and his vendor. Some time prior to the sale to plaintiff, a survey was made by Ragan, in which survey the line was run on the western boundary, not according to the government subdivisions, but an arbitrary line was run so as to include one hundred acres. This arbitrary line the common author had the legal right to make.

"But the pivotal point in the case, on which the whole controversy is made to turn, in our opinion, is whether the plaintiff bought with reference to this arbitrary line; and, if not, does his acquiescence in this line of subdivision for more than ten years preclude his right of action to fix a new boundary line between the two estates, more in conformity with his deeds? The sole object of this action is to fix visible marks of separation of estates. Its character and object are thus described by the supreme court in *Andrews v. Knox*, 10 La. Ann. 605: 'When two tracts of land contiguous to each other have never been separated or had their boundaries determined, or if the boundaries determined are no longer to be seen, each of the proprietors has the right to compel the other to fix the limits of their respective estates. So the question to be determined is, have these two contiguous tracts of land been separated, judicially or otherwise, and the boundary line between the two deter-

mined according to law? It might be important, in this connection, to state that what is known as the 'Ragan Line' is indicated on a map made by Ragan, annexed to the defendant's deed, and recorded in 1875. It is justly established that the fence which divides the two properties is on the Ragan line, and that both proprietors have looked to this as the dividing line since its construction, in 1875. The fence was originally constructed on the Ragan line by the defendant, and has occasionally been rebuilt and repaired by the plaintiff, but there is no evidence in the record that there was any agreement between the two proprietors that the fence or the Ragan line should be taken as the boundary line between said properties. The procès verbal of the court survey indicates that there was also a survey made by Mr. Percy; but there is an absence of any evidence in the record tending to show when this survey was made, or at whose instance. The Ragan survey does not purport to be run according to government subdivision in section 19. The line is in harmony with the government subdivisions in section 30, but when section 19 is reached, going north, an offset of 1.40 chains is made west, which we presume was done by the surveyor so as to include in the Bernstein tract 100 acres, as near as practicable. The line marked by the government survey follows the government subdivision called for by the plaintiff's deed. So, to give the plaintiff the land according to the calls of his deed, we would have to encroach on the lands of the defendant 5.18 acres,—the land in dispute. The Ragan line, in section 19, is an artificial or arbitrary one, as clearly demonstrated by the map made by him. Bernstein accepted a deed in which the western boundary of his land in section 19 is referred to as 'Williams' Land'; and, under all the authorities, when he accepted a deed bounding him by another land, the land referred to in the deed became a muniment, and controlled distances. The contention of the plaintiff is that he purchased the land included in the calls of his deed, without reference to any particular survey, and without mention being made in the act of sale of any circumstances which would qualify or restrict his right to demand the whole quantity embraced within the calls of his deed; the defendant contending that the plaintiff took the land with full knowledge of the Ragan survey made by the common author, and has recognized the same as the boundary line between said estates ever since 1873. As we have said, there are no restrictions or limitations in plaintiff's deed, or reference to any survey made by Ragan; and it remains to consider whether anything has been done by the plaintiff looking to the Ragan line as the true boundary, and by means of which he has lost the right to recover the whole of the property included or embraced within the calls of his deed,—in other words, whether there has been such a fixing or establishment of the boundary line as to operate as a basis of the prescription

of 10 years, as contemplated by article 853 of the Revised Civil Code. If his right of action is not barred by the prescription of 10 years, according to our construction of the law, he is legally the owner of the whole of the land embraced within the calls of his deed, and the boundary line should be adjusted accordingly.

"The main question, in our opinion, that underlies a proper solution of this case, is whether the erection of a division fence by two adjoining proprietors, and each looking to this as the division line for more than ten years, constitute the establishment of the true boundary, in the absence of any agreement, or otherwise, that the site of the fence should constitute the true boundary between the two properties; and, if this state of facts should constitute the fixing of a boundary, within the contemplation of articles 883 and 853 of the Revised Civil Code, would any action in rectification of the boundary thus made be barred by the prescription of ten years? We must confess that under the facts and circumstances, viewed in the light of the judicial expression of our supreme court, the question is not free from difficulty. The equities of the case seem to preponderate in favor of the defendant, but the articles of the Code on the subject are positive and direct. If the boundaries had been fixed according to a common title, or according to different titles, and the surveyor had committed an error in his measure, it can always be rectified, unless the part of the land on which the error was committed be acquired by an adverse possession of ten years, if the parties are present, and twenty years, if absent. Rev. Civ. Code, art. 853. Whether the limits be fixed judicially or extrajudicially, it must be done by a sworn surveyor of the state, who shall be bound to make a procès verbal of his work in the presence of two witnesses called for the purpose, who shall sign the procès verbal with him, or mention shall be made of the causes which prevented them from signing. Id. art. 833."

The court then takes up and discusses the cases of *Broussard v. Duhamel*, 3 Mart. (N. S.) 11; *Babineau v. Cormier*, 1 Mart. (N. S.) 457; *Bourguignon v. Boudousquie*, 6 Mart. (N. S.) 700; *Frederick v. Brulard*, 6 La. Ann. 382; *Lemoine v. Moncia*, 9 La. Ann. 515; *Williamson v. Hymel*, 11 La. 183; *Gray v. Couvillon*, 12 La. Ann. 730; *Zeringue v. Harrang's Adm'r*, 17 La. 350; and *City of New Orleans v. Shakspeare*, 39 La. Ann. 1033, 3 South. 346, —closing with an extract from the latter case, in which the court say: "Article 853 is found in the Code, under the title of 'Fixing the Limits and of Surveying the Lands'; and it must be construed with reference to other articles of the Code under the same title which treat of the same subject-matter. The pivotal article under that title [article 833] provides that, whether the limits be fixed judicially or extrajudicially, it must be done by a sworn surveyor of the state, who shall be bound to make a procès verbal of his work in the presence of two witnesses called for the purpose,

who shall sign the *procès verbal* with him. There is no pretense here that such fixing of limits preceded the location of the partition fence erected by the commissary of the municipality at the time which he describes as being some time before the consolidation in 1852."

The court of appeals proceeds to say: "The plain purport of these adjudications, and the only conclusion to be drawn therefrom, is that, unless the boundary lines between the two contiguous estates has been fixed in conformity with article 853 of the Revised Civil Code, that an action in rectification is only prescriptible by thirty years. Even if the lines be fixed extrajudicially by a sworn survey, or after due notice to the parties, and no opposition being made, the parties do not thereby lose their right of resorting to a court of justice to rectify the operations, if they think it for their interest. *Id.* art. 839. *Lacour v. Watson*, 12 La. Ann. 214. The right of action, however, to rectify a mistake of this character, is barred by the prescription of ten years. The theory and policy of the law is that the survey by a sworn surveyor is an official act, and the *procès verbal* is written evidence of the proper location of land in accordance with the title papers of the parties, and is sufficient to translate the ownership of property, and serve as the basis of prescription. Applying the principles of law thus announced to the uncontested facts of the case, we are led to the conclusion that the plaintiff's right of action to establish a permanent boundary line between his property and that of defendant is not barred by the prescription pleaded.

"Recurring again to the title deeds of the parties, the fact remains that the calls in plaintiff's deed are by government subdivisions, and according to which he is entitled to all the lands embraced within the east half of the west half and the west half of the east half of section 19, and that the line should be run accordingly. A sale by government subdivisions controls acreage stipulated in the deed. Such sales of land have certain limits, which are mathematically established and generally known. From this it becomes a certain and limited body. *Phelps v. Wilson*, 16 La. 185. In a sale of this character, a supplement of the price, in the event of an overplus of measure, cannot be claimed by the seller; neither can the purchaser claim a diminution of price on account of deficiency in the measure, unless the real measure falls short by one-twentieth,—regard being had to the totality of the object sold. *Rev. Civ. Code*, art. 2494; *Phelps v. Wilson*, 16 La. 185. The defendant's tract is described as being bounded on the west by land of plaintiff. The Revised Civil Code (article 844) declares that 'when an owner has alienated one of two estates which belonged to him, and the ownership of any part of it is contested, the lands assigned to it by the vendor at the time of the sale must be consulted. The limits anciently subsisting between two estates must not be regarded, because the designation which the

vendor makes of the metes and bounds forms new limits between the two estates, or between the parts of them which he has sold.' Now, under this article, if we consult the limits assigned by the vendor at the time of the sale, it is clear that we should follow the calls of the plaintiff's deed, and not consider 'limits anciently subsisting between the two estates,' because the designation which the vendor makes of the metes and bounds forms new limits between the two estates, or between the parts of them which he has sold. *Lacour v. Watson*, 12 La. Ann. 214; *Alexander v. Bourdier*, 43 La. Ann. 324, 8 South. 876. There is nothing to show that an adverse possession has produced any difference in plaintiff's situation, so as to defeat his right by prescription. While it was perfectly competent for the common author to establish an arbitrary boundary between two tracts, yet, when she sold specific tracts without any mention being made in the act of sale of the boundary thus established, it is perfectly clear that the purchaser is not bound by any such *ex parte* survey made by the defendant, or by one made by him and the common author. *Sprigg v. Hooper*, 9 Rob. (La.) 248. If there be a written declaration, fixing and establishing the line contended for by the defendant by the common author, by which it was declared that the Ragan line should form the boundary between the two properties, it would not have been binding on the plaintiff, unless the same had been duly recorded, or otherwise brought home to the plaintiff by recitals in the deed to that effect. *Kittridge v. Landry*, 2 Rob. (La.) 72.

"There are numerous other issues raised and discussed, both by plaintiff's and defendant's counsel, which we have not considered, as, under our view of the case, a solution of the controversy hinges entirely on the plea of prescription tendered by the defendant. Entertaining the views that we have announced, it follows that the case is with the plaintiff, and that the judgment appealed from must be reversed."

Jack & Fleming, for appellant. Pierson & Porter, for appellee.

NICHOLLS, C. J. (after stating the facts). I have examined the case carefully, to see whether the relator has made such a showing as would justify this court in issuing a writ of certiorari to the court of appeals. I think he has not, but that the judgment complained of is correct. The character impressed upon the action by plaintiff's pleadings is not that of an action for a rectification of boundaries, as relator asserts, but an action of boundary, pure and simple. An action of that character is not open to a plea of prescription. *Rev. Civ. Code*, art. 825. The action may be repelled by showing that the boundary line between the two properties had been settled by judicial decree, or by a survey made by a surveyor in conformity to the requirements

of the Revised Civil Code. A line, however, even when established between the parties by such a survey, yields to a demand, under an allegation of error, for the rectification of the line, unless the party resisting the rectification should allege and show an adverse possession of 10 years under the erroneous line. The mere fact that parties owning adjoining property have cultivated lands up to a certain line, or up to a certain fence, built either by one or both, or built by one and repaired by the other, does not per se evidence an adverse possession up to the line or fence, or an acquiescence in or recognition of an adverse ownership. Neighbors constantly run up fences within or beyond the boundary lines, and join their fences; doing so with the knowledge and understanding that such acts are merely temporary, and done subsidiarily to, and with reference to, the right of both to ultimately ascertain and fix rights by an action of boundary, or through a formal, legal survey. Until this happens, the lands held by each are in the occupancy, and not in the adverse possession, of either,—certainly so in the absence of a clear and direct claim advanced of adverse ownership and possession. In the absence of such a claim, the other party is justified, inasmuch as matters as to boundary are resting in abeyance, subject to future adjustment through an action of boundary. There can be no question as to the correctness of the judgment in dealing with the original rights of the parties, as derived by each through their vendor. Both claim under a common author. Plaintiff was the first purchaser, under a title calling for the government lines as the boundary lines. Defendant purchased subsequently a certain number of acres of land, as per a certain survey referred to; this act declaring, however, that the property purchased was bounded by the plaintiff's land. There can be no doubt as to the right of a person owning adjoining properties, acquired by him under separate and distinct titles, to ignore the original division lines, and to dispose of his property according to new and arbitrary lines; but, if he has sold to one by the original lines, he cannot thereafter sell to another by a new and arbitrary line, to the prejudice of the rights and boundaries conveyed to his first vendor. His act in so doing would be null and void, as an attempted sale of another person's property. We understand relator to say that, whether or not his vendor had the legal right to sell to him as she did, she did in point of fact sell, and his subsequent possession was not over and beyond the title as made to him, which would require a prescription of 30 years to acquire ownership, but in strict conformity with, and to the full limits of, the title given him, which would require only a prescription of 10 years to acquire the ownership of anything which his vendor was not legally entitled to convey to him. We think that holding, as he did, by purchase, property adjoining to that already conveyed to the plaintiff

by a common author, he cannot claim to have held any portion of the property actually owned by the plaintiff by adverse possession, in the absence of a clear and distinct advanced claim of adverse ownership of that portion. Plaintiff would have the right to assume that defendant's possession, if such it could be termed, was by sufferance, precarious, and subsidiary to the adjustment of the exact legal rights of the parties, to be ultimately ascertained and fixed by an action of boundary. I think relator's application for a writ of certiorari should be refused. The application is hereby refused.

(51 La. Ann. 523)

KOERBER et al. v. ORLEANS LEVEE BOARD et al. (No. 12,940.)

(Supreme Court of Louisiana. March 7, 1899.)

PLEADING—AMENDMENT—EMINENT DOMAIN—POLICE POWER—LEVEES—POWER OF COMMISSIONERS—EMERGENCY CASES—TRESPASS TO REALTY.

1. Where plaintiff sues for a certain amount for injury done to his property by defendant, and the latter has, after an answer filed by him, pleading the general issue, restored the property to its original condition, he is entitled to set up that fact by supplemental answer. The issues in a case of that character are not changed by such answer. The whole tendency of later jurisprudence is towards extending the privilege of amendment as far as is consistent with substantial justice, and not in opposition to express statutes. Multiplicity of suits and creation of oppressive costs are thus avoided.

2. Ordinarily, private property should be taken for public use only by regular judicial proceedings, but there are occasions when the public safety requires and justifies the taking by the state of such property under the exercise of its police powers. It is the duty of the state to save the owner thoroughly harmless under such circumstances.

3. The board of levee commissioners of the Orleans levee board is a "body politic," with corporate powers, with the right granted to it to sue and be sued. It was created as a governmental public agency to represent the state in dealing with the matters and things placed under its control by the statutes referring to it. The object of the board was to protect the property within the district from overflow as rapidly and effectually as possible by the construction and repair of all levees, whether on river, lake, canal, or elsewhere, necessary for that purpose. To that end it was granted the franchise and power to do and perform all things needful to carry out the purposes of the act, and vested with discretionary power of action in cases of emergency.

4. The right and power of the board to act in emergency cases was not made, by law, conditional upon having obtained prior thereto the approval and consent of the state board of engineers. The provisions of the law relating to such approval bear not upon the exercise of the power of ordering emergency work, but upon the method by which the contract for the work should be made. The validity of the contract might be affected by departure from the terms of the law in this regard, and yet the work itself might have been legally ordered and executed.

5. It was not necessary, to warrant action by the board as being taken under an emergency, that it should wait until there was an actual break in the levee, or it was in face of an absolute certainty that there would be such a

break. To require this would make the exercise of the power practically useless.

6. When the work ordered by the board to be made is authorized to be made in the exercise of the police power of the state, the contractor for the work is authorized to enter upon the owner's property to execute the same, and the latter is not justified in resisting his doing so. When such resistance is made, he is authorized to put an end to the same, provided he do so in a legal manner, not passing beyond the exigencies of the case. He is authorized to invoke the aid and assistance of a policeman present in arresting the parties, instead of attempting to enforce legal rights himself, as thereby there would be less danger of a breach of the peace.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

Action by the widow and heirs of Paul Koerber against the Orleans levee board and others. From a judgment for defendants, plaintiffs appeal. Reversed.

Plaintiffs, the widow and heirs of Paul Koerber, in a petition filed on May 12, 1897, asked judgment in solido against the city of New Orleans, the Orleans levee board, Alonzo C. Bell, Otto Thoman, and William G. Mitchell for \$3,500. Otto Thoman, one of the defendants, was at the time of the acts referred to in plaintiffs' petition president of the Orleans levee board, Alonzo C. Bell, city engineer, and William G. Mitchell, a contractor, under a contract with the Orleans levee board, for the purpose of repairing and strengthening the Protection levee, a levee situated in the parish of Orleans, between the parishes of Orleans and Jefferson. Among the plaintiffs were John Koerber and Paul Koerber, sons of Paul Koerber, Sr. Their demand is based upon allegations that the Orleans levee board was then in the act of repairing the so-called "Upper Protection Levee," situated in New Orleans, between the boundaries of the parishes of Orleans and Jefferson; that said levee board had given out the contract for said repairing to one William G. Mitchell, who had hired a number of persons to do said work for said levee board; that for the purpose of raising and strengthening said Protection levee under his contract it became necessary for said contractor to obtain dirt; that a vast amount of same was obtained from the streets of the Seventh municipal district, at a great distance from said works, and at great cost to the contractor and the levee board, and to the great detriment of the streets of the city of New Orleans; that the said contractor, Mitchell, and Otto Thoman, seeing the great cost of the raising of said levees, and Alonzo C. Bell, city engineer, seeing the defacing of the public streets, and the great cost that would ensue to the city for replacing the streets in the same condition as they were originally, after conferring with the authorities of the Orleans levee board, came to the conclusion that the taking and appropriating for said purpose of petitioners' property was the easiest way out of the difficulty, so that

on Saturday, the 24th day of April, 1897, at about 4 p. m., on a day and at an hour when petitioners could not have protected their legal rights by way of injunction or otherwise, said parties, having confederated as aforesaid, invaded with about 100 men, and trespassed upon, without any warrant in law, certain property in the city of New Orleans belonging to them, which they fully described; that two of the plaintiffs,—John Koerber and Paul Koerber,—some time after the invasion of petitioners' lands, seeing that great damage was being done their property, came upon same, and, in order to protect petitioners' rights, protested against the illegal taking of their land, and the digging of large trenches for the purpose of taking dirt; that Alonzo C. Bell, acting in his individual capacity, and by authority of the Orleans levee board, and as city engineer, or in all of said capacities, did threaten to arrest both of protestants, and actually did cause the arrest of Paul Koerber, without any warrant in law; that neither the Orleans levee board, nor the city of New Orleans, nor said contractor, had any right or authority to invade and trespass upon said lands in order to make the excavations on same; that no authority was ever shown petitioners, or any of them, that could have granted to said trespassers the right to take physical possession of the same; that expropriation proceedings were never instituted against petitioners for said lands; and petitioners further averred that no written permission of the state board of engineers was ever obtained by the Orleans levee board, authorizing them to employ any contractor, or any one else for any so-called emergency work as required by law; that no actual emergency existed at the time to warrant the illegal appropriation of petitioners' lands as aforesaid. They further represented that said contractor, William G. Mitchell, and Otto Thoman, authorized and assisted by the Orleans levee board, did employ between 80 and 100 men in making said excavations and removing dirt from petitioners' lands; that petitioners' property was, at the time of filing their petition, a pond throughout its length and breadth more than 3 feet deep, and water was then standing, and it was then unfit for habitation or occupation; that their property was, prior to the excavation, very valuable, due to the fact that a line of street railway had then its tracks laid and would soon have run its cars to their property, which was situated at its terminus at the head of Fourth street; that the destruction of their property had caused great damage and injury to same, to an amount exceeding \$2,000, which they considered a very fair and reasonable amount of actual damages; that the annoyance and humiliation caused them by the forcible entry upon their property and the trespassing upon same, the taking of same and spoliation of same, without any warrant in law, exceeded the sum of \$1,500, which petitioners considered a very

fair and reasonable amount of punitive and exemplary damages done in the premises. The levee board answered, pleading first the general issue. It then averred that the board of commissioners of the Orleans levee board, under Act No. 93 of 1890, was authorized and empowered to appropriate property for levee purposes, and it was, under the authority to it delegated in said act, authorized and empowered to take the quantity of dirt referred to in the petition of plaintiffs; that the property referred to in the plaintiffs' petition was part of the levee system of the parish of Orleans, and respondents were not liable to pay for any property taken as aforesaid for levee purposes, or destroyed for such purposes; that the dirt referred to in plaintiffs' petition was absolutely necessary for levee purposes, and respondents, even if expropriation proceedings would have been necessary under ordinary circumstances, were justified in the emergency wherein said dirt was taken to use and employ the same for levee purposes; that the board of commissioners of the Orleans levee district considered the Protection levee of the city of New Orleans required strengthening, and in furtherance of said views required the said dirt; that, if the court should find that the respondent should pay for the dirt thus used as aforesaid, then the amount due could only be determined by a jury impaneled in accordance with the expropriation laws, and the value of the same could not be determined in any other way. The Orleans levee board (over plaintiffs' objections and under their bill of exception) was permitted by the court to file a supplemental answer, in which it averred that at the date of the filing of the original answer the Mississippi river was at a high stage, and threatening the city of New Orleans; that said answer was filed under conditions then existing in the city of New Orleans; that since the filing of said original answer defendants had replaced the dirt or earth referred to in the petition filed, and therefore no cause of action existed. The district court rendered judgment in favor of the defendants, and plaintiffs appealed. During the trial plaintiffs discontinued their demand against Bell, Thoman, Mitchell, and the city of New Orleans.

Gustave V. Soniat and Clark W. Besançon, for appellants. Bernard McCloskey, for appellees.

NICHOLLS, C. J. (after stating the facts). The Orleans levee district was created by Act No. 93 of 1890, entitled "An act to establish the Orleans levee district and board of levee commissioners thereof, to define their powers and duties, to provide a revenue therefor and to repeal conflicting laws." By the sixth section of the act the board was charged with the construction and repairing, and invested with the control and maintenance, of all levees in said Orleans district, whether on river, lake,

canal, or elsewhere, and directed to proceed as rapidly and effectually as possible to put the same in such state as to amply protect the property within the district by the best methods. The board, as to location, construction, and repairs of all levees necessary to protect said district, were to first have the approval in writing of the state board of engineers. All levee work, or work of similar character, except that required by emergency, was directed to be advertised to be let out by sealed proposal to the lowest responsible bidder, reserving to the said board authority to reject all bids. The act declared that in case of emergencies said board might itself build or repair levees to protect said district, without such competition, but with the approval, as aforesaid, of the state board of engineers, if it should be practicable to obtain such approval; in such cases, however, spreading on its minutes a statement of the reasons of such action. By the third section, the board of commissioners of the district, authorized by the act to be appointed by the governor, was created "a body politic," and had conferred upon it "the franchise and power to do and perform all the purposes of the act, and to act, hold, own, and convey all the property, real and personal, needful in the premises, and to alienate, mortgage and pledge the same for said purposes." By the eighth section, the board was given full power to expropriate any lands necessary for its works, whether in the parish of Orleans or in adjoining parishes, by the proceedings provided by the Revised Civil Code of 1870 (articles 2626-2641, inclusive), which were thereby made in all respects applicable to said commission and its works, and the right of way over all lands of the state and of the city of New Orleans was thereby granted to said commissioners for any of its works. By the ninth section, it was enacted that the act should be liberally construed to effect its object. Section 6 of Act No. 93 of 1890, was amended and re-enacted by Act No. 79 of 1892. The amending act charged the board of commissioners with the control and maintenance of all levees in said Orleans district, whether on river, lake, canal, or elsewhere. It made it also the duty of said board to provide by the best method for the thorough protection of said district against overflow, and to this end said board should have full power and authority to put up and erect, in connection with its levee system, such pumps, flood gates, and other appliances as might become necessary to carry out said purpose, provided that the said board of levee commissioners, as to location, construction, and repairs of all levees on the river front of said district should first have the approval in writing of the state board of engineers. All levee work and other work ordered by the board, except that required by emergency work, was directed to be advertised to be let out by sealed proposals to the lowest responsible bidder, reserving to said board to reject any

and all bids. In case of emergency, said board was authorized to itself build or repair levees, and do all other necessary work to protect said district without such competition, "but with the approval as aforesaid of the state board of engineers; in such cases, however, spreading on its minutes a statement of the reasons for such actions." In 1897 the waters of the Mississippi river rose to such an unusual height as to cause the gravest apprehension of disaster throughout all that portion of the state subject to overflow. The members of the state levee board, with a view of averting as best they could the threatened danger, left the city of New Orleans, the domicile of the state board, to take personal supervision of the levees within the different districts to which they had been assigned, making it impossible to secure, at that time, board action in reference to levee matters within the city of New Orleans. The people of that city and the members of the Orleans board shared in the fears entertained on this subject throughout the country parishes. Immense interests were at stake, and official responsibility very heavy. Danger confronted the city, not only from the levees directly upon its river front, but from the waters which would flow into it from the sides and rear from breaks in the levees in the parish of Jefferson, which parish adjoined on its lower line the upper line of the parish of Orleans. Called to take action, the Orleans levee board determined to meet the latter danger by raising and broadening a levee known as the "Protection Levee," which had been constructed a number of years before. That levee ran almost at right angles from the Mississippi river along the boundary lines between the two parishes just named, back to the swamp. To accomplish the object in view, it was necessary that earth should be taken from the properties lying along and near the base of this levee, to be thrown upon the levee. The plaintiffs in this suit owned land just in that situation. Property so situated was not held subject to a servitude for the erection of levees running back from the river. Regularly, it could only be taken for such purpose, for public use, by means of judicial expropriation proceeding, upon proper compensation made according to law. It was, however, liable to be so utilized under the exercise of the police power of the state when called into action by emergency admitting of no delays. Defendant board, considering the situation to be one of emergency, made a contract with W. G. Mitchell, one of the defendants, to repair and strengthen the Protection levee, without having first advertised the same for sale at public auction. The work was ordered and executed, and the contract given to Mitchell, without prior consultation with, or consent of, the state board of engineers. On April 24, 1897, before commencing work upon the levee, the Orleans levee board, through its secretary, wrote a letter to John Koerber, in which it said

that the requirements of the board would compel it to take dirt from his lot, corner of Oak and Protection streets, but that it would refill it when the water receded, and that the letter sent him would be the basis and evidence of his claim when the river went down. Mitchell, with a view of executing his contract, proceeded, with his laborers, to the Protection levee, and entered upon the property of the plaintiffs, but before work to any extent had been made two of the plaintiffs, John and Paul Koerber, appeared to protest, as they claimed, against an illegal invasion of, and unwarranted taking of, their property, evidently under the impression that a judicial expropriation was essentially necessary to have been made to justify the action of the board. A number of persons, from curiosity or otherwise, appeared upon the scene, and quite a heated discussion took place as to what should or should not be done, and one or more of the bystanders made use of intemperate remarks. Paul Koerber forbidding the workmen to proceed in their work, it became evident that it would stop unless his opposition could be disposed of at once. To that end Bell, one of the defendants, who was present as the consulting engineer of the defendant board, ordered a policeman, who was on the spot, to arrest Paul Koerber, and take him to the office of one of the city recorders; Bell saying that he would make a charge against him. The order was obeyed, and the three proceeded before the recorder. Before his office was reached, Koerber asked to be permitted to see certain parties, with a view of getting released on bail; but Bell informed him that he would see that he was paroled, and this promise was carried out. The prosecution was abandoned, and Koerber discharged the next day, or a few days after. In the meantime the work was carried on, and in the course of several weeks the widening and raising of the levee was completed. In the course of this work, the property of the plaintiffs seems to have been pretty effectually dug up,—as some of the witnesses said, "converted, for the time being, into a pond." After the waters receded so as to admit of sand being taken from the banks, the defendant board caused the lot to be filled up (completely so, according to the defendants' contention, and very imperfectly and insufficiently so, according to that of the plaintiffs). For several years prior to the execution of this work by the Orleans levee board, Protection or Upper Line street—a street running back from the Mississippi river, and which formed the upper boundary of plaintiff's property—had been partially taken up by the building on its upper side of Protection levee, but there remained still some open space between the base of the levee and plaintiff's upper side line, by means of which they could have access (though not as fully as would be proper and customary) from the street in front to that in the rear. This open

space included that usually devoted in cities to the sidewalks. The raising and widening of Protection levee by the defendant board caused this space to be closed up to, if not beyond, plaintiffs' line, Protection levee itself being now the upper boundary of plaintiffs' lot. The record does not show who was the owner of the property covered originally by Protection street, and the sidewalks of the same, at the time of the dedication of the same as a street, and we do not know where the fee of the same was at the time the open space we have referred to was closed. Almost immediately after the work was commenced under Mitchell's contract, and while plaintiffs' property was in its worst condition, the present suit was brought,—brought obviously under a sense of having been outrageously treated, both as respects personal and property rights. It was only subsequently to the filing of the suit and the answer of the defendant board that the lot was refilled by orders of the defendant board.

The first contention made by the parties was that on the part of the defendants that there was a misjoinder of parties plaintiff, and an improper joinder of different causes of action between distinct parties. They contend that Paul Koerber has improperly cumulated an action for malicious prosecution, in which he is alone concerned, with an action for damages brought by other parties. Defendants are mistaken in supposing that the allegations made in plaintiffs' petition were advanced for the purpose of basing thereon a substantive cause of action. They were inserted in the petition merely for the purpose of swelling the amount of damages claimed by the plaintiffs in an action for malicious, forcible trespass, by showing, as they claimed, aggravating circumstances connected with defendants' taking illegal possession of their property. On plaintiffs' theory of their case, there was no rejoinder.

The next question we have to consider is whether plaintiffs' complaint that defendants should not have been permitted by the court to file the supplemental answer found in the record is well founded. They maintain that it was too late for them to file an answer, and, besides, it changed the issue before the court. They contend that, after the defendants took possession illegally of their property, they had the right to sue upon a money demand for damages, and defendants could not cut off this claim for money, and substitute in lieu of that remedy, to which they were legally entitled,—a *restitutio in integrum*; that it was optional with them to say whether their property should be replaced in its original condition or not, and they had elected not to have this done; that defendants' answer was substantially a plea for payment or compensation which they were not authorized to make.

In ruling that defendants' supplemental answer should be filed, the court informed plaintiffs that time would be granted to them, if

they so desired. They did not avail themselves of the privilege.

Plaintiffs' action is not based upon the theory that their property has been taken from them by means of expropriation or otherwise, but that the property (still theirs) had been maliciously trespassed upon and injured, for which injury they ask for damages in the amount claimed. They have not abandoned the property, nor tendered it to the defendants, but the owners thereof sue the board for damages, after it, without opposition from them, has refilled the lot. When the plaintiffs demanded from them \$2,000 as damages to their property, and the defendants pleaded the general denial, we think that defendants were authorized, under that plea, to show either that they owed them nothing at all, or an amount less than the sum claimed. The substantial issue at the time of the judgment was whether, by the action of the defendants, plaintiffs could rightfully ask judgment for \$2,000, as having received injury to that extent. If their property, at the time of the judgment, was in as good condition as it had ever been, it would be inequitable to permit them to ignore that fact by reason of the circumstance that at some particular antecedent date it had been damaged to some extent. Mere replacement of the property to its original position would, however, leave open any claims which plaintiffs might properly have for the tort dehors that resulting from the depreciation of the property itself. The action, under certain circumstances, would not abate even by an admission by the plaintiffs that the property had been restored to its original condition, though the question of the damages claimed upon that branch of the case might be eliminated. *Powers v. Florance*, 7 La. Ann. 524. "The violation of the right to the use of property supports an action to vindicate the right, without proving damages." *Dudley v. Tilton*, 14 La. Ann. 283. The fact that the injury to the property was repaired after the defendant had filed its answer did not do away with its right to plead it by supplemental answer, and prove the fact on the trial. It is true that decisions can be found announcing the doctrine that facts occurring after the institution of suit cannot be considered to determine the justice of the demand (*Hen. Dig.* pp. 731, 737, tit. "Judgment," subd. 5, "Of the Conditions of Judgment, and Its Conformity to the Pleadings and Verdict"), but this rule is subject to many exceptions, and each case has to be determined on its own state of facts. We are of the opinion that the district judge did not abuse his discretion in permitting the filing of the supplemental answer, particularly in view of the fact that he offered to grant plaintiffs time, should they desire it. The whole tendency of later jurisprudence is towards extending the privilege of amendment as far as is consistent with substantial justice, and is not in opposition to express statute. Multiplicity of suits and

creation of oppressive costs upon litigants are thereby avoided.

We are not called on to express any opinion as to what the legal situation would have been had we decided that the defendants had illegally and maliciously trespassed upon plaintiffs' land, and invaded their rights of property, and that Bell in so doing had illegally caused the arrest of Paul Koerber. The conclusion we have reached on those subjects, and the discontinuance of plaintiffs' demand as to Bell individually, eliminate that question from the case. See, on this subject, *Sicard v. Chitz*, 13 La. 111. The board of levee commissioners of the Orleans levee district is "a body politic" with corporate powers, with the right granted to it to sue and be sued. It was designedly created as a governmental public agency to represent the state in dealing with the matters and things placed under its control by the statutes referring to it. The object of the board was to protect the property within the district from overflow as rapidly and effectually as possible by the construction and repair of all levees, whether on river, lake, canal, or elsewhere, necessary for that purpose. To that end the board was granted "the franchise and power to do and perform all the purposes of the act." Act No. 93 of 1890, by which the board was created, was partially amended and re-enacted by Act No. 79 of 1892. In the original act the board was directed, as to the location, construction, and repairs of all levees, to first have the approval in writing of the state board of engineers. In the amending act it was provided that the board of commissioners should first have such approval as to all levees on the river front; such prior approval not being called for in respect to levees elsewhere. In both acts it was made the duty of the board of commissioners to generally advertise and let out by sealed proposals to the lowest responsible bidder all levee work, or work of similar character. The legislature, foreseeing the possibility of some emergency occurring which might call for immediate action in order to secure the public safety, gave to the board the power to meet such emergency. In aid of the exercise of that power, the general assembly dispensed it from letting out the work in the manner provided for, and authorized it to give out the work by private contract. In the original act this right was to be exercised with the approval of the board of engineers, if it should be practicable to obtain such approval. In such cases it was made the duty of the board to spread on its minutes a statement of the reasons of such action. In the amending act the words, "if it be practicable to obtain such approval," were omitted. The plaintiffs contend that the work done by the board of commissioners upon the Protection levee was not "emergency" work, and their property could only have been taken for public use through and under regular expropriation proceedings and

prior compensation; but that, even if the work was called for by an emergency, the board did not have the prior consent thereto of the state board of engineers, and by law this prior consent was made a condition precedent to the work being done. They maintain that the action of the board in the premises was premature; that it was not confronted by an actual, but a mere possible, danger; and therefore it acted beyond its powers. We do not think the board was called upon to wait until it was in face of an actual danger. To postpone action until there was an actual break in the levees of Jefferson parish, or until there was an absolute certainty that they would break, and that therefrom the parish of Orleans would be inundated, would be to make the exercise of the power of action practically useless. The work itself of throwing up and strengthening levees is a work of time, and the efficiency of the work is also, to a very considerable extent, dependent upon time. We think the situation in the Orleans levee district at the time the board of commissioners had the work done upon the Protection levee was such as to warrant and justify the course followed by it.

Ordinarily, private property should be taken for public use only by regular judicial expropriation proceedings, but there are occasions when the public safety requires and justifies the taking immediately of such property under the police powers of the state. The plaintiffs were obviously not aware of that fact, and were prepared to resist what they deemed an illegal invasion of their property rights. Persons taking the law into their own hands assume the risk of the consequences of their acts, should they be mistaken as to what the law is. If the board of commissioners was authorized to take the action it did (as we hold it was), and the contract with Mitchell was legal, he and his workmen were authorized to enter upon plaintiffs' land, and the latter were not warranted in interfering with them in the discharge of their duty. Bell was, therefore, authorized to put an end to such resistance, provided he did so in a legal manner not passing beyond the exigencies of the case. We think he was authorized to invoke the aid and authority of the policeman present, instead of attempting to enforce legal rights himself, as there was much less likelihood of a breach of the peace by pursuing such a course. We do not think that the legality of the work done upon the Protection levee was dependent upon the board of commissioners having obtained prior thereto the approval and consent of the state board of engineers. The provisions of the law on that subject bear, not upon the exercise of the power of ordering emergency work, but upon the method by which the contract for the work should be made. The validity of the contract for the work might be affected by departure from the terms of the law in that respect, and

yet the work itself might have been legally executed. Some taxpayer might resist the payment of the contractor on the ground that the contract should have been let out at public auction, but the plaintiffs occupy no such position, and raise no such issue in this case.

Coming now to the merits of the case, we are not satisfied that exact justice has been done. Plaintiffs' property has been legally, but somewhat harshly, taken from them, and we think it was the duty of the state (and defendants practically represent the state) to have saved plaintiffs thoroughly harmless under the circumstances. There is great difficulty in reaching that end, as the original condition of the lot is not shown with anything like precision, so as to make it serve as the basis for a test whether the work of replacement by the defendant board has been sufficient or not. There is doubt on that subject, and we resolve that doubt in favor of the plaintiffs, and we do this the more readily as there is one feature of the case which the board has evidently overlooked. We refer to the fact that by reason of the work done upon the Protection levee the means of passage from the front to the rear of plaintiffs' property on the upper boundary line has been completely cut off, and the value of the lot must have, to some extent, been affected by that fact. A "street" has been converted into a "levee," and the character of the original servitude on the upper line radically altered. Whether the fee was in plaintiffs or not, the existence of the street on the upper side was an appurtenance of the property. We are not prepared to say that, when plaintiffs were deprived of the benefit of that street by a change of servitude for public use under the police power of the state, they would not be entitled, under the constitution of 1879, to compensation as for damages to their property. We leave this question open. The property, as we have said, was not held subject to a servitude in favor of the state for levee purposes. We think the ends of justice will be best subserved by reversing the judgment of the district court, and remanding the case to that court for further proceedings in accordance with law, and in accordance with the views herein expressed. For the reasons assigned, it is hereby ordered, adjudged, and decreed that the judgment of the district court be, and the same is hereby, annulled, avoided, and reversed, and this cause remanded to the district court for further proceedings according to law; costs of appeal upon appellees.

(51 La. Ann. 689)

STATE ex rel. NATIONAL BROADWAY BANK v. CITY OF NEW ORLEANS.
(No. 13,063.)¹

(Supreme Court of Louisiana. March 7, 1899.)

MUNICIPAL IMPROVEMENTS—CERTIFICATES.

City improvement certificates issued to contractors for street paving, block by block, as

the work progresses, are payable in cash upon appropriations when made by the city, and their payment does not in any manner depend upon the contractor's fulfillment of the maintenance clause of his contract in behalf of the city.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frederick D. King, Judge.

Application by the state, on the relation of the National Broadway Bank, for a writ of mandamus against the city of New Orleans. Judgment for plaintiff. Defendant appeals. Affirmed.

Samuel L. Gilmore, City Atty., and Walter B. Sommerville, Asst. City Atty., for appellant. Farrar, Jonas, Kruttschnitt & Gurley, for appellee.

WATKINS, J. This is a proceeding by mandamus, directed to the city of New Orleans, commanding it, through its proper disbursing officers, the mayor, comptroller, and treasurer, forthwith to pay over to petitioner, out of funds appropriated therefor, in cash, on the surrender and delivery thereof, the amount of certificates Nos. 1 and 2, as set out and particularly described in its petition, bearing date September 10, 1895, issued to the Rosetta Gravel, Paving & Improvement Company, amounting in the aggregate to \$5,477.14, with 6 per cent. per annum interest from date. On the trial there was a judgment making the mandamus peremptory, and the respondent city prosecutes this appeal therefrom.

The substantial representation of the relator is as follows, viz.: That by virtue of a notarial contract made and entered into between the city of New Orleans and the Rosetta Gravel, Paving & Improvement Company, bearing date May 10, 1895, the latter contracted and agreed to do certain paving work on Poland street, to be done at prices therein specified, partly by the front or abutting proprietors, and partly for certificates, due on demand, by the city; that said paving and other work was duly performed by the gravel company, the same was accepted by the city, and certificates were duly issued for the city's portion of said work, and same were signed by the commissioner of public works, the city engineer, and the mayor of the city, and delivered to the gravel company; that among those so issued were certificates Nos. 1 and 2, each dated September 10, 1895 (one for \$2,170.67, and the other for \$3,256.52); that on the 9th of April, 1896, for value received, the gravel company transferred and assigned said certificates to relator, and upon the same day said transfer was registered in the office of the comptroller of the city, in pursuance of Ordinance No. 2066, A. S., and that ever since the city of New Orleans has recognized relator as the owner and holder of same; that by Ordinance No. 11,347, O. S., adopted since said assignment, the city made due and proper appropriations to pay said certificates in their proper order and rank,

¹ Rehearing denied March 20, 1899.

under which there are at this time ample funds in the city treasury applicable to the payment and satisfaction thereof, capital and interest; that relator presented said certificates to the city comptroller for such payment, and he "refused to make such payment until [it] had presented him the certificate required by Ordinance No. 13,338, C. S."; and that thereupon its counsel addressed a letter to the comptroller, making a formal demand of him for payment of said certificates, and to which he replied that he was prepared to pay same when relator complied with the requirements of said Ordinance No. 13,338, C. S. Relator specially avers that said ordinance was adopted by the city council long subsequent to the execution and fulfillment of the aforesaid contract by the gravel company, long after the passage of Ordinance No. 11,347, C. S., making appropriation for the payment of said certificates, and long after said certificates had been by the gravel company assigned to the relator, and to the knowledge of said city and its officers. The following is a copy of the provision of said Ordinance No. 13,338, to which relator refers, viz: "That no certificate for the city's portion of the cost of any street or banquette, paving of streets or banquettes, in which there is a clause requiring the contractor to maintain the street or banquette in good condition for any term, shall be paid to any beneficiary or assign until the beneficiary shall file with the comptroller a certificate signed by the commissioner of public works that the maintenance clause in the contract under which said paving certificate is issued has been fully complied with." The relator thereupon represents and avers that said ordinance is null and void, and of no effect as against it, because (1) it imposes upon the assignee or beneficiary of such certificates as those upon which its demand is founded, as a prerequisite to their payment, a burden not imposed on the contractor itself, thereby making the position of an assignee worse than that of its assignor, and is therefore discriminative and unreasonable; (2) it imposes upon the payment of those certificates onerous terms and conditions, which did not exist at the time of the original contract out of which said certificates originated was made, and after same had been assigned to relator with the knowledge and consent of the city, and is therefore violative of the obligation of the contract, and divests vested rights, in contravention of the constitutions of the state and United States. Finally, the relator avers "that the sole and only reason why the city authorities refuse to pay said certificates in cash, out of the funds now in the city treasury appropriated and applicable thereto, is the fact that [it] has declined to submit to the provisions of said Ordinance No. 13,338, C. S., and that said pretension is illegal and unconstitutional.

The following are extracts from the return of the respondents, viz: "(1) That certificates Nos. 1 and 2, held by relator, and de-

scribed in its petition, are certificates issued by the municipality of New Orleans for work done for said municipality, and under the laws governing the issuance of such certificates or scrip; that said scrip is nonnegotiable in its character; and that, on their faces, said certificates bore notice to relator that they were subject to all the equities between the city of New Orleans and the person to whom they were originally issued. (2) That the Rosetta Gravel, Paving & Improvement Company, to whose order said certificates were issued, agreed, in the contract which is referred to in relator's petition, and made a part thereof, to maintain Poland street in good order and condition for the term of five years after said company had finished paving said street; that said five years have not yet elapsed; that the Rosetta Gravel, Paving & Improvement Company has failed to comply with the terms of its contract to maintain Poland street in good condition; and that the money is not due under said contract, and on the certificates here sued upon, until the said contract is complied with, and the street maintained in good order and condition. * * * (4) That Ordinance No. 13,338, C. S., is not burdensome, illegal, unauthorized, null, or void; that the certificates therein provided for are issued by city officials without cost or charge; that said ordinance is merely administrative in its nature, and authorized by the city charter, and is useful in the expedition of the business of the city with private contractors."

The purport of the return appears to be that the gravel company has engaged with the city, as a part of its contract, "to maintain Poland street in good order and condition for a term of five years after it had finished paving said street," and that said time has not elapsed, and said company "has failed to comply with the terms of its contract to maintain Poland street in good order and condition, and that the money is not due under said contract, on the certificate sued on, until the said contract is complied with, and the street maintained in good order and condition" (our italics); that, notwithstanding the gravel company has been duly notified "to repair Poland street," it has failed to do so; that Ordinance No. 13,338, C. S., is neither "burdensome, illegal, unauthorized, null, nor void," but that it is "merely administrative in its nature, and authorized by the city charter, and is useful in the expedition of the business of the city with private contractors," etc. From the foregoing it appears that the respondents do not contest the fact that the gravel company had completed its contract with the city to do certain paving work on Poland street, and that same had been performed satisfactorily to, and accepted by, the city, but that they do contest relator's right to have its certificates paid until the maintenance clause of the gravel company's contract with the city has been carried to its

final and complete termination; or, in other words, the relator's demand for the payment of its certificates is premature, the maturity thereof being postponed by the aforesaid suspensive condition of the contract to maintain Poland street in good order and condition. In order to determine the validity and applicability of Ordinance No. 13,338, C. S., to relator's certificates, and the relief it demands, an examination must be made of the paving contract which the gravel company made with the city, which is the foundation of its rights; and it was conceded in the argument at bar that relator possessed the same, and no greater, rights than the gravel company, its assignor, had originally,—said certificates being nonnegotiable in form.

On the 10th of May, 1895, the mayor of the city, duly empowered by Ordinance No. 10,450, C. S., made and entered into a contract with the Rosetta Gravel, Paving & Improvement Company for the paving of Poland street with concrete gravel; specifying all details of the work. The following are the terms of what is known as "the maintenance clause," viz.: "The entire work shall be maintained in good order by the contractor for and during a period of five years from date of the final acceptance; this 'good order' being understood to mean that, whenever so directed in writing by the commissioner of public works, all decayed, broken, or injured wood or other material in any part of the street shall be removed and replaced by the contractor, within ten days, with sound materials, according to those specifications, or whenever so directed," etc. The contract also provides for a bond, which is of the following tenor, viz.: "The successful bidder will furnish bond, with good and solvent security, approved by the mayor and comptroller of the city of New Orleans, in an amount equal to twenty per cent. of the estimated value of the contract for the construction and maintenance of the work according to the foregoing specifications." In addition to the foregoing clauses, the contract concludes with the following clause with regard to certificates, viz.: "Certificates will be issued for every two blocks when completed by the contractor, and approved by the city engineer and commissioner of public works." From the foregoing it is manifest that the issuance of the certificates did not depend upon the contractor's compliance with the maintenance clause, but solely and alone upon his completion of the two blocks, the price of which they purported to represent. That stipulation was reiterated in the bid of the gravel company; and it provides, further, that that "portion of the cost of such paving is to be paid by the city of New Orleans, in cash, out of item two (2) of the reserve fund of the year 1895, and all deferred payments shall

bear interest at the rate of six (6) per cent. per annum, to run from the date of issuance of the joint certificates of payment of the city engineer and commissioner of public works." This contract was duly signed by both of the contracting parties. The two certificates which are declared upon are in exact conformity to the contract, and the assignment thereof was in due form, and in compliance with the provisions of Ordinance No. 2086, A. S.; and each indorsement bears the certificate of the city comptroller that it has been duly filed in his department. By Ordinance No. 11,347, C. S., bearing date September 26, 1895, an appropriation was made, in favor of the gravel company, to pay the two certificates of relator out of the reserve fund of 1895; but the comptroller declined to pay the said certificates to relator until Ordinance No. 13,338, C. S., had been complied with.

The question of importance is whether the city council possessed the power to enact Ordinance No. 13,338, and give same a retroactive effect with respect to the rights of relator, so as to oblige it to see to it that the maintenance clause of the paving contract had been fully complied with by the contractor, as a *sine qua non* to the payment of its certificates by the city. In our appreciation, the city had no such power. The terms of the paving contract did not warrant it. The maintenance clause of the contract has exclusive reference to the repair of paving once perfect and complete, and is a condition subsequent thereto. The issuance of the cash certificates had nothing whatever to do with the maintenance of the street paving; and to attempt to give to it the retrospective effect its terms would imply would render it both burdensome and unreasonable, and operate an impairment of the relator's contract, in the sense of the federal constitution. We do not regard this as a mandamus proceeding to enforce the obligation of a contract, and it is not a suit to compel the specific performance of a contract. The object of this suit is to compel the disbursing officers of the city to comply with the terms of specified city ordinances, by paying the certificates the relator holds, in cash, from a fund which had already been appropriated for that purpose. Such a proceeding as this is a well-recognized remedy in such a case. Indeed, it is the only one of which such a demand for relief is susceptible. The certificates are mere choses in action, and nonnegotiable in form. Consequently the relator occupies the same place as the gravel company. But that in no manner alters the situation, or applicability of mandamus as a remedy. We are entirely satisfied that the relator's demand is well grounded, and that Ordinance No. 13,338 has no application to the certificates it holds. Judgment affirmed.

(51 La. Ann. 814)

SHREVEPORT & R. R. V. RY. CO. v. ST. LOUIS S. W. RY. CO. (No. 12,837.)

(Supreme Court of Louisiana. June 22, 1898.)

EMINENT DOMAIN—PROPERTY SUBJECT—RAILROAD PROPERTY.

A railroad corporation, having secured a franchise and right of way for the purpose of constructing its tracks upon a locus publicus of a city, has the right to expropriate from another railroad corporation sufficient clearance space to enable it to pass its trains free of obstructions and hindrance from the latter, if the use thereof be not of such a character as to be indispensable to the movement and operation of its own trains or its other business.

On Rehearing.

The use of a team track and delivery space of a railroad company was not shown so essential as that it would result in impairing defendant's franchise and use, in case another railroad is permitted to use three feet for clearance space, which clearance does not interfere with the running of defendant's trains, nor to an irremediable extent with the use of defendant's team track and delivery space.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Caddo; A. D. Land, Judge.

Action by the Shreveport & Red River Valley Railway Company against the St. Louis Southwestern Railway Company. Judgment for plaintiff, and defendant appeals. **Affirmed.**

Tallaferro Alexander and S. H. West, for appellant. Leonard & Randolph, for appellee.

WATKINS, J. This is an expropriation proceeding, the object of which is to procure the condemnation and adjudication to the plaintiff of a certain strip of ground, which is described in its petition, upon the payment of such damages as may be awarded to the defendant in compensation therefor by a jury of freeholders, coupled with an injunction prohibiting the defendant from laying any track or other obstruction thereon, or in any manner incumbering same, pendente lite. On the trial there was a verdict of the jury in favor of the plaintiff, expropriating a strip of ground three feet in width off of the southwest side of defendant's reservation on the batture on the river front of the city of Shreveport, and in length extending from a point opposite block 61 in said city to a point opposite block 59, and aggregating about 1,995 square yards, as shown by the map which is annexed to the petition. And the verdict of the jury further declared that said strip of ground was awarded to the plaintiff company upon its paying to the defendant the sum of \$750 therefor, and \$2,250 in full for damages sustained. It further awarded the maintenance and perpetuation of plaintiff's injunction, in so far as and to the extent of said expropriation, and that same be otherwise dissolved. In pursuance of that verdict, the judge a quo pronounced judgment in plaintiff's favor, and thereupon the plaintiff deposited with the clerk of the

district court the sum of \$3,000, the amount of said judgment and award, and the defendant prosecutes an appeal therefrom.

In this court the plaintiff appeared by counsel, and filed an answer to the appeal, and requested an amendment of the judgment appealed from, by rejecting and disallowing the sum of \$2,250 which the jury awarded as damages. The averment of the plaintiff's petition is that it is proceeding with the work of constructing a railroad from the city of Shreveport to the town of Coushatta, and is under an obligation to the city of Shreveport to establish its depots in, and run its daily trains into, the city of Shreveport; that, in consideration thereof, said city has granted it "a right of way to lay its track on Commerce street, in said city, as is shown by plat and ordinance thereto annexed"; that in laying and establishing its said "track, under the grant of said city, on said Commerce street, between Texas and Cotton streets, in the said city, the space granted to it between two existing tracks of the defendant, between Cotton and Texas streets, is not sufficiently wide to accommodate its said railroad tracks and [its] business on Commerce street, between the said Cotton and Texas streets; that an additional strip of ground, six feet wide, between the Red river and [its] right of way, and extending along Commerce street [between certain points, indicated on the map], is necessary and indispensable to [it] in the laying of its tracks and the construction of its road, and in reaching its terminals in said city, as per its contract with said city"; that said strip of ground is claimed by the defendant exclusively, which refuses to allow it to use or occupy any portion of said necessary strip of ground, notwithstanding it has tendered to the defendant the value thereof, and amicably demanded same, and notwithstanding the same is not required for the defendant's use, it having already two tracks laid on Commerce street and the aforesaid batture, and having a large amount of ground adjacent to and parallel with the aforesaid strip of ground; that, in consequence thereof, the expropriation and use of the aforesaid six-foot strip will not interfere with the operation and use of either of the defendant's two aforesaid tracks. The petition further represents that there are at present no erections or constructions of any sort upon said strip of ground, but that its fear and apprehension are that defendant contemplates, and will, if not restrained by injunction, lay, a track thereon, or otherwise obstruct the same pendente lite.

Without answering to the merits, the defendant filed an exception to the effect that the strip of land sought to be expropriated is part of its tracks, grounds, and terminals, and essentially necessary to the proper operation of the same, in handling its freight traffic in the city of Shreveport; that said strip of ground lies between its tracks, and constitutes a part of the space arranged, filled

in, graveled, and built by it, at great expense, for the accommodation of its business for the purposes of freight delivery; that same is now in actual use for the purposes aforesaid, was so in actual use at the date of the institution of this suit, and had been so in use for more than one year prior thereto; that the bisecting of said space, by the laying of a track and the operation of the same, as sought for by the plaintiff in this proceeding, would utterly destroy and render valueless, for the purposes and uses intended, and for which it was intended by the defendant, the entire space between the tracks; that there exists no necessity for the infringement of the rights of the defendant and the destruction of its property, by laying thereupon of the track, as proposed and contemplated by the plaintiff in this proceeding, but that there is ample space, outside of defendant's track, both on Commerce street and along the batture, opposite its ground; that there exists no legislative authority or other legal power under the laws of this state to expropriate the property of the defendant, which is in actual use by it, and necessary for the efficient, proper, and successful operation of its railway and transportation business.

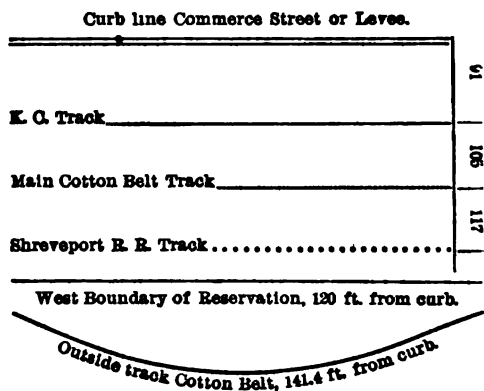
Fully reserving the benefit of the foregoing exceptions, the defendant filed an answer in extenso, in which the following additional grounds of defense are set out, viz.: That it is now, and has for several years been, engaged in operating a line of railway in the state of Louisiana, and in the city of Shreveport, having succeeded to the rights and franchises of the Shreveport & Arkansas Railway Company and the St. Louis, Arkansas & Texas Railway Company; that it is the owner, in possession of, and engaged in operating its said road over certain tracks in the city of Shreveport, under grants by proper ordinances from said city; that its said tracks and franchises are very valuable, and necessary to the proper operation of said road, in getting access to and from its freight depot, and also in getting access to cotton compressors, warehouses, mills, foundries, and other factories and industries, and that the free and unlimited use of its said tracks and terminal facilities is absolutely essential to the successful and proper operation of its said road; "that its said tracks and terminals embrace, among others, a right of way on and along Commerce street, in the city of Shreveport, between Cotton and Texas streets; that, in addition to its right of way at this point, it is the owner and in possession of a tract or strip of ground, along the river front on Commerce street, one hundred feet in width, granted to it by virtue of an ordinance of the said city of Shreveport, which was part of the consideration in inducing the respondent company or its predecessors * * * to build said railroad into the city of Shreveport; that it has laid upon its said right of way and strip of ground two tracks, one of

which is upon its right of way on Commerce street proper, and the other upon the one hundred foot strip adjoining thereto, on the batture which was granted it as aforesaid; that the said inner track is used as its main track, in getting to and from its freight depot, warehouses, compressors, mills, etc., and the other, or the outside, track is used as a switch or delivery track, for the purpose of delivering freight to various shippers and consignees in the city of Shreveport; that at the time the said main or inside track was laid, and for years subsequent thereto, the said main track was on the edge or brink of the river; that within the last twelve months it has, at great expense, and at a cost of more than ten thousand dollars, filled in its said ground along the river front, and built its outside track thereon; that it was so built and constructed with the consent of the city, and in accordance with rights theretofore granted to it by the city council; and that the use of said tracks as they now exist at this point, as well as of the intervening space, is essential to the proper and efficient operation of said railroad." It further avers that the strip of ground sought to be expropriated is a part of the tracks, grounds, and terminals, which is necessary to the proper operation of same "and the handling of its freight traffic in the city of Shreveport"; that the strip of ground lies between the tracks of the defendant, and constitutes a part of the space which it graded and filled in for the accommodation of its own business, and for the purposes of freight delivery to its customers. It specially denies the plaintiff's legal right to expropriate said property, and also denies the legal right of the city of Shreveport to grant to plaintiff any right of way over said strip of ground. It then avers that the direct and immediate effect of the expropriation of said strip of ground, and the laying of a railroad track thereon, would be to destroy said freight delivery, and render same useless for the purposes same was intended to subserve, and to cause irreparable injury to its property, rights, and franchises. In the alternative, it estimates the loss and damages it will sustain, in case said strip of ground is expropriated, at \$25,000, and it demands a verdict for that sum, and the further amount of \$2,000 as the actual value of the strip of ground.

The petition, exception, and answer are considered especially valuable as containing, not only a statement of the facts and particulars of the physical situation of the res in question, but more particularly for their judicial admissions, whereby the scope of the evidence and judicial inquiry have been greatly limited. There is no question of the fact that the city of Shreveport, by appropriate city ordinance, did grant to the plaintiff a right of way along and parallel to Commerce street, from Cotton street, near the terminus of the railroad bridge across Red river, to Texas street, and beyond, in the direction of

Cross Bayou, within the city limits; and this grant was made and intended to enable plaintiff's road, which was a new one, to reach and render accessible certain terminal facilities, freight depot, workshops, etc.; that this grant proposed and did permit the plaintiff to build and operate one single track, parallel with one of the defendant's tracks, nearest to Commerce street, and between it and its outer track, which is immediately upon the brink of the river's bank; and that the small strip of ground which the plaintiff proposes to expropriate is a portion of the intervening space of ground which lies between the defendant's two tracks, and is or will be longitudinally bisected by the plaintiff's track. The plaintiff's contention is that the defendant is without any fee-simple title to the aforesaid space, and has no other right there-to than a use or easement, same being riparian property, situated upon the bank or shore of a navigable water course; while that of the defendant is that it has an absolute right of ownership in said strip of land. It is worthy of note that, notwithstanding the plaintiff demanded the expropriation of a space of six feet, the jury only awarded three feet, and that the plaintiff not only failed to appeal from the judgment and award, but in its answer to the defendant's appeal requested no increase in the quantity of space awarded by the jury. The record shows that the plaintiff immediately paid into the hands of the clerk of the lower court the full sum of \$3,000, according to the award, and that since the rendition of the judgment it has built and thoroughly completed its track upon the space of ground granted to it, and is operating same with its trains.

The city of Shreveport has not been made a party to this suit, and hence there has been made herein no direct assault upon the city ordinance which granted plaintiff its franchise, and hence we are bound to accept its existence as a fact, and one that is unquestionable, in so far as the parties to this litigation are concerned. And this necessitates the further statement that, in point of fact, this suit does not involve an actual expropriation of either the title or use of the strip of ground itself, but, in strictness of speaking, only what is termed in railroad parlance a "clearance," or the room or space that is necessary for the movement and operation of its coaches and trains of box cars, in passing to and fro over its tracks which are adjacent thereto. It was three feet of space which the jury awarded, and for which the plaintiff was condemned to pay, and has paid, the sum of \$3,000, notwithstanding the verdict and judgment used the phrase, expropriating "a strip of ground three feet in width off the west side of defendant's reservation on the batture," etc. As more precisely indicating the locus in quo, we have annexed a small sketch, which we have extracted from the plaintiff's supplemental brief, viz.:



On the 11th of May, 1888, the common council of the city of Shreveport adopted an ordinance granting a right of way and privileges on certain streets, in which it is declared "that the right of way, with the privileges of laying one or more tracks thereon, * * * be, and the same is hereby, granted to the Shreveport and Arkansas Railway Company, its successors and assigns, * * * on Commerce street, from the depot grounds of said company to Cross Bayou; the said railroad company being hereby granted the right to occupy and use a strip of ground one hundred (100) feet in width along the river front, on Commerce street, between Cotton and Travis streets: provided, that said railway company shall not lay its tracks, or in any manner use or occupy any portion of the levee, or Commerce street, between Cotton and Texas streets, within one hundred and twenty (120) feet of the banquettes or sidewalk of said street," etc. It further provided that said railway might "lay and maintain its track for and during one year from that date, on the space between Commerce street (between Cotton and Texas streets), within one hundred (100) feet of the sidewalk"; but it was further expressly stipulated therein that the railway company was obliged to remove the same at the expiration of the year specified. It was under and in pursuance of that ordinance that the predecessor and assignor of the defendant got into position as a railway company in the city of Shreveport, and built and now maintains and operates its railroad, together with its rights and franchises therein; and to that ordinance we must look, in order to ascertain the full measure of its rights to the locus in quo. The proof shows, and the fact is, that the said railroad company subsequently built its track at a distance of 105 feet from the "curb line of Commerce street," and is indicated on the sketch as "Main Cotton Belt Track,"—a name by which the defendant's road is popularly known. That track was at first only intended to have been a temporary one, but by a subsequent agreement, made between the company and the city for a satisfactory consideration, same was made a permanent

structure, and has since that time been used and operated as its main track. The distances marked on the sketch indicate the centers of the different tracks. Subtracting the 105 feet from the curb line of Commerce street to the defendant's main line, there will remain, necessarily, 15 of the 120 feet of the original reservation of the city. The record shows that, at the time this track was first built, it was immediately on the brink of the river bank; and under authority from the city council, and at an expense of over \$10,000, the defendant graded and filled in the space outside its track, up to and within the 120-foot limit, and thereon erected another track, which is designated on the sketch as the "Outside Track Cotton Belt, 141.4 feet from curb." Between these two tracks of the defendant, the city council granted the plaintiff, upon its reservation, its right of way, and its track, as placed thereon, is indicated on the sketch by the words "Shreveport R. R. Track,"—the center of same being 117 feet distant from the curb line on Commerce street, and only 3 feet from the west or outside boundary of the city's reservation of 120 feet. In the ordinance of the city council, herein referred to as having granted to the defendant and its predecessors certain batture and riparian privileges, there is an express stipulation to the effect "that the city reserves the right to alter, amend, restrict, or enlarge the conditions, requirements, and burdens herein imposed on said grantees as to the use of said track or tracks," etc., and it was subject to those reservations that the defendant's predecessors accepted the grant to use and right to occupy said batture with their railroad tracks, etc.

From the foregoing it appears that, in its original grant to the defendant's predecessors, in 1888, the city gave them permission to construct and maintain a railroad track "on Commerce street, from the depot grounds of said company to Cross Bayou; the said railroad company being hereby granted the right to occupy and use a strip of ground one hundred feet in width along the river front," etc. But the granting ordinance specially provided "that said railway company shall not lay its tracks, or in any manner use or occupy any portion of the levee, or Commerce street, * * * within one hundred and twenty feet of the banquettes or sidewalk of said street." The effect of this ordinance was to absolutely exclude the defendant's predecessors from the occupancy and use of this 120-foot reservation, and to grant it "the right to use and occupy a strip of ground one hundred feet in width" outside of the limit of that reservation. Hence the city council had a perfectly unquestioned and unquestionable right to grant to plaintiff a right for its railroad track over its reservation, as it was 12 feet distant from the main Cotton Belt track on one side, and 3 feet from the outside limit of the reservation on the other side. The city council had a

right equally as undeniable to grant the plaintiff a right of way over the reservation as it had to grant a similar right of way over same to the defendant's predecessors, and more recently a similar right of way over same to the Kansas City Railway Company. But, inasmuch as the center of plaintiff's right of way is only 3 feet from the outer limit of the reservation, 6 feet additional was deemed necessary, and 8 feet additional was awarded by the jury to the plaintiff,—not for the purpose of enabling it to build its track thereon, but to give to it ample clearance in operating its trains, in the event the defendant or other company should parallel its track; there being no track or other obstruction on said 3 feet of space at the date this suit was filed.

In order to re-enforce this statement, we have made the following extract from the brief of the plaintiff's counsel, viz.: "Your honors must know that the track of the plaintiff company, at this disputed point, is already laid and in possession of plaintiff. Now, then, the present situation is as follows: Defendant's or Cotton Belt main track has its center 105 feet from the curb of Commerce street. The Shreveport & Red River Line has its track just next to it, with its center 117 feet from the curb. The outer rail of the plaintiff's line is $2\frac{1}{2}$ feet from the center, or 119.6 feet from the curb. Now, the 'reservation' of the Cotton Belt only begins at 120 feet from the curb. Thus, the plaintiff's rail lacks 6 inches of touching defendant's 'reservation,' but, in running a car or train over our track, the car or train laps over or trenches on the so-called 'reservation' about a foot, and the other 2 feet is needed for 'clearance.' In order to save dispute between the plaintiff and the Cotton Belt as to such use while our trains were passing, we asked the court and jury to state how much we should pay the Cotton Belt, considering the fact that the Cotton Belt had spent money in improving this particular strip, and therefore had an equitable claim for reimbursement. They fixed it with great liberality at \$3,000; for, be it remembered, we do not seek, and never intend, to use the 3 feet in question, except in the way explained above, and are willing for your honors to enter any modification of the decree below as may seem fit to meet the peculiar situation."

On this presentation of the facts of the case, the question for decision is whether the jury properly awarded to the plaintiff the 3 feet of clearance space for the passage of its trains; same being rendered necessary from the fact that only 3 feet of space was allotted to it, between the center of its right of way and the defendant's reservation,—an insufficiency of room for the operation of its trains, though there was plenty of space for the construction of its track thereon. Indeed, there remained 6 inches of space outside of the outer rail of its track which was not covered by it; but, as stated by counsel, the coaches

and box cars would, in transit, lap over or extend beyond the track, so that 3 additional feet of space were necessary for their operation. In the first place, we think it sufficiently appears from the terms of the original grant that the defendant's predecessors did not acquire thereby any fee in the strip of ground 100 feet in width in front of the reservation of the city. It is also apparent that the city ordinance in terms excluded them from any use or enjoyment whatever of the city's 120-foot reservation. All of this property was and is *batture*, and is so mentioned and designated throughout these dealings and transactions. There is no limit fixed in the ordinance for the duration of the grant, but it in terms declares its revocability at the pleasure of the council. From the foregoing premise, it is easily deducible that, in so far as the plaintiff's franchise from the city to establish its tracks impinges upon the defendant's grant, the latter ordinance was an implied repeal of the former one. That this was the evident purpose and intention of the city council, in granting to the plaintiff a right of way for its tracks within 3 feet of the defendant's reserve, there can be no doubt; for it is neither reasonable nor just to suppose that the council did not believe that the right of clearance would pass to the plaintiff as an incident of the franchise conferred.

We are of opinion that the principles of law announced in *Construction & Improvement Co. v. Illinois Cent. R. Co.*, 49 La. Ann. 527, 21 South. 891, are strictly applicable to the defendant's contention that it acquired the ownership of a portion of the *batture*. The defendant's counsel does not contend that the plaintiff is without the legal right to expropriate at all the space in question, for that question was decided in *Kansas City, S. & G. Ry. Co. v. Vicksburg, S. & P. R. Co.*, 49 La. Ann. 29, 21 South. 144. All property is held subject to the right of eminent domain, the principal condition on which the right depends being the public necessity for the expropriation demanded. *Rev. Civ. Code*, art. 3637; *Rev. St. art.* 1486; *Const.* 1879, art. 156; *Cooley, Const. Lim.* p. 523 et seq.; 2 *Kent, Comm.* p. 838. No question is made of the plaintiff's use of the space being a public purpose, nor that its use is an absolute necessity for the operation of its road. These propositions being conceded, there can be no answer to the plaintiff's demand, other than that the space proposed for expropriation is in the actual use of the defendant for the purposes of its traffic and business, and that same is indispensable thereto. In *Kansas City, S. & G. Ry. Co. v. Vicksburg, S. & P. R. Co.*, cited *supra*, this court said: "The question, then, is whether the land, the subject of this controversy, is in public use. If not, it is subject to be taken for such use, the same as that of any individual. If a corporation acquires more land than it requires for its uses, the land not needed is impressed

with no immunity from the exercise of that power to which all submit." What is the situation of this reservation of the defendant, and to what public use is it subjected which interposes a legal barrier to plaintiff's right of expropriation? The proof shows, and the fact is, that the defendant's track, which is nearest the river, is only a switch track, and is laid in the form of a curve, and at its greatest diameter is 25 feet from the track of the plaintiff. The space within is open, and altogether free from erections or constructions of any kind; and it was the alleged purpose of the plaintiff to keep it entirely free therefrom, by means of its injunction, *pendente lite*. The defendant principally employed this space for the purposes of freight deliveries from its freight trains, when goods are deposited and temporarily remain until they can be hauled to the warehouses of its customers on Commerce street; and the principal inconvenience which the defendant will suffer by this attempted expropriation is, to our thinking, more seeming than real, in view of the fact that no portion of its reservation is actually taken, and only a "clearance" of 3 feet has been awarded.

Before the plaintiff acquired a franchise upon the reservation of the city, the defendant had uninterrupted communication between its two tracks; and we think it reasonably inferable from this record that this franchise is the serious grievance in the case. It is perfectly obvious that the city of Shreveport has granted to the plaintiff a franchise, on which it has already built its track and is now operating its trains thereon. It is equally obvious that it cannot continue to so operate its trains without it is awarded the clearance of 3 feet which is absolutely necessary thereto; and the defendant is enjoined from interfering therewith. A jury of freeholders, chosen from the vicinity of the locus in quo, arrived at the conclusion that 3 feet of clearance space was essential to the operation of the plaintiff's road, awarded the expropriation thereof, and assessed the damages therefor at \$3,000; and the district judge of the vicinage declined to grant a new trial. Our examination of the record, and a study of the law and evidence bearing thereon, have satisfied us that justice has been done. Judgment affirmed.

BLANCHARD, J., takes no part in this decision.

On Application for Rehearing.
(Jan. 9, 1899.)

The chief ground of complaint which is urged against our opinion is with regard to certain extracts it made from the city ordinance which granted the original franchise to the defendant's predecessor, as will appear from the defendant's application, viz.: "The statement of the court, in its opinion in this case, that defendant company's grant of right of way and franchise from the city of Shreveport is held subject to an

expressed condition in the grant itself, which makes it revocable at the pleasure of the council, based, as it is, upon error of fact, is calculated to work serious injury to the defendant. It affects not only the present suit, but may be used against it in the future to jeopardize the rights of the company to its entire tracks and terminal system in the city of Shreveport," etc. The statement of the opinion referred to is given, as follows, viz.: "In the ordinance of the city council, herein referred to as having granted to defendant and its predecessors certain batture or riparian privileges, there is an express stipulation to the effect 'that the city reserves the right to alter, amend, restrict, or enlarge the conditions, requirements, and burdens herein imposed on said grantees as to the use of said track,' etc., and it was subject to those reservations that the defendant's predecessors accepted the grant to use and right to occupy said batture with their railroad tracks," etc. Again, the opinion states: "There is no limit fixed in the ordinance for the duration of the grant, but it in terms declares its revocability at the pleasure of the council." The present contention of defendant's counsel is that, notwithstanding the original draft of the ordinance did embody the foregoing provision, a subsequent ordinance was immediately thereafter adopted, which explained and modified the provisions of the original grant. To show the application of this ordinance and of its amendment, the following statement of the contentions of the parties, quoted from our opinion, will suffice, viz.: "The plaintiff's contention is that the defendant is without any fee-simple title to the aforesaid space, and has no other right thereto than a use or easement, same being riparian property, situated on the bank or shore of a navigable water course; while that of the defendant is that it has an absolute right of ownership in said strip of land." The opinion makes an extract from the city ordinance making the grant to defendant's predecessor, which conferred only "the right to occupy and use a strip of ground one hundred feet in width along the river front," same being 120 feet distant from Commerce street. It further states that "it was under and in pursuance of that ordinance that the predecessor and assignor of the defendant got into position as a railway company in the city of Shreveport, and built and now maintains and operates its railroad, * * * and to that ordinance we must look, in order to ascertain the full measure of its rights to the locus in quo." It is to this state of the case that the quotation from the ordinance which counsel object to was applied. And, predicated upon that quotation, our opinion says: "Hence the city council had a perfectly unquestioned and unquestionable right to grant to plaintiff a right of way for its railroad track over its reservation, as it was 12 feet distant from the main Cotton Belt track on one side, and 3 feet from the outside limit of the reservation [of the defendant] on the other side." Again: "On this presentation

of the facts of the case, the question for decision is whether the jury properly awarded to the plaintiff 3 feet of clearance space for the passage of its trains; same being rendered necessary from the fact that only 3 feet of space was allotted to it, between the center of its right of way and the defendant's reservation,—an insufficiency of room for the operation of its trains, though there was plenty of space for the construction of its track thereon. Indeed, there remained 6 inches of space outside of the outer rail of its track which was not covered by it; but, as stated by counsel, the coaches and box cars would, in transit, lap over or extend beyond the track so that 3 additional feet of space were necessary for their operation. In the first place, we think it sufficiently appears from the original grant that the defendant's predecessors did not acquire any fee in the strip of ground 100 feet in width in front of the reservation of the city. It is also apparent that the city ordinance in terms excluded them from any use or enjoyment of the city's 120-foot reservation. All of this property was and is batture, and is so mentioned throughout these dealings and transactions." Then follows the language to which counsel makes objection, viz.: "There is no limit fixed in the ordinance for the duration of the grant, but it in terms declares its revocability at the pleasure of the council. From the foregoing premise, it is easily deducible that, in so far as the plaintiff's franchise from the city to establish tracks impinges upon the defendant's grant, the latter ordinance was an implied repeal of the former one." It is this statement of the opinion and conclusion of the court which defendant's counsel regard as an assault upon the defendant's franchise, and the correctness of which they deny.

Taken in connection with the quotations that preceded it, it is evident that the objectionable language does not affect the opinion, though it might, in the future, affect the plaintiff's franchise. The entire reservation of the defendant of 100 feet in width is alluvion, and, at the date of the city ordinance which granted it to the predecessors of the defendant, it was a portion of the bank of Red river, a navigable water course. Some years after the defendant's acquisition of it, same was raised or filled in by the defendant, and thereupon its outside track was built. The inside, or western, limit of this reservation was 120 feet distant from the outside curb of Commerce street, which runs parallel with the river. It is this strip of 3 feet of the defendant's reservation, which adjoins the city's reservation, that is in controversy. The city granted to the plaintiff a right of way upon its reservation of 120 feet, and within 3 feet of the defendant's reservation. There being upon this right of way an insufficiency of space for the plaintiff to operate its cars, it seeks to appropriate the additional space required. Its petition demanded six feet in width, and the jury allowed only three. Evidently recogniz-

ing the fact that the strip of ground upon which it granted defendant's predecessors a franchise was a portion of the river bank, the city did not donate the soil or land in fee simple, but conferred upon it only "the right to occupy and use a strip of ground one hundred feet in width along the river front." It was evidently upon this theory that plaintiff sought an expropriation thereof, and it was confessedly upon the theory that it had filled in and raised the height of the river bank that the defendant demanded and was allowed a large sum in damages. In view of this state of the case, it was quite an unimportant factor, in the decision of same, whether the original grant was revocable or irrevocable, or whether or not the city ordinance which granted a franchise to the plaintiff operated as an implied repeal of the prior ordinance, which granted a franchise to the defendant's predecessors. For, if same was an irrevocable grant to the defendant's predecessors, and its grant had been of the fee, instead of the use, it was, in the sense of the opinion and in our conception, liable to expropriation by the plaintiff. The statement in the opinion with regard to the revocability of the defendant's grant, and it having been impliedly recalled by the grant in favor of the plaintiff subsequently, was merely argumentative, and only intended to more clearly demonstrate the untenability of defendant's contention. In this view let us consider the amended and supplemental ordinance, to which our attention is now attracted, and its scope and purpose, in connection with the defendant's original grant. The latter is of the following purport, viz.:

"Section 1. Be it enacted by the city council of the city of Shreveport, * * * that the right of way, with the privilege of laying one or more tracks thereon, * * * be and the same are granted to the Shreveport and Arkansas Railway Company, its successors and assigns; * * * the said railway company being hereby granted the right to occupy and use a strip of ground one hundred feet in width along the river front," etc.

"Sec. 6. Be it further ordained, etc., that the city reserves the right to alter, amend, restrict, or enlarge the conditions," etc.

This ordinance is then dated and signed as a completed ordinance. It was offered and filed in evidence on behalf of the plaintiff. In a different part of the transcript the same ordinance again appears, as part of the defendant's evidence. Upon this latter page there is what appears to be an amendment to the original ordinance. The original ordinance was adopted on December 30, 1887, and the amendment was adopted on the 11th of May, 1888; but our attention was not particularly attracted to this amendment until this application was filed. The amendment, among other things, provides "that section six be and the same is hereby amended by striking out the first portion of said section," etc.; that is to say, that portion which re-

lates to the reservation of the city "to alter, amend," etc. The gist of this amendment is not readily apparent, and upon casual observation would not be seen; but, giving to it its full effect, it does not impair in any sense the force or logical consequences of our opinion, as has been sufficiently explained. But, as defendant's counsel have explained, the error of statement, though inadvertently made, might in the future most seriously affect and impair the defendant's franchise; hence we will make the proper correction, so as to give full force and effect to the amended ordinance, but in so doing we will not disturb our conclusions in other respects, nor the force and effect of our decree. In all other respects I think the opinion is full and ample, and needs no additional correction. Subject to the alterations made, the rehearing should be refused; but I yield to the views of a majority of my associates.

On Rehearing.

(March 7, 1899.)

BREAUX, J. Defendant insists that the ground plaintiff seeks to expropriate is a part of its (defendant's) tracks and terminals, and indispensable in its operation, and to the handling of its freight traffic in the city of Shreveport; that the space lies between the tracks of its company, and is part of a track filled in and graveled by it, at great expense, for the accommodation of the business of the road, and delivery of its freight; that the space is in its actual use; that there is no necessity for the expropriation. Defendant, in the application, also complains of a passage in our opinion in regard to a right expressly reserved by the city of Shreveport "to alter, amend, restrict, or enlarge the grant" made by it (the city) to the defendant; again, to the statement in the opinion: "There is no limit fixed in the ordinance for the duration of the grant, but it in terms declares its revocability at the pleasure of the council." The original ordinance of the city council, as first adopted, was introduced without the amendment which now forms part of it, and which struck out entirely the clause authorizing the council to alter and amend the grant at its pleasure. It is a fact, as contended by defendants, that the ordinance, with the amendment, shows that the city council made the grant without any reservation whatever, and that without reservation it was accepted by the defendant company. It also appears that the city of Shreveport has never repealed or in any way restricted the Cotton Belt grant, and that the ordinance under which the plaintiff company holds contains a statement that the grant to it was not intended to affect the Cotton Belt grant. The space over which the right of way was granted by the city to plaintiff to lay its track on Commerce street was not sufficiently wide to accommodate its track. Therefore, the need of additional space, sued

for under the laws authorizing expropriation. The trouble all arose in matter of the expropriation, with which the city of Shreveport had naught to do.

We do not find it possible to agree further with the position taken by defendant in this application for a rehearing. As to the first ground stated, that the space of three feet which plaintiff seeks to expropriate is indispensable to the running operation of defendant's road, we do not take it that plaintiff has the right of the use of way in such a manner as to wantonly cause loss or damage to defendant. These companies will have to manage to run over the short space, and manage their freight there, with as little inconvenience as possible to one another. We take it that, in handling freight from one road to the other, there should be but little, if any, impediment. The defendant has argued that a right of way should not be needlessly interfered with by another right of way. By exercising some of the regard good neighbors usually manifest towards one another, these railroads, we believe, can manage to get along very well, and not inflict injury on each other's interests. Railroads, as with all other interests, are subject to regulations. It is true, as contended by defendant, that these three feet allowed were filled in and graveled by it at considerable expense. We thought, and still think, as did the jury in this case, that \$3,000 was compensation enough for this work, provided the use was exercised with due regard to the rights of the defendant's road. With reference to the delivery of freight, and the communication between the two roads in the matter of freight, we do not take it that there should be any interference, further than must unavoidably arise from passing trains of plaintiff company. We do not think there is any necessity to discuss the question growing out of the right of the batture, further than to state that, in our view of the case, it was in charge of the municipality. While we have no reason to change the rules of property under which it was decided, in a number of jurisdictions, that property in use by a railroad company cannot be expropriated by another railroad company without legislative direction, we cannot be unmindful of the fact that, in a number of cases, it has been held that even part of the yard of defendant's railway may be taken under general grant of the power of eminent domain. Elliott, R. R. § 1121, citing a number of decisions. We are informed that the right of way was essential to the construction of plaintiff's railroad, and plaintiff urges that, having the amount assessed, it is reasonable and just to let plaintiff have the use for its passing trains. Plaintiff avers that its rail lacks six inches of touching on defendant's "reservation"; that, in running plaintiff's car or train over its (plaintiff's) track, the body of the car or train extends over and shadows the reservation about a foot, and the other two feet are

claimed by plaintiff as indispensable for "clearance." The three feet expropriated are never to be used, save to the extent just stated, and that, as we take it, for the purpose of passing trains only, and none other. The foregoing, we think, is sustained by the testimony. The purpose involved in the principle that one railroad company shall not expropriate the property of another, save for crossings and similar objects, is to prevent one railroad from absorbing, destroying, or injuring another. In the present case, we have not discovered that the mere passing (over the short distance expropriated) of plaintiff's road will have that effect. As we take it, the appointed work of the defendant road can be carried on at this place without damaging interruption.

In the light of the evidence before us, we think it proper to sustain our original opinion. We have not discovered, after a painstaking review of the testimony, that the decree would to any degree, with the modification here made, impair defendant's franchise. It is therefore ordered, adjudged, and decreed that plaintiff's rail shall not be laid nearer than six inches to the defendant's reservation, and that, in running over the track, the body of plaintiff's cars or trains shall not top over or trench on defendant's "reservation" more than about one foot, and that the remaining space of two feet shall be plaintiff's clearance for its cars or trains, and that this right shall be used only for passing and crossing trains. With this modification, we, for reasons assigned, readopt our original opinion and decree as the decree of the court; that is, as in our original decree, the judgment of the lower court is affirmed. Rehearing refused.

BLANCHARD, J., takes no part in the decision of this case.

(51 La. Ann. 389)

KERNAN v. HUMBLE et al. (No. 12,985.)
(Supreme Court of Louisiana. Feb. 20, 1899.)

CONSPIRACY—ACTION—PARTIES.

When a tort is perpetrated through the instrumentality of a combination or conspiracy, the party wronged and injured may look beyond the actual participants in committing the injury, and join with them, as defendants, all who co-operated in, or advised, or assisted in the accomplishment of, the common design; for co-trespassers are bound in solido.

(Syllabus by the Court.)

Appeal from judicial district court, parish of East Feliciana; Joseph L. Golsan, Judge.

Action by W. F. Kernan against H. S. Humble and others. Judgment for defendants, and plaintiff appeals. Reversed and rendered.

Dart & Kernan, for appellant. Milton A. Strickland, for appellees.

WATKINS, J. This is an action in damages for a trespass alleged to have been committed by the several defendants, with vari-

ous persons unknown, on the plantation and premises of the plaintiff, and for which the latter demands compensation in the sum of \$4,250. The circumstances under which the alleged trespass was perpetrated are peculiar, and the best statement of it which can be made is that furnished in plaintiff's petition, from which we make the following extract, viz.: "That on the nights of September 28 and 29, 1897, the said Peter Humble, Sr., the said Kirke Humble, the said Arthur Humble, the said Peter Humble, Jr., and Horace Humble (the latter being a minor, and a child of Henry Smith Humble, for whose conduct, acts, and torts the said Henry Smith Humble, his father, is liable and responsible), all of said parish and state, did go on the said Riverside plantation of the said Kernan, as petitioner is informed and believes, and go to the house of one R. Walker Hays, a tenant of the said Kernan on the said plantation, and did then and there, as petitioner is informed and believes, threaten the said Hays to kill him and to burn his house, if he reported an offense committed by the said parties at an entertainment given on said place on September 25, 1897, for the purpose of raising funds to build a church; and at the house of one Mike Turner, another tenant and employé of petitioner. That the said Peter Humble, Sr., Kirke Humble, Arthur Humble, Peter Humble, Jr., and Horace Humble (the said Horace Humble being a minor, and child of the said Henry Smith Humble), with sundry other parties, as petitioner is informed and believes, did pursue two colored mulatto women (Minerva Beattie, wife of John Beattie, and Rhoda Hays), both tenants of petitioner on said Riverside plantation, into the house of one Mike Turner, tenant on petitioner's Riverside plantation, and then and there threaten the said Mike Turner and his wife, and other parties then in said house, that, if they did not turn out of the house the said mulatto women, they would kill the said Mike Turner and his wife; and otherwise terrorized and threatened the said Mike Turner and family that, if they reported the said offense to the authorities at Clinton, they would kill the said Turner and his wife, and burn all the houses on the place. That the aforesaid Humbles, in company with a large crowd of persons from the county of Amite, state of Mississippi, as petitioner is informed and believes, on the night of Tuesday, September 28, 1897, did go upon the said plantation, and go to the house of R. W. Hays, on said plantation, and notify the said Hays that they had burnt up one house on the plantation, and that they would burn every other house, if he reported the said offense to the authorities at Clinton, and that they would kill the said Hays. That the said Hays, being so terrified, was afraid to remain in his said dwelling, and that on Wednesday, the 29th of September, for fear that his said residence would be burned, or that he would be killed, or some great bodily injury done him, moved

out of said house his family, and his furniture and other things, and sought safety elsewhere. That the said Humbles assembled the said crowd, and announced their intention of bulldozing the said John Beattie, another tenant and employé of petitioner. That, with his family, his house having been burned, as petitioner believes, by accident, although some of the said parties declared they had burned the same, and in consequence of said threats, the said John Beattie, being a tenant of petitioner, abandoned his crop, turned loose his working animals, and left the place. That the said John Beattie thereupon transferred all of his crops and other things on said place to petitioner. That on the night of Wednesday, September 29, 1897, the aforesaid Humbles, with a large crowd, some of whom were from the state of Mississippi, visited the residence of the said R. W. Hays, who, having heard of their threatened coming to burn his house, and to kill or inflict serious bodily harm on him, had vacated the same; and the said crowd found no person therein when they came. That they wantonly killed his dog, in the house, and fired their pistols and rifles to a great extent. That the other leases on said plantation, as petitioner is informed and believes, are so terrified and alarmed that they are afraid to stay in their houses, and afraid to go to the fields and gather their crops. That the said tenants of petitioner, as petitioner is informed and believes, have done nothing whatever to justify, extenuate, or excuse the aforesaid Humbles and their said crowd for their said illegal acts and doings. That some of the tenants of petitioner, as petitioner is informed and believes, have abandoned their crops; others are afraid to go into their fields to gather their crops, and petitioner fears that they will leave said plantation; and that said crops are being seriously damaged by stock breaking in thereon, and that the same is liable to waste for the want of other labor to gather the same. That petitioner is informed and believes he will find great difficulty in getting labor for the balance of this year, for the next year, and the succeeding years, to operate the said plantation, because of being in terror of the said Humbles. That petitioner, to protect his employées and tenants, has been compelled to buy arms, ammunition, employ guards, and hire teams, and send them to the said Riverside plantation, at great expense, because of the said unlawful and nefarious acts of the aforesaid Humbles and their co-conspirators. That the crowd from Amite county, state of Mississippi, was present and took part in said unlawful acts on the aforesaid two nights by the invitation and solicitation of the aforesaid Humbles. That petitioner has been damaged by the said unlawful and nefarious acts of the aforesaid Humbles in the sum of forty-two hundred and fifty dollars, in the manner following to wit: For terrorizing and demoralizing said tenants on said Riverside plantation of

petitioner, two thousand dollars; for estimated amount paid and to be paid for guards, teams, guns, and ammunition to protect the tenants and employes on said plantation, two hundred and fifty dollars; for damage to crop by deprivation of stock, waste and loss of labor to gather the same (estimated), five hundred dollars; for injury to the reputation of the said place, rendering it very difficult to get labor to operate said plantation, by reason of the threats and intimidations of the aforesaid Humbles and their co-conspirators, the sum of one thousand dollars. That petitioner believes that for the protection of petitioner's rights an injunction is necessary, to forbid and restrain the aforesaid Humbles from entering upon the aforesaid Riverside plantation of the petitioner; from interfering with, threatening, or troubling in any manner or form whatever, the tenants and employes of petitioner on said plantation."

Subsequently plaintiff filed an amended petition, the purport of which is that since the filing of his original petition he has made the discovery that Peter Humble, Jr., is a minor, and that his true name is Ivy Humble; that he is a son of Henry Smith Humble, who is liable for all the acts of trespass committed by his minor son, and for the injury inflicted by him. He charges that said Ivy Humble was one of the principal actors in the transactions enumerated and described in the original petition.

For answer, W. S. Humble, in his behalf, and as representing his two minor sons, Horace and Ivy, pleads a general denial; and Arthur, Kirke, and Peter Humble, making common cause, also plead the general issue.

Inasmuch as the testimony was delivered by the witnesses in a narrative form, we have chosen to reproduce a large part of same in like manner, by making excerpts therefrom as follows, viz.:

Dr. R. L. Carruth, sworn, says: "He knows where Judge Kernan's Riverside place is. He was there on the 25th of September, 1897. At the time of the entertainment given by the colored people, there were present Kirke Humble, Peter Humble, Horace Humble, Peter Humble, Jr., myself, Bruce Hodges, a Mr. Frisbee. All these parties were more or less intoxicated. I don't know that there was any particular disturbance. When we arrived there, Mr. Kirke Humble was cursing, swearing, and using violent language, some distance from the negroes. That was, I judge, about 35 yards from the place of assemblage. I don't know that that had any effect on the negroes. After we got there, Mr. Kirke Humble quieted down. I went to them, and told them we were a peaceable crowd, and they seemed to be satisfied. I judge this was about nine or ten o'clock. The entertainment continued at least an hour after we got there. After it broke up, witness started home, and Peter Humble called to him to come back. There were a number of darkies coming along the road behind wit-

ness. They were carrying a torchlight. Peter Humble, Jr., and Peter Humble, Sr., were following a short distance behind them. Peter Humble, Sr., called to them to stop and hold on with that light, and called to me to 'Hold on, doctor.' I stopped and allowed the negroes to pass me. I don't know whether Johnnie Beattie was in that crowd or not. At this time the only white men I know of were present were Peter Humble, Sr., Peter Humble, Jr., and myself. There were women in the crowd. I merely noticed there were women. Don't know whether they were black or mulatto. When Peter Humble called to me, I dismounted and hitched my horse, and went back to Peter Humble, Sr., who was on the ground, on foot. About the time I got to him, Peter Humble, Jr., who was on his horse, said to Peter Humble, Sr.: 'Don't bother those negroes. Let them alone.' He said to Peter Humble, Sr.: 'Go get that light.' Peter Humble rode on after the negroes on his pony, and I saw him overtake them on the road, and ride for several moments by the side of the one that was carrying the torch. Then he came back to the other Humble and myself, where we were, and said: 'Bud, I can't get that light. John Beattie has got it, and won't give it up.' I remonstrated to Peter Humble, Sr., and the only answer he gave me was, 'You follow us.' My answer was, 'Why don't you let those negroes alone?' When little Peter came and told him he could not get the light, he said, 'Go and get it.' Again little Peter rode on and left us, and passed out of my sight. Peter Humble, Sr., also went ahead of me, and I followed after him, and when I overtook him both of them were stopped at a fence. I saw nothing of the torchlight, and said to Peter Humble, Sr., 'Don't bother those negroes any more,' and asked him, 'Where are you going? What are you going to do?' He said, 'You stay with us.' Little Peter Humble left his horse outside the fence, and the two got over the fence into a field, and walked off from me; and I followed in the direction they went, when I came to a cabin, and stopped at a picket fence. I saw at the door of the cabin, on the gallery, Peter Humble, Jr.; and at the end or side of the cabin Peter Humble, Sr., was standing. I stood where I was and listened. I first heard a voice on the inside of the house saying: 'What do you want, Peter? You can't come in my house. I ain't going to open the door.' Little Peter Humble was standing at the door, and said: 'Go to the door.' Then, I heard the voice of Peter Humble, Sr., but could not understand what he said. I heard the voice on the inside saying: 'Tell me what you got to say. I'll put my ear right down to this hole, and nobody can hear what you say but me. There ain't nobody else standing close to the door.' Then, again, after hearing the voice of little Peter, not understanding what he said, I heard from the inside the same voice. All this voice I have been talking about was

a man's voice, saying: 'No, I don't want no whisky. You can't come in. I ain't going to open the door.' * * * When I saw Peter Humble, Sr., at the end of the house, I went to him, and tried to persuade him to come away. I spoke in a whisper to him. He answered in a loud tone, and addressed me as 'doctor.' Then I left him, and went back to a small cabin, where I could conceal myself from view; and there I heard Peter Humble, Sr., say: 'You don't go towards that gun. I'll shoot you,' or 'I'll blow your brains out,' or some threatening remark. Then little Peter left the door, stepped off the gallery, walked a short distance, and fell, and remarked that he was sick. I went to him and helped him on his feet, and assisted him, with a good deal of difficulty, to walk outside of the yard inclosure, where he fell again. And at that time Peter Humble, Sr., came to where we were, from where he had been stationed, at the end or side of the house; and when we got to where I asked him to help me to get little Peter away from there, and proposed that we leave the place, get away from there, and go home, he said: 'No, you stay with me, and we will go in that house.' I told him he was crazy, and that I would not assist him in doing anything of the kind. I begged him again to help me carry little Peter off, and about that time I heard a noise at the door of the house, as if it was opened, and a voice asking: 'Let me come out there. I want to speak to you.' Peter Humble, Sr., spoke up and said: 'Get back in that house, you —, or I will kill you.' This was on Judge Kernan's place. I heard only one voice in the house. Where I heard the voice was in Mike Turner's cabin, in which he lived, on W. F. Kernan's place. I know where John Beattie lived, on Judge Kernan's place. Mike's cabin is a little less than a mile from the cabin occupied by John Beattie. The house where John Beattie lived must have been burned, as I have passed by there, and it is not there."

John Beattie, sworn, says: "I lived in September, last year, on Judge Kernan's Riverside place. I was renting land from Judge Kernan. I owed him. I was not at the church entertainment at the first beginning. I came there about an hour before it broke up. I think it was about ten o'clock before my wife and children and sister-in-law were there. I saw Dr. Carruth, Kirke Humble, Peter Humble, Sr., Peter Humble, Jr., Mr. Bruce Hodges, and Mr. Frisbee. Mr. Frisbee lives in Mississippi. When I got there, the people did not seem to be disturbed. They were selling and going on when I got there. They broke up. I think, about eleven o'clock. After they broke up, I started home with my wife and sister-in-law and Henry Holmes and the little children. The entertainment was north of my house, towards the Mississippi line. Mrs. Humble's house is south of my house. I started home, and just below the church, about a hundred yards, the roads forked. The right-

hand road went to my house; the left-hand road to Mike Turner's house, where my sister-in-law was going. I went as far as Mike Turner's with my sister-in-law. I had a light. Little Peter Humble rode up, and asked Henry Holmes to step aside; he wanted to see him. I told Henry to give me the light, and I would walk on. Peter Humble, Jr., rode up side of Henry Holmes, and told him to blow the light out. I told Henry no, he could not blow the light out; and he said: 'No? If we can't blow it out, we will shoot it out.' After they got over the fence, I went on to Mike Turner's house, too. Directly Peter Humble, Jr., walked up in the yard, and I stepped in the house and shut the door. In about a minute or so after the door was shut, another man came in behind the house, and poked a pistol through the crack, and told Mike Turner to open the door. Mike did not open the door, and the man outside told Mike to stand up to the door, and hear what he had to say to him. He cursed, and told Mike if he did not open the door, and get up there and hear what he had to say, he was going to shoot him. In a short while they walked off out to the cotton patch, talking. I stepped out on the gallery. I asked for Mr. Humble, and said, 'Mr. Humble, I would like to talk with you.' He said: 'You had better get back in there. I will shoot your head off.' That was, I think, Peter Humble, Sr., from his voice. I went back into the house. My wife, sister-in-law, Rhoda Hays, Mike Turner, his wife, Columbus Dunn, Mike Turner's stepdaughter, Henry Holmes, and children, were in there. Mr. Arthur Humble told me, at Mr. Felix Dreyfous' store, that Tuesday morning, when I came into Clinton, that that racket that went on up there, if it was not stopped, I would be held responsible for it. He said his brother had got in a little disturbance up there on Judge Kernan's place, and he was informed that I was going to carry it to Clinton, and report him; that, if so, that he was going to get up a crowd of men, and come over there and hurt some one."

Mike Turner, sworn, says: "I live at Judge Kernan's Riverside plantation. Lived there last September. I remember the night John Beattie, his sister-in-law, and a lot of them came to my house. They got to my house about ten o'clock. They came in with my little children very calmly, and said, 'Papa, get up and open the door.' Mr. Peter Humble came to my house, and wanted to get in. Little Peter came on the gallery, and said: 'Mike, you know me.' I said, 'Peter; yes, I know you.' He says, 'I ain't going to hurt you.' Peter Humble, Sr., says, 'Open the door, and he will give you a gallon of good whisky.' He says: 'Open the door for me, please. I ain't going to hurt you, nor neither your family.' That Rhoda Hays promised to let him go home with her, and he wants to go. 'If you don't open the door, I will shoot you.' I says: 'Peter, here is a crack in the door. I can hear all you want to say to me,' and the

other one says: 'Get up to that door, and hear what that man has got to say. That is all I know about it.' I saw a pistol poking through the crack at the head of my bed. I had taken it to be a pistol at that time. Peter Humble, Sr., said, if I did not get up to the door, he would shoot me."

Minerva Beattie, sworn, says: "She is the wife of John Beattie. I was in the house the night the disturbance took place. I was with my sister, and she asked me to go by with her,—she was afraid to go; and I went by with her. Myself and sister Rhoda were on the way. Some parties behind hitched their horses and came up behind us, and we broke and run. We ran into the house. I think Johnnie Beattie fastened the door. They cursed, and told Mike Turner to open the door. They told Mike Turner they would not interrupt him, if he would open the door, but did not say what they wanted. Mr. Peter Humble was at the back of the house, and threatened to shoot in if we did not open the door. There were four men, four women, and three children in the house. I went under the bed. I was afraid they would shoot in the house. My sister and Mike's stepdaughter went behind the bed, which had a high headboard. The men stood around the hearth at the fire. We got away from there about half past eleven o'clock. I left Judge Kernan's place. I left because I was afraid the white people would come back again, as they had threatened to do. I was afraid of the people at the supper. Peter Humble, Sr., Peter Humble, Jr., Kirke Humble, and Dr. Carruth, they were all I knew to be afraid of. I went to the supper about nine o'clock, and did not stay long. There was no disturbance at the supper, more than the white people were cursing around, and I thought there would be a disturbance, and I left. I don't know who it was cursing. They were down the road a piece. I heard their voices. Mr. Humble, Dr. Carruth, and young Humble all followed behind us. They were right close when we broke and run. They were right at us. I did not know what they were following us for, and I was afraid, and we all run. It was the Humbles' way to go by Mike Turner's house, home."

Robert Germany, sworn, says: "He was living in the parish in September, last year. He knows the Humble boys. Arthur Humble invited him to join a crowd to go to a church. He said his brother and Bruce Hodges had gone to a collation affair over there, and raised —. He said they were drunk, and they did not do anything; and he said the boys had been back, and apologized to them, and offered to pay any damages for what they had done. I think he said the negroes agreed to drop it, but had since heard they had gone to Clinton to report them, and he wanted to get up a crowd of the boys to go and tell them they had to drop it. I don't know that Arthur said anything more. Witness said, if the negroes resisted, they might have some of them to kill; and Arthur said he did not think they would

fight. I told them it ought to be headed by settled men, and not a lot of boys; and Arthur Humble said there would be old men at the head of it,—either Mr. Bruce Hodges' father or Mr. Talbert."

W. H. Doughty, sworn, says: "I was not invited by any of the Humble boys to go on Judge Kernan's place. I did not join any crowd to do so. I heard Arthur and Kirke Humble make a threat against John Beattie, early Tuesday morning, at Felix Dreyfous' store, the day the house was burned. They were looking for John Beattie at the time, and said, if he went to town, they would do something. He don't remember what. He knows that John Beattie was one of Judge Kernan's tenants at that time. Arthus Humble was around at that time with a pistol. He made inquiry about where John Beattie was. Kirke Humble had something to say about John Beattie. He made some threat,—don't remember exactly what it was,—and wanted to know whether he was around or not. Arthur stayed at the store. Kirke went up the road towards Clinton or Mr. Hodges'. They said, if John Beattie went to town and reported the case, what they would do. Don't remember what they said."

Rhoda Hays, sworn, says: "She was present at that entertainment Saturday night. She was disturbed at the entertainment. Some white boys came up to the church where we were. Some cursing and slinging. I went to Mike Turner's house. There was a crowd followed me. Mr. Peter Humble, Mr. Carruth, and young Peter Humble were in the crowd. I did not do anything but run. I was afraid, like all the rest were. I was afraid, because they were cursing and going on, and it frightened me. That was Saturday night. I was disturbed on Wednesday, and left home, and went to Mr. C. Louis Talbert's quarter. I was at home Tuesday night. There was a disturbance near my house on Tuesday night. There was a crowd came there to Mr. Walker Hays. I saw them and heard a great lot of them. I did not know who the three were. By the noise of the horses when they left, it seemed like there were more than three. It was dark. I could not see. I recognized Mr. Frisbee's voice in the crowd that night. I did not recognize the voice of anybody else. They told Mr. Hays, if he reported them, they would come back and kill every colored man on the place, and him too. We stayed at home that night. I left home next day, and went over to Mr. Talbert's. Was not there Wednesday night. All the people on the place left, except two families. One of the families did not know anything about it. I went back home Thursday morning. I saw where some one had shot a dog on a cotton pile in my house. I saw horse tracks all around everywhere. The hands quit work gathering the crops. They quit more than a week. The hands did not go back to work until W. H. Doughty and Louis Talbert went to take charge."

Albert Hays, sworn, says: "I was there on Tuesday night when the crowd came there. When they rode up, they halted. Ma answered them, and they asked, was Mr. Hays at home. Mr. Hays said 'Yes,' and he opened the door. They said: 'Come out on the gallery. I would like to converse with you a few moments. No harm, no danger whatever.' They said: 'We came over to see about that little disturbance them boys had here on Saturday night. We heard you all had reported us.' They said: 'If this thing is reported, we are going to burn the last house there is on the place, and swing the last negro man's neck to a limb;' and they said, 'Yours, too, Mr. Hays.' They said, 'This thing lies in your power, and, if it is reported, you will pay the penalty of it.' They said: 'You can go to town to-morrow and report it, if you want, but you had better make your coffin before you leave home. If you can't make it, you had better hire me, I am a good carpenter;' and spoke and says: 'I will give you fifty dollars to carry it to town. I guess you claim that them boys burned that house of John Beattie's, and says the boys that were here on Saturday night has got your house surrounded. They are here;' and said, 'I guess you heard what I say.' Mr. Hays told him 'Yes,' and he said, 'Good night.' That was between three and four o'clock at night. I did not recognize the voices of any of them, but old man Frisbee. We did stay there the next day. We left home that night. When they did, I went down to Alvin Nesom's place, in the Sixth ward. Ma and the others went to Mr. Talbert's. I went back to the place Thursday morning. Left it on Wednesday morning. Went after a wagon to move ma and them. I could not get anybody to go in there with a wagon. They were all scared after the white folks had been in there. I was afraid to go in there. Of the crowd. Pretty much all the hands left the place, and left their crops in the field. The hands were gone four or five days, both night and day. After that they would come back and work in the day, and go away at night. The cattle destroyed as much of the crop as they wanted to, a couple of nights after these fellows was in there, because everybody was scared to go for them, because of the knowledge there was a disturbance on the place."

Jonas Barnes, sworn, says: "All I know about Saturday night, I came to Clinton, and when I arrived at Mr. Felix's store (as near as I can come at it, about half past seven) these men left the store ahead of me, and came over on the south of the creek on Judge Kernan's place. I then went home, and did not go to the entertainment. Tuesday night, ten minutes after two o'clock, these men passed by my house, going towards Mr. Hays'. I saw nothing more of them that night. It seemed to me, from the noise of the horses' feet, there were maybe twenty-five head of men. The crowd was coming from Beaver Creek ford, leading by John Beattie's house.

They came up a road which leads from Felix's store across Beaver creek, and by Beattie's. Wednesday night I heard a little noise of horses' feet about 50 yards from my house. They did not come on by my house. From the north part of the place. Mr. Hays and Mike Turner live on the north part of the place. I was sitting out in the thicket, because I was afraid to stay in the house. About half past ten o'clock I heard the fire of two guns towards Mr. Hays' house. I went back in my house at half past eleven o'clock, and between midnight and day I heard the report of another gun. I heard no more from them that night. I had gone to bed, and heard the voice of a man say, 'Who lives here?' That was Saturday night. I was a tenant on Judge Kernan's place at that time; also, Walker Hays. My wife was scared, and left home with the children. I could not keep them there. Everybody on the place left, except myself, my grandfather, and my grandmother. They were disturbed very severe for about five days. The cattle broke in one portion of the field, and we found it out. They did not destroy very much. The largest majority of the hands left out Wednesday morning. When Mr. Doughty came there and told them he had taken charge of the place, the hands came back."

Phoebe Clark, sworn, says: "I lived on Judge Kernan's place last September. I have no husband. I lived in one end of my house. I was at the house when they came there Tuesday night. I heard some one come to Mr. Hays' door and call, and when he called I answered in my room. Then Mr. Hays answered, and asked them what did they want. They asked him to step out on the gallery; they wanted to talk with him about the disturbance that passed down at John Beattie's Saturday night. He says: 'It did not happen at John Beattie's. It happened down at the church, and at Mike Turner's.' He said: 'Mike Turner? O, yes; that makes me kind of hungry for him.' He said: 'Mr. Hays, I understand you all want to put young men that were here Saturday night to trouble; but let me tell you one thing: If those young men are put to trouble, you all shall pay the penalty.' Mr. Hays said, 'I don't know anything about the disturbance, more than that I have heard.' He said, 'Sunday evening, when Peter Humble was over here, I got those boys to drop it, and have no more to do about it;' and he said, 'As to reporting, I don't know anything about it.' He said: 'Mr. Hays, it is in your power to keep it out of the court house. If it gets into the court house, we will burn the last house here, and swing the last negro man's neck; and yours, too, Mr. Hays.' He said: 'I guess you will say those white men burned this house down here. If they did, they were free white men from the state of Mississippi.' He said: 'Mr. Hays, if you know the benefit of your life, you will keep that out of the court house. If this thing goes into the court house in Clin-

ton, Mr. Hays, your doom will be in the bottom pit of —. You ain't looking for heaven, are you? If you is, you will never reach it.' He said: 'Mr. Hays, if you go to Clinton to-morrow, make your box, and carry it with you; for you will never reach here any more.' And the man on the right hand spoke and said: 'If you can't make it, get me to make it. I am a pretty good carpenter;' and the other man on the left-hand side said, 'I would give fifty dollars for it to get to Clinton.' The man that was first talking said, 'Mr. Hays, do you know who I am?' Mr. Hays said, 'I do not.' He said, 'I am a free white man from the free state of Mississippi, 20 years of age, with a white heart.' Said, 'Mr. Hays, you understand what I had to say, didn't you?' Mr. Hays said, 'Yes, sir; I did understand every word.' He said: 'Tell all your surrounding friends what I had to say. Good night;' and they went away. I did not recognize any of the voices, except old Mr. Frisbee. I stood up on my bed and looked all I could. I could not tell exactly how many there were. There were there eight at the door with guns, and looked like about nine or ten behind up the road. The clock had just struck three, not five minutes before they rode up. I was awake. I was over at Mr. Louis Talbert's plantation with my children Wednesday night. I was scared to stay at my house. I returned Thursday morning about eight o'clock. When I left home, I shut up my doors. When I returned, they were open, and a dog lying on the cotton pile, dead. That pile of cotton was inside the house. The dog was shot. I carried everything I had to the woods before I left. All the hands scattered out and went to other plantations awhile, and some of them never came back to stay. I first became satisfied to return there to stay when Mr. Louis Talbert came, and said Judge Kernan had sent him there to protect the place. Henry Holmes and John Quinn went back after they came down here and saw Judge Kernan, and he sent them back. Mike Turner stayed up there with us for about a week,—up there where Mr. Talbert was. Mr. Doughty was there tending to gathering John Beattie's crop. He did not stay there at night. During this time the stock eat up a good deal of our crop. The gates would be open every morning, and when I would get there I would run them out. I don't know anything about Beattie's crop. I lived about one and a half miles from Beattie, way up near the Mississippi line. When I returned Thursday morning there were horse tracks all around the house."

W. H. Doughty, recalled, says: "I was employed by Judge Kernan to take charge of the place and gather the crops. I had John Beattie's crop gathered, and saw after all the balance. The crops were injured by the stock. Mr. Hays' crop was damaged, and John Beattie's crop was damaged, by the stock. John Beattie's corn was damaged

about twenty-five barrels; and his cotton, I suppose, a bale. I had six bales ginned for John Beattie. I had gathered about four or five bales. I paid 50 cents a hundred for picking. I paid 60 cents a day for gathering his corn. I had four hands for two days gathering the corn. About \$4.80. Judge Kernan paid me for my services,—forty-five dollars for gathering the crop and seeing to the place. I had two hands for nine dollars a month and feed, for one month, gathering John Beattie's crop, and doing other work on the place. It cost about four dollars a month each to feed the hands,—making \$26."

Louis Talbert, sworn, says: "I was employed by Judge Kernan to go on the place, protect his hands, and keep them there. The hands left the place during this disturbance. Some of them came onto my place. They said, if Judge Kernan did not put some man there, they would not go back. I was there in the capacity as guard—a protector—ten days. Judge Kernan paid me twenty dollars. I am on that place now as a tenant. I rent this year the John Beattie land for 1,350 pounds lint cotton. Judge Kernan has to build me a dwelling to live in on the place. He was also to build me a cabin for me on his land."

Walker Hays, sworn, says: "He lived on Judge Kernan's place last year. Some parties came to my house in September. The crowd rode up to my house about two o'clock in the morning, and called for me three times before I answered. Then I asked them what they wanted. They said: 'Please step on the gallery. We want to converse with you a little.' That there was no harm, no danger whatever. I opened the door. They asked me to walk on the gallery. I told them I would not. I told them I could hear all they had to say where I stood. He said, 'Mr. Hays, our presence here to-night is to see you on this little trouble that took place at John Beattie's.' I told them it happened out at a little church where they had an entertainment, and at Mike Turner's. They said, 'Mr. Hays, we were notified that you wanted to put that nice young gentleman to trouble; and, if you do, we will hang every nigger man on the place, and you, too, Mr. Hays.' I spoke and told them that trouble had been settled; that Mr. Peter Humble had come over on Sunday evening to my house, and brought with him John Beattie and Mike Turner; that little Peter had told me he was guilty of the charge they made against him, and that he was very sorry, and asked, 'Mr. Hays, use your influence with the boys, and get them to drop this thing;' I spoke to Beattie and Mike, and thought they ought to forgive him; he acknowledged he was sorry, and would not do so any more. I told the crowd, also, that Mr. Bruce Hodges and Charley Doughty had been over to see me on the same business on Tuesday evening, and told them that I had told Mr. Hodges and Mr. Doughty that it was dropped. The crowd

replied, 'Mr. Hays, this is in your power to keep this out of Clinton, and, if you know the benefit of your life, you will do so.' They said, 'Do you know we have made the attempt to burn this house?' I told them I did not. I believe that is about all they said. These parties coming there made me feel mighty bad. They said, if I went to town, I had better make my box, and carry it along with me. John Beattie's house was burned on Tuesday evening about three or four o'clock. Mr. Bruce Hodges and Charley Doughty came to see me on Tuesday following the disturbance at the church, on Saturday night. I left the place on Thursday. I was not at my house on Wednesday night. I came to town on Wednesday, and stayed all night at Mr. Talbert's Wednesday night, and went back Thursday morning. Mr. Talbert stayed down there with me at night. The hands left on Wednesday. As I was returning from Clinton on Wednesday, I was met by one of the hands, who came to me out of the swamp, and told me not to go on the place, as the hands had been threatened. (This testimony is objected to on the part of defendant on the ground it is hearsay and irrelevant.)"

W. F. Kernan, sworn, says: "He is the owner of Riverside plantation, in this parish. Some of the hands that were on the place left the place last year, and some declined to continue for 1898; preferred to go somewhere else. Some of them gave me this reason: They said they were afraid of the Humbles. I suffered loss from John Beattie's leaving. I had to employ a man to superintend the gathering of his crop. I furnished him money to pay hands for picking the crop. My recollection is, I furnished Mr. Doughty \$28 to pay hands for gathering the crop. I paid him \$45 as wages for looking after the same. During the time I was paying Mr. Doughty wages for seeing to gathering the crop, he superintended, for a few days, hauling some lumber. He made one trip to Kentwood and back. Don't remember whether he made two trips or not. John Beattie had two hands hired, whose privilege was superior to mine, and I paid them. I paid Henry Holmes \$37.95. I paid John Quinn wages \$28.25. I paid for ginning 6 bales cotton \$7.50. I paid for bag and ties for 6 bales \$4.50. I took out of his crop mule hire \$15. I paid for supplies for him \$15.90. In the spring I let him have an order on I. L. Heyman & Son for oats and supplies, which I had to pay Mr. Heyman. I got from him six bales of cotton and four hundred and fifty pounds lint for Mike Turner. Proceeds of cotton in excess of rent, \$97.35; corn, \$37.50. A small balance due me on the crop transaction of \$27. The fact of John Beattie leaving the place caused me to make a disadvantageous compromise. I was notified that parties were coming onto my plantation to burn up all my houses and run off tenants, and I had to send the sheriff and men up there to pro-

tect them. I think that was on a Thursday. After the second disturbance, as reported, I went over to Chas. Kilbourne, sheriff, and asked him to send a deputy up with some men to protect my property, and keep them from burning up my houses and running off my people. He kindly designated one of his deputies, and told him to get ready and go. It was a little difficult for him to get other men to go, and I had to go and hunt them up. Mr. Boyd and Mr. Walker, young men in my office, consented to go and protect my property. I got Mr. Mat Broadway and Mr. Hunter Payne and Mr. Lee White. I got a hack from Mr. Bennett's livery stable, and they all started up, but, before going, I had to buy a shotgun for Mr. Broadway. And I bought two other shotguns,—one for Mr. Louis Talbert, and the other for Mr. Hays. Mr. Hays afterwards took off my hands the one I bought for him, and now has it. The two guns I now have left me on my hands cost me \$30, and \$12.50 for the one Mr. Hays returned. I spent more than \$5 for ammunition, and, had this trouble not occurred on my place, I would have had no earthly use for the guns or ammunition. I think the hire of Mr. Bennett's hack was \$3. Of the parties who went up in Bennett's hack, only two of them charged me,—Mr. Broadway and Mr. Payne. One I paid \$2, and the other \$1.50. I had to engage Mr. Talbert as a guard to protect the hands, and I paid him \$25 for his services. I was getting from John Beattie 1,600 pounds of cotton, and I rented to Mr. Talbert 80 or 90 acres for 1,350 pounds cotton, and built him a house with four or five rooms,—a frame comfortable house for a small family. I agreed to pay for the building of a good log cabin for him, which cost \$40 or \$50, which was an unnecessary expense. I am satisfied the dwelling house cost over \$400, all cash. I rather look on the building of the residence as an investment. I would not have had the thing to have occurred for \$500. That the place has suffered in reputation, there is no doubt. The place has been damaged in its reputation, rendering it difficult to secure labor on it. What that damage is, I could not say."

On this testimony the case was submitted to a jury, who rendered a verdict in favor of the plaintiff for \$25, without making any mention of the plaintiff's injunction. From that verdict, and the judgment of the court thereon, the plaintiff prosecutes this appeal; and the appellees, in answer to the appeal, pray for the reversal of the judgment, and the rejection of appellants' demand in toto.

We gather from this evidence: That the colored tenants on the plaintiff's Riverside plantation gave an entertainment on the night of the 25th of September, 1897, to raise funds for the building of a church, and which was very generally patronized. That while the supper was in progress, at about the hour of 10 o'clock, the defendants, all of whom are white men, in company with a party of

friends who resided in the state of Mississippi (this plantation being very near the state line), appeared, and being in a state of intoxication, and using obscene and bolsterous language, created a great disturbance, breaking up the entertainment, and causing the darkies to rapidly disperse and return to their respective homes. Some of these were followed by the defendants, who acted and spoke in a threatening manner, and tried to obtain possession of torchlights they bore; and, being thus pursued, they sought the shelter and protection of the neighboring cabin of Mike Turner, into which they withdrew, and closed the door behind them. These parties immediately surrounded the cabin, and called upon its occupants to come out; threatening to shoot into the cabin if they did not. Finding the darkies were determined to remain within, and not open the door, the parties eventually left; one of the most conspicuous of their leaders having become so drunk he could not stand. The following day, Peter Humble, Sr., called on Mike Turner, and apologized for the conduct of himself and associates on the night before; but, ascertaining from common report in the neighborhood that some of the colored people intended to give information of the affair of the Saturday night previous to the parochial authorities, a mob was collected for the purpose of going on the Kernan place, and so awing and frightening the negroes that they would desist from the prosecution, and of killing them, if it was found necessary. The proof is very conclusive that this band of marauders were assembled at the instance of the defendants, or some of them, and that all, or very nearly all, of them actively participated therein, and assisted in its consummation. This mob arrived on the Kernan place at about the hour of 8 o'clock on Tuesday morning, surrounded the cabin of Walker Hays, and awakened the occupants. That they stated to them that they had come to warn the negroes that the affair of Saturday night must not be reported, and, if it was done, they would hold him responsible for it, and hang every negro on the place. That there appeared to have been about 25 horsemen in the party, all of whom were armed, and while surrounding the cabin they were engaged in shooting off their guns and pistols. That, as soon as the crowd dispersed, the negroes scattered into the woods, and totally abandoned the plantation, and their crops were left in the fields ungathered. That, as soon as this information reached the plaintiff, he called upon the sheriff of the parish for protection, and the latter sent a deputy, who was accompanied by a number of the friends of the plaintiff, who volunteered their services as guards, to go upon the plantation and remain thereon to protect and defend it against further trespass or depredations. That this guard was furnished with arms by the plaintiff, and ammunition and subsistence, and they remained on

duty for about 10 days, when the present suit was filed, accompanied with an injunction. It is to obtain redress for this grievance that this suit was brought, and it is as a recompense therefor that the plaintiff prays for judgment in damages against the defendants in solido. The true amount claimed is \$3,750, instead of \$4,250, as stated in the petition, which is the result of an incorrect addition merely. The proof shows, and the fact is, that, as the direct and immediate result of the tort of the defendants, the crops of the tenants, which were abandoned, suffered very greatly by depredations of stock and lack of cultivation; that several of the tenants who were maltreated never returned to the plantation; that the actual loss suffered by the plaintiff was very great; and that the reputation of his plantation was incalculably injured. In our opinion, the verdict of the jury falls far short of doing substantial justice to the plaintiff. The conduct of the defendants, was, to characterize it mildly, simply outrageous and unjustifiable; and all who participated in these transactions, or contributed thereto, are liable in solido to the injured party. That there was a conspiracy among the defendants to terrorize and frighten the tenants of the plaintiff, the proof shows most clearly; and that the threats of violence on the part of the defendants and their associates had the effect of terrorizing them and driving them off the plantation is made equally plain. There were no relations between the plaintiff and the defendants of any kind which could possibly have given the defendants' conduct the color of excuse or justification.

The governing rule in such matters is very well stated by Cooley, in his treatise on Torts; and we extract the following quotations from the brief of plaintiff's counsel, after having verified the reference, viz.: "Mr. Cooley on Torts (page 125), referring to a conspiracy, says: 'When the mischief is accomplished, the conspiracy becomes important, as it affects the means and measure of redress; for the party wronged may look beyond the actual participants in committing the injury, and join with them as defendants all who conspired to accomplish it. The significance of the conspiracy consists, therefore, in this: that it gives the person injured a remedy against parties not otherwise connected with the wrong.' At page 127: 'Most wrongs may be committed either by one person or by several. When several participate, they may do so in different ways, at different times, and in very unequal proportions. One may plan, another may procure the men to execute, others may be the actual instruments in accomplishing the mischief; but the legal blame will rest upon all as joint actors.' And at page 133: 'Where several persons unite in an act which constitutes a wrong to another, intending at the time to commit it, or doing it under the circumstances which fairly charge them with intending the consequences which follow, it is a very

reasonable and just rule of law which compels each to assume and bear the responsibility of the misconduct of all. To require the party injured to ascertain and point out how much injury was done by one person, and how much by another, or what share of responsibility is fairly attributable to each, as between themselves, and to leave this to be apportioned among them by the jury according to the mischief found to have been done by each, would in many cases be equivalent to a practical denial of justice. * * * While the law permits all the wrongdoers to be proceeded against jointly, it also leaves the party injured at liberty to pursue any one of them severally, or any number less than the whole, and to enforce his remedy regardless of the participation of the others.' See *Comitez v. Parkerson*, 50 Fed. 170."

The case of *Dickson v. Dickson*, 33 La. Ann. 1261, presents a striking parallel, in its facts, to the instant case. The report shows that the defendants formed a conspiracy "to deprive plaintiff's plantation of its laborers by threats, promises, and inducements; that, in prosecuting this common intent, they visited the plantation frequently, * * * and by means of threats, persuasions, and otherwise, induced the laborers to refuse to contract, or to abandon their contracts, and leave the plantation. * * * It is manifest," say the court, speaking through Mr. Justice Fenner as its organ, "that these acts, thus wantonly and maliciously done by defendants, were, in the sense of the law, faults; that is, acts done in the exercise of no legal rights of their own, and in violation of the rights and feelings of the [plaintiff], who was entitled to pursue his lawful business without interference or hindrance from defendants. For the damages resulting from such acts the defendants are responsible." That case was tried and decided in the lower court without the intervention of a jury, and the district judge awarded the plaintiff the sum of \$2,500 against the defendants in solido, and this court affirmed his judgment. Quite a similar case is stated in *Cooper v. Cappel*, 29 La. Ann. 213, from which we have made the following extract, as quoted in the brief of plaintiff's counsel, after having verified the same, viz.: "There was, beyond doubt or question, a lawless combination, a conspiracy, a prearrangement by the defendants to go to the gin house at a late hour (it was after sunset when they left the store, getting dusk when they reached the gin house), to take and carry away the cotton by force, by the use of deadly weapons, firearms, provided in advance, if Cooper could not be over-

awed, and the anticipated resistance repressed, by numbers and by bluster. Such lawlessness must be repressed, must be put down, by the strong hand of the law, and wrongdoers must be taught 'that the way of the transgressor is hard.' It is only when the laws are enforced and obeyed, when rights are observed and respected, and when the citizen can feel that he is secure in his person and property so long as he does no wrong to others, that there can be peace, good order, and prosperity in the land." Our predecessors amended the judgment appealed from, and increased the allowance, and awarded the sum of \$3,000 against the defendants in solido.

Having examined this case with the most diligent and painstaking care, and given all the testimony serious consideration, our conclusion is to set aside the verdict of the jury, and the judgment thereon based, and render judgment in favor of the plaintiff for an increased amount, namely, the sum of \$2,000, and also to reinstate, maintain, and perpetuate the plaintiff's injunction. It is therefore ordered and decreed that the verdict of the jury be annulled and set aside, and the judgment thereon based, likewise; and it is further ordered and decreed that the plaintiff do have and recover of and from all the defendants, in solido, excepting Henry Smith Humble, the sum of \$2,000. It appearing from plaintiff's petition that it is not alleged that Henry Smith Humble, one of the defendants, was either present, participating in the alleged trespass that is complained of, or aiding or co-operating with others, though absent, but that, as the father of Horace Humble, a minor, who was present, actively participating therein, he is liable and responsible for his conduct, acts, and torts, and finding this statement borne out by the record, and entertaining the opinion that he is only liable for actual damages, we think the amount of plaintiff's recovery, as to him, should be fixed at the sum of \$300. It is therefore ordered and decreed that the plaintiff do have and recover of and from Henry Smith Humble, as the father of his minor, Horace Humble, the sum of \$300, as actual damages, same to be taken and considered as only a portion of the \$2,000 for which judgment is herein rendered against all other defendants in solido. And it is further ordered and decreed that plaintiff's injunction be reinstated, and that same be maintained and perpetuated, and that the defendants and appellees be taxed with the costs of both courts, in solido, excepting Henry Smith Humble, who is held liable for a pro rata share thereof.

(51 La. Ann. 840)

LACASSAGNE v. ABRAHAM et al.
(No. 12,966.)(Supreme Court of Louisiana. March 20,
1899.)HUSBAND AND WIFE — CONVEYANCES — FRAUD —
MORTGAGES — SALES PENDENTE LITE.

1. A mortgagee in good faith, accepting his mortgage on the faith of a recorded title, based on a conveyance made by a husband as head and master of the community, is not affected by the fraud imputed to the husband with respect to his wife.

2. Such a mortgage is not within the prohibition of alienation of property prescribed by the Code, pending suit for recovery of the property, the mortgagee being no party to such suit.

3. A mortgage is, in the purview of the law, a quasi alienation; the seizure and sale of the property under it the exercise of the remedy and the consequence of the mortgage.

Breaux, J., dissenting.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Vermilion; Lewis L. Bourges, Judge ad hoc.

Action by Laurent Lacassagne against H. Abraham & Son and others. A judgment was rendered, from which plaintiff appeals. Reversed.

William S. Benedict and Don Caffery & Son, for appellant. W. A. White, for appellees Abraham & Son. H. S. Southon, Albert Voorhies, and W. J. Formento, for appellees Widow Cavallhez and Widow Remick.

The following opinion, prepared in greater part by MILLER, J., prior to his decease, and acted on and adopted as the judgment of the court after his decease, was completed and handed down by BLANCHARD, J.:

This is an appeal by plaintiff from the judgment dissolving the injunction obtained by him to prevent the seizure and sale of a plantation of which he claims to be the owner, under a judgment of one of the defendants against another defendant, F. Chaplus. The facts of this complicated litigation are: J. B. Cavallhez, a Frenchman, acquired the plantation, the subject of controversy, in 1869. He and his reputed wife made a donation of the property to their daughter. The donation, not proving effective for some cause not material to this discussion, was followed by a sale to Remick, the husband of the daughter. Cavallhez, his reputed wife, and their son-in-law, Remick, subsequently died, and at the sale of the property of the latter's succession his widow, Marceline Remick, acquired the property. All these titles were duly recorded. On the faith of her title, Mrs. Remick, in 1883, obtained a loan, and to secure its payment mortgaged the property to A. L. Maxwell. Thereafter, Jeanne Caroline Cave, claiming to have been married to J. B. Cavallhez in France, in 1833, brought a suit in the United States circuit court for the Western district of Louisiana, alleging her marriage 50 years before, representing that the subsequent marriage of Cavallhez in Louisiana was void; asserted her title, as widow, to one-half of the property

acquired by Cavallhez, including the plantation; and averred that he was indebted to her, and that she had a mortgage on the other half of the plantation to secure that indebtedness. The petition also attacked the donation by Cavallhez to his daughter and his sale to Remick as in fraud of her rights as his wife. The judgment of the circuit court, rendered in January, 1886, decreed the petitioner to be the lawful wife of J. B. Cavallhez, annulled the donation by him as well as his sale to Remick, and recognized the wife's rights to the full extent claimed in her petition. This suit was directed only against Mrs. Remick, individually and as tuitrix, the sole survivor of those the bill charged had combined and conspired to deprive the complainant of her rights as the wife of J. B. Cavallhez. While this litigation of J. Caroline Cave, alleging herself to be the widow of J. B. Cavallhez, was in progress, Maxwell, no party to the litigation, conceiving that his mortgage granted by the recorded owner before the Widow Cavallhez made her appearance to set up her claims under the marriage in France of 50 years before, was wholly unaffected by that suit, instituted proceedings on his mortgage claim, and seized and sold the property, he and Lacassagne becoming the purchasers thereof on the — August, 1885. They entered into possession. In April, 1886, Mrs. Cave Cavallhez caused a writ of possession to issue on her judgment in the United States circuit court, under which she sought to dispossess Lacassagne, he having become sole owner, by purchase, of Maxwell's interest; whereupon Lacassagne filed a bill in the United States circuit court, and averring his ownership and possession, and that he was neither a party to, nor bound by the decree in, the suit of Mrs. Cave Cavallhez against Mrs. Remick, obtained a writ of injunction to restrain the execution of the writ of possession. The case found its way to the supreme court of the United States, and that tribunal held that the remedy of Lacassagne was at law, not in equity; and that, if the mortgage was superior to the right of the Widow Cavallhez, his remedy at law was ample. The court, in its opinion, referred to the fact that his title had been acquired subsequent to the suit of the widow, and thought the article of our Code avoiding alienations of property pending suit for its recovery applied. The bill was dismissed, with full reservation to Lacassagne to enforce his rights at law. While this litigation was pending in the supreme court, the Widow Cavallhez died, and her will constituted F. Chaplus her executor and legatee. He mortgaged the property to Abraham & Son, under whose execution the property was about to be sold. At this juncture, Lacassagne, remitted by the decree of the United States supreme court to the assertion of his rights at law, enjoined the sale under the execution of Chaplus' creditors, setting up his title to the property. This is the suit now before us on a second appeal, the first having been de-

terminated by us in 1896. 48 La. Ann. 1100, 20 South. 672. On the previous appeal the defense pleaded was *res judicata*, based on the decree obtained in the suit of Widow Cavallhez against Mrs. Remick. That defense, as well as the other aspects of the case argued, received our attention. We held that the plea of *res judicata*, based on a decree in a suit to which Lacassagne was no party, could not be sustained as against him. The argument there took a wide range, and asserted in its general effect that the mortgage granted by the recorded owner before the claims of the Widow Cavallhez were made known could not be enforced by the seizure and sale of the property, because of the suit of Mrs. Cavallhez to establish her rights as his widow, based on the marriage in France in 1833. But our decision maintained that the mortgagee in good faith, acquiring his mortgage on the faith of the recorded title based on the conveyance of J. B. Cavallhez, could not be affected by any fraud imputed to Cavallhez with respect to the wife it is claimed he married in France before he came to Louisiana, and that the enforcement of such a mortgage created prior to the suit of the widow was not within the inhibition of alienation of property pending suit for its recovery. Our decree, overruling the plea of *res judicata*, remanded the case for trial on the merits. On the second trial the defendants supplemented their pleadings by urging the exception of *res judicata*, based on the decree of the supreme court of the United States on the bill filed by Lacassagne to enjoin the writ of possession issued in the suit of the Widow Cavallhez against Mrs. Remick. *Lacassagne v. Chapuis*, 144 U. S. 119, 12 Sup. Ct. 659. On this exception, as well as on the merits, the lower court rendered judgment in defendants' favor, and the case is again before us on appeal.

The first inquiry is as to the right conferred by the mortgage of this property to Maxwell, in 1883, as the plaintiff's title is based on that mortgage, and the mortgage is based on the sale of the property in 1869 by J. B. Cavallhez. He was the "head and master," as our Code expresses it, of the community. Whether married in France before he came to Louisiana and contracted the marriage here is unimportant in testing the effect of his sale of the property involved in this controversy in 1869. The power of disposition was his, and the title made by him, and spread on the public records, gave validity to any subsequent sale or mortgage created on the faith of that title. If the husband alienates the community property by any fraud to the injury of his wife, the law gives to her an action against him and his heirs, but the sale by him is entirely valid as to third persons who in good faith have acquired rights on the faith of the title he spreads on the public records. It is a proposition we deem beyond reasonable controversy that the mortgage to Maxwell, based on the title to the vendee of

J. B. Cavallhez, and which had stood unquestioned on the public records for 15 years before Widow Cavallhez asserted her rights under the marriage contracted in France, was not assailable by her. This proposition is based on the protection accorded those who act on the faith of the public records, so often recognized by our courts and of general recognition in every system of jurisprudence. It is bottomed upon the principle that the true owner, whoever he may be, is bound by the title he puts on the public records, so far as respects third persons *bona fide* acquiring rights on the faith of that title. If the mortgage granted in 1883 was securely protected by law and jurisprudence, it gave to the creditor the right to foreclose it. We cannot conceive that this right, so essential to the creditor, could be taken away by a suit brought afterwards by the wife asserting her right to the community, subordinated, as are all her rights, to the power of the husband to mortgage or alienate the community property. The mortgage creditor, exerting the remedy given him by the contract, seized and sold the property for his debt, and the title, passing at the sale, was completely vested in the plaintiff Lacassagne. The contention is that the sale was void because, when made, the suit of the Widow Cavallhez was pending. Although the Maxwell mortgage was of record when the suit was brought, she carefully abstained from making him a party. The argument seeks to apply the provision of our law which forbids alienations, pending a suit to recover property, to the prejudice of the plaintiff bringing the suit. The article of the Code embodying this provision has clear application to cases of alienation, pure and simple, not to the enforcement of rights created before the suit was brought. The mortgage created a right to seize and sell the property for the payment of the debt. Under our law, the mortgage is a quasi alienation. The seizure and sale is the exercise of the remedy, and is the consequence of the mortgage. If, then, the mortgage is to be deemed an alienation, the title of the plaintiff is not within the scope of the provision forbidding alienations pending the suit, for the mortgage was granted before the suit. There are expressions in the reasoning of the United States supreme court which, taken literally and severed from the context and decree, may seem to give color to defendants' pretensions as to the scope and effect of that decree. But the ground that the plaintiff's remedy was at law disposed of the case, and points to the decree as containing all that constitutes *res judicata* in any sense known to the law. That decree simply and only dismissed the bill, with full reservation to plaintiff to enforce his rights at law.

Now, what right could he enforce? The mortgage had merged in the title. The supreme court could not have contemplated a suit on a mortgage changed into another right. To remit him to some supposed rem-

edy on a mortgage, exposed both to the defense of pre-emption and that of prescription, would have been to substitute a mere shadow for the substance of Lacassagne's right. The decree reserved his legal rights given him by the mortgage. Following that decree, when Lacassagne found the property seized under the execution of the creditor of Chaplus, the legatee of the Widow Cavallhez, he resorted to the remedy given him by our law. He asserted his title to the property attempted to be levied on as the property of another, and, in our view, adopted the only practicable method of exercising the right left to him by the supreme court.

Under the mortgage granted by the head of the community, clothed with full competency to grant it wholly irrespective of whether he had or had not married in France, the mortgage creditor had the right to seize and sell the property in whose hands soever it might be, without regard to any change of title by suit, alienation, descent, or any other mode. On what theory, then, are we to hold that the suit to establish the French marriage of Cavallhez denuded the mortgage of the right it gave the creditor to seize and sell? To so hold would be to simply change our jurisprudence and overthrow a rule of property.

Nor do we appreciate the supreme court of the United States, in the decision now pleaded as *res judicata* and as effective, and intended to destroy the creditor's right to foreclose his mortgage, as sustaining any such contention. The case presented to that court was a bill in equity to restrain the execution of the writ of possession issued by Widow Cavallhez on her judgment against Marceline Diaz, widow of C. H. Remick, deceased. The plaintiff here, the complainant in that suit, averred his title and possession as the basis for the relief he sought. The court held the plaintiff's remedy was at law, not in equity. We do not think the question of Lacassagne's title was passed upon, or intended to be passed upon, in that decision. What the court declared and held was that, on the showing made, "a court of equity cannot give the plaintiff any relief until he has established his title by an action at law" (144 U. S. 124, 12 Sup. Ct. 659); and all his rights with respect to such action at law were reserved to him. We hold the present suit to be such "action at law" as there contemplated, coupled with injunction to prevent the property being sold under execution for the debt of another alleged not to be the owner. The necessary parties are before the court to adjudicate the question of title raised, and that the suit involves the title is shown by the averments of the petition and by its prayer, which is that plaintiff be decreed the owner of the property and sent into possession thereof. On the issue thus presented we think the case is with the plaintiff, and that his claim of ownership must be sustained and his right of possession enforced.

For the reasons assigned, it is ordered, ad-

judged, and decreed that the judgment appealed from is avoided and reversed; and, proceeding to render such judgment as should have been rendered in the first instance, it is now ordered and decreed that the estate of Laurent Lacassagne, deceased, represented by Marie L. Casey, as administratrix thereof, be, and is, recognized as the owner of the property described in the petition filed, and, as such, that she be sent into possession thereof, for which purpose a writ of possession is directed to issue. It is further ordered, etc., that the injunction issued herein be sustained and perpetuated, and that the property be held free from any incumbrance placed upon the same by defendant F. Chaplus, or asserted against it by defendants H. Abraham & Son. It is further ordered, etc., that defendants pay all costs of both courts.

BREAUX, J., dissents.

(51 La. Ann. 416)

MISSOURI, K. & T. TRUST CO. v. SMART,
Assessor, et al. (No. 12,971.)

(Supreme Court of Louisiana. Feb. 20, 1899.)

RAILROADS—PUBLIC AID—ORDINANCES—REPEAL—
MANDAMUS—DEFENSES.

1. The police jury, having canvassed and compiled the returns of an election, and proclaimed the result of same to have been in favor of the special tax in aid of a railway enterprise, and thereafter passed an ordinance levying the tax in accordance therewith, is without legal capacity to subsequently pass another ordinance repealing the former one, and annulling the tax; the railway having been in the meanwhile completed, and put in operation.

2. Having proclaimed the result, and levied the tax, the police jury is without interest or legal right to defend a mandamus of relator to decree the collection of the tax upon grounds which can alone be asserted by taxpayers who had long since acquiesced in the election as well as its result.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Vernon; S. D. Read, Judge.

Action by the Missouri, Kansas & Texas Trust Company against M. N. Smart, assessor, and others. From a judgment for defendants, plaintiff appeals. Reversed.

Tallaferro Alexander and Pujo & Moss, for appellant. J. Henry Shepherd, for appellees.

WATKINS, J. This is an action to compel the assessor of the parish of Vernon to extend upon the parish tax rolls the special five-mill tax as levied by the police jury of that parish on the 6th of December, 1895, in aid of the Kansas City, Shreveport & Gulf Railway Company; and also against the sheriff and ex officio tax collector to compel him to collect said tax according to law,—same being accompanied by mandamus. The police jury was made a defendant for the purpose of enabling the plaintiff to make proof, if necessary, of its full compliance with the requirements of the ordinance levying the tax, which was condi-

tioned upon the completion of the railroad and putting it in operation within a certain time. The assessor answered, denying that he had any power to assess and levy the tax; the sheriff answered, denying that he had any power to collect the tax; and the police jury answered, asserting the legality and validity of the ordinance they had adopted purporting to repeal the ordinance levying the special tax, and the illegality of the tax. On the trial there was judgment in favor of the defendants, and the plaintiff has appealed.

The substantial facts exhibited by the record which antedated the institution of this suit in July, 1898, are as follows, viz.: That an agreement was made between a committee of taxpayers and the Kansas City, Shreveport & Gulf Railway Company whereby a special tax of 5 mills for 10 years was to be voted for, levied, and paid to said railroad company in consideration of the location, construction, and operation of its line through said parish. That upon the petition of a sufficient number of property taxpayers of said parish the police jury thereof ordered an election to be held in accordance with Act No. 35 of 1886, whereat was to be submitted the question of the levy of said special tax. That on the 6th of December, 1896, the police jury met, and proceeded to canvass and compile the election returns; and they proclaimed, as the result of said election, that the tax had been voted for by a majority of the electors entitled to vote, both in number and amount. That immediately thereafter the police jury promulgated the aforesaid result of the election, and formally adopted an ordinance levying the tax of 5 mills on the dollar upon all the taxable property of the parish for a term of 10 years in aid of said railway company; the said tax to continue in force until the entire 10 years' tax shall have been collected, and paid over to the railway company. That the railway company located, constructed, operated, and is now operating, its line of railway through the parish of Vernon within the time and in accordance with its contract and the terms and provisions of the police jury ordinance. That a stubborn resistance to this tax was made at the polls, and great dissatisfaction was produced by this result, and which eventuated in suit contesting the legality of the tax by a portion of the taxpayers, and, among others, was the ground alleged that frauds and irregularities had been perpetrated by election commissioners at certain polls, and also by the police jury in canvassing the returns and in declaring the result of the election. That the defense consisted of a denial of the plaintiff's charges, and a counter charge by the railroad company of frauds and illegal acts on the part of the petitioners, on account of which the apparent majority favoring the tax was largely reduced. That propositions for a compromise of that litigation were submitted and accepted, the purport of which was the company should release, and thereafter hold harmless against the payment of said special tax,

all the members of the tax-resisting association; and a consent judgment to that effect was agreed to and signed,—the proportion of the tax assessable against them aggregating only about 10 per cent. of the whole amount thereof. That, subsequent to said compromise, the police jury, on the 30th of March, 1898, passed an ordinance in terms repealing the prior ordinance of December 6, 1896, levying said special tax. It is to meet that exigency that this proceeding by mandamus was instituted, and it is apparent that the answers of the tax collector and assessor are predicated upon that alleged repealing ordinance. And the answer of the police jury, denying the legality of the tax, is the attempted defense of the rights and interests of those property taxpayers who did not join in the aforesaid suit.

We make the following extracts from the brief of defendants' counsel, which sets out very fully the substance of the answer of the police jury, viz.: "E. E. Smart, president of the police jury, in response to the mandamus, avers that the relators filed in the office of the clerk of the parish of Vernon an agreement by which relators released from the payment of the five-mill tax for ten years four hundred and sixty-nine taxpayers of Vernon parish, who claimed to have voted against said tax, in a suit filed by these taxpayers seeking to annul the ordinance levying the tax, for the reason that a sufficient number of fraudulent votes were counted in favor of said tax to make a majority; there being but 463 votes promulgated in favor of said tax, with 459 against the tax, and that the agreement of release absolutely released 469 persons. Among those being released were the very persons who were charged to have been counted for the tax, when in fact they had voted against the same. The president of the police jury, in his answer, avers that by said release relators destroyed the validity of the ordinance in their favor; that the number released being in excess of the number claimed to have voted for the tax is a clear admission that said tax was not voted by a majority of the property taxpayers voting in said election. Respondent further avers that by reason of said public notice that there was no majority in favor of said tax the police jury rightfully repealed said ordinance. Respondent further avers that the police jury was no party to said compromise, in which a larger number of voters and taxpayers were released from the operation of said tax, and presented with an honorarium of \$1,500 for attorney's fees. Respondent further avers by said act of compromise relators attempted to effectually prevent any further judicial inquiry into said election and setting the same aside on the ground of false voting. Respondent further answers that a tax in aid of a railway is a solidary obligation, each voter casting his ballot for a tax on all the property in the parish, and not on his individual property, and that he shall only pay a taxation if a clear and clean majority of all qual-

ified taxpayers shall vote in favor of the same. Respondent further avers that a release of one is a release of all; that to now levy a tax of five mills on a portion of the property of Vernon parish for ten years will be to deny the people of Vernon parish the constitutional guaranty that taxation shall be equal and uniform; that a tax of five mills on only a portion of property of like character in the parish of Vernon would impose an unjust and unequal burden, create a favored class of citizens, will destroy the equality and uniformity for taxing purposes by the state and parish, and will create a condition of affairs in matters of taxation in said parish repugnant to good morals and conscience; and the law cannot enforce such a partial method of dealing with the citizens of the same territorial jurisdiction, and create invidious discrimination by the law. Respondent annexes and makes part of his petition the petition of the citizens and taxpayers against the railroad company and police jury, together with the answer and compromise agreement filed in the clerk's office October 12, 1897. The petition of citizens and taxpayers of Vernon parish against president of police jury of Vernon parish et al., filed on February 27, 1896, within the legal time required by law, charges gross frauds against supervisors of said election, and fraud in the canvass of the vote by the police jury. They specially set out that the commissioners, naming them, at Kirk's box, precinct 2, ward 2, fraudulently returned as voting for the tax the following legal qualified electors: Alfred Self, Enoch Self, J. J. Masters, Charles Martin, Lewis Martin. Your honors will find this direct charge in this petition, and on examination your honors will further find that these self-same persons are relieved by the notarial release of the company. Their names appear in the roll of the redeemed for ward 2. The petition further charges that more than 50 ballots from which the word 'For' was stricken (meaning 'For the Tax'), were actually counted for the tax, when according to every rule of canvass these ballots should have either not been counted at all, or according to the intent of the voter, which most clearly means against the tax, for why would a voter desiring to vote for the tax scratch out the very words which would most clearly express his intention?"

1. The first and most important question which arises is whether a police jury, having canvassed and compiled the returns of an election in reference to a special tax in aid of the construction of a railway, and declared that said special tax had received the sanction of a majority of the votes cast, and officially promulgated the result thereof, and levied the tax, had the legal competency to pass a subsequent ordinance, *ex proprio motu*, repealing the one first enacted, and annulling the tax, long after the railway company had accepted the tax, completed its railroad, and put same in operation. In *Reynolds & Hen-*

ry Const. Co. v. Police Jury, 44 La. Ann. 863, 11 South. 236, this question was considered and decided, and Mr. Justice Breaux, speaking for the court, said: "The authority which ordered the election, on the petition of the taxpayers, which promulgated the returns, and declared them adopted and legal, assails the returns as null, and asks that a recount be made and the nullity decreed. The defendants are estopped. It proclaimed the regularity of this election, which resulted in the acceptance of a contract, and the performance of work. It cannot question the binding force of its own acts. * * * The repeal of the Ordinance 634, adopted for the levy of a special tax, is without effect." In *State v. Tax Collector*, 48 La. Ann. 28, 18 South. 757, the court, speaking through the chief justice as its organ, said: "The question is whether, after having exercised the power or duty intrusted to it, it can subsequently reverse its action, and stay proceedings, because it may suppose that its duty was incorrectly performed. We do not think it was charged with the duty of correcting its own mistakes, if mistakes it made. There would be no end to litigation, if such a doctrine were true. When the counsel levied the tax it was ordered to levy, the subject-matter passed out of its hands. It had no further legal interest in the premises. It had performed the specific duty imposed upon it, and its connection with the levying of the tax ceased. *Darcantel v. Refrigerating Co.*, 44 La. Ann. 644, 11 South. 239." In our opinion, the principle announced in these decisions is correct, and they meet our approval and concurrence; and, being applied to the instant case, are conclusively against the legality of the alleged repealing ordinance. It has no power or efficacy to bind the assessor and tax collector in the collection of said special tax, and we decline to give the same any effect.

2. Applying the principle announced in the preceding paragraph to the respective contentions of the tax collector and assessor, they must be deemed and held groundless for the same reason; for, the police jury ordinance levying the tax remaining in force, these officers plainly come within the power and scope of the plaintiff's writ of mandamus. Their demands are therefore rejected.

3. The substance of the contentions of the police jury appears to be an assault upon the special election on the ground that same is and was illegal, null and void, because of certain alleged frauds and irregularities in the proceedings leading up to said election, and in the management and conduct thereof, but all of which, necessarily, antedated their examination and tabulation of the election returns, and their official proclamation that the election had been duly and regularly carried in favor of the tax. And it is obvious that their official proclamation of the result of the election preceded the adoption by them of an ordinance levying the special tax. Their averment is that, subsequently to said proclama-

tion and ordinance, quite a large number of the property taxpayers of the parish entered a suit, within the time prescribed by law, contesting said election upon various grounds; but that during the pendency thereof a compromise of same was effected between the parties litigant, the suit dismissed, and judgment entered therein. That, notwithstanding the plaintiffs in that suit represented less than 10 per cent. of said special tax, and that the railroad had been intermediately constructed and put in operation, the police jury—who are made merely nominal parties defendant—set up as a defense to the collection of the tax the illegality of the election, which they had officially declared legal and valid, and long after they had passed an ordinance levying the said tax. More particularly stated, their grounds of resistance may be summarized as follows, viz.: (1) That relator, as one of the stipulations of the compromise, agreed to release from the payment of the tax, during the entire 10-year period of its duration, all of the plaintiffs in the aforesaid suit; and that among those released were many of those who were charged to have been counted for the tax, when in fact they voted against the same. (2) That by said release of said plaintiffs, more than 400 in number, relator destroyed the validity of the ordinance of the police jury which levied the tax in its favor; the number released being greater than the number claimed to have voted for the tax, thus leaving subject to the payment thereof less than a majority in number of those voting at the election. (3) That a tax in aid of a railway is a solidary obligation, each voter casting his ballot for a tax on all the property in the parish, and not on his individual property, and upon the condition that a majority of the property taxpayers shall vote in favor of the same; and that, consequently, the release of one is the release of all. (4) That by this release the property of the parish will be deemed to have violated the constitutional guaranty that taxation shall be equal and uniform; and that a tax of five mills on only a portion of the property of the parish would impose an unjust and unequal burden, create a favored class of citizens, and destroy the equality and uniformity of the tax, and create an invidious distinction among taxpayers not authorized or contemplated by law. But in stating these defenses the police jury are confronted with the indisputable fact that the plaintiffs in that suit were the only taxpayers of the parish who resisted the payment of the tax in the manner and within the time prescribed by law, and those who did not join in that suit are conclusively presumed to have acquiesced in the result of the election as it was officially proclaimed by its ordinance, and cannot now be heard to complain in a court of justice; that it, having canvassed and compiled the returns of the election, and made due proclamation that the tax had been voted for and carried by a majority of the

votes legally cast, has no better right or greater power to ask a court of justice to render a judgment contrary thereto than it had to pass an ordinance repealing their prior ordinance levying a tax in pursuance of their proclamation. We are bound to accept as the initial point from which to consider and decide this case the proclamation by the police jury that the election had been carried for the tax, and their ordinance levying the tax. That matter has been finally and irrevocably settled in the manner the law has directed, and same cannot now be reopened and reviewed at the behest of the police jury, in the interest of that portion of the tax-paying inhabitants who failed to make protest seasonably for themselves; and particularly at a time long subsequent to the relator's acceptance of the tax, and the construction of the road, and putting same in full and complete operation. In any view that can be taken of the present contentions of the police jury, the relator's release of a portion of the citizens from the payment of the tax after it had been actually levied could have no bearing on the legality of the election; nor could it affect the uniformity of the tax, or increase or diminish the burdens of those who were not released. The tax once in esse became incontestable and certain, and a release of some of the taxpayers from the payment of it does not cause an increase in the rate of taxation due by others. The constitutional question sought to be raised by the police jury is without any foundation in law or jurisprudence. "Constitutional provisions that all taxes shall be equal and uniform apply only to general taxation, and have no application to local assessments." 25 Am. & Eng. Enc. Law, p. 495. The provision of the constitution that "taxation shall be equal and uniform throughout the state" does not apply to or preclude local assessments or special taxes levied in pursuance of special provisions of law, in aid of public improvements. Cooley, Tax'n, p. 438. In support of that proposition, that author cites the following decisions of this court, viz.: *Municipality v. Dunn*, 10 La. Ann. 57; *City of New Orleans v. Elliot*, Id. 59; *Yeatman v. Crandall*, 11 La. Ann. 220; *In re New Orleans Draining Co.*, Id. 338; *State v. New Orleans*, 15 La. Ann. 354. See, also, *Munson v. Board*, 43 La. Ann. 15, 8 South. 906. "It is only when statutes impose taxes on false and unjust principles, or which operate to produce gross inequality, that courts can declare them void." *Com. v. People's Five Cent. Sav. Bank*, 5 Allen, 428; *Warren v. Henly*, 31 Iowa, 31; *Howell v. Bristol*, 3 Bush, 493; *Turner v. Althaus*, 6 Neb. 54; *State v. Cumberland & P. R. Co.*, 40 Md. 22; *Bank v. Miller*, 19 Fed. 377. "The want of uniformity must be the direct result of the law itself, and not the maladministration of a proper law." 25 Am. & Eng. Enc. Law, p. 38, citing *Dundee Mortgage & Trust Co. v. School Dist. No. 1*, 21 Fed. 151; *Cummings v. Bank*, 101

U. S. 153; *State v. Maxwell*, 27 La. Ann. 723. In that last case, the court very pertinently said: "This question was decided in the case of *Morrison v. Larkin*, 26 La. Ann. 699, in which the court said: 'While the exempting of the property in contravention of the constitution may be void, the levying of the tax is constitutional. * * * There is then no inequality of which the plaintiff can complain.' We adhere to the opinion then expressed. We cannot perceive how a taxpayer can justly complain that the levying of a tax is unequal, because some property in this state has been omitted in the assessment, either through inadvertence or because it is supposed to be exempted by an unconstitutional law; for the effect would be the same. We imagine that there never has been an assessment which embraced all the property of the state; but that fact did not render the assessment unconstitutional." The constitutional requirement that taxation shall be equal and uniform applies to the levy, and not the method of collecting the tax. 25 Am. & Eng. Enc. Law, p. 57. "Although an exemption from taxation may be illegal, such a trifling exemption would not necessarily invalidate the whole ordinance which levies the tax, unless it could be shown that by reason of such exemption the taxes on the property had been increased." *State v. Town Council of Beaufort* (S. C.) 42 Am. & Eng. Corp. Cas. 330 (s. c. 17 S. E. 365). "It is an interesting question what is the effect of an illegal exemption of property from taxation upon the validity of the general assessment, and the answer to that question depends upon the effect of such illegal exemption upon the rate or amount of taxation which is assessed upon the other beyond what would be assessed upon it if there had not been an illegal exemption. The mere omission by an assessor of certain property from his assessment list without authority of law will not invalidate the entire assessment, as long as the illegal exemption cannot be shown to have increased the amount of the tax, which the other taxpayers have been required to pay." *Tied. Mun. Corp. v. Police Jury*, cited supra, it was said in the syllabus: "An agreement relieving a corporation from the payment of the five-mill special tax for a consideration is not in contravention of article 203 of the constitution, so long as no injury arises therefrom." And in the body of the opinion the court said: "The police jury cannot defend and defeat the obligation on the ground that it made a discrimination operating unequally against taxpayers. 44 La. Ann. 867, 11 South. 238. The release of certain taxpayers by the railroad company does not operate injuriously; the rate of taxation remains the same." In our opinion, the defense set up by the police jury is untenable, and cannot be sustained; on the contrary, the demand of the relator is just and well founded. It is therefore ordered and decreed

that the judgment appealed from be annulled and reversed; and it is further ordered and decreed that the relator's provisional mandamus be made peremptory as to all the respondents, and that they be taxed with all costs of both courts.

BLANCHARD, J., takes no part in this decision, having been formerly of counsel for plaintiff.

(51 La. Ann. 562)

STATE v. AMERICAN SUGAR-REFINING CO. (No. 12,877.)

(Supreme Court of Louisiana. Dec. 19, 1898.)

CONSTITUTION—CONSTRUCTION—LICENSES TAXES—EXEMPTION—MANUFACTURERS—SUGAR REFINERS.

The words and terms of a constitutional article, like those of a statute, are to be construed and understood in their most usual signification; and an exemption from taxes or licenses must receive a strict interpretation. If no precise exemption can be pointed out as applicable to that claimed, the demand will be disallowed.

On Rehearing.

The proof disclosing that a business corporation purchases from planters and other sources a large supply of sugar in a completely manufactured state, and by skillful manipulations, through the instrumentality of vast, elaborate, and complicated machinery, and an application thereto of steam power and great air pressure, same is first melted, then cleansed of its impurities, then bleached and improved in color, and then dried, granulated, and brought into sugar again, in exactly the same state it was when these manipulations were commenced, though greatly improved in purity and beauty of appearance, and rendered more merchantable, it is not a manufacturer, in the sense of article 206 of the constitution of 1879, which exempts manufacturers from license taxation.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frank A. Monroe, Judge.

Proceeding by the state against the American Sugar-Refining Company. From a judgment for defendant, the state appeals. Reversed.

E. Howard McCaleb, Jr., for the State. Thomas J. Semmes, for appellee.

WATKINS, J. This is a proceeding by rule on the part of the state tax collector of the Second district of the city of New Orleans against the defendant for the sum of \$21,000, as the aggregate amount of licenses due the state for the years 1892, 1893, 1894, 1895, 1896, and 1897, upon which interest and attorney's fees are to be computed according to law. It is alleged that the defendant is conducting the business of refining sugar and molasses, and has been conducting said business during the various years aforesaid without having obtained any license therefor from the state, and that the annual gross receipts of said defendant company are in excess of \$2,500,000. It is further alleged that all persons who conduct any business with-

out obtaining a license from the state before the 1st day of March are declared delinquents, and become liable to interest and penalties, and that the defendant, having been a delinquent in each of the aforesaid years, is liable for said licenses, interest, and attorney's fees. To the rule taken, the respondent excepted that the tax collector had no authority to thus proceed, it never having been placed on the list of delinquent license payers which the law requires him to furnish. Reserving the benefit of said exception, it makes the following answer, viz.: That the business of refining sugar and molasses is exempt from the payment of a license tax for the years specified, because its said business is, and always has been, that of refining sugar and molasses, and none other, and as such "it is, and always has been, one of those manufacturers enumerated in article 207 of the constitution as entitled to exemption from license taxes," etc. Its further answer is that Act No. 150 of 1890, on the authority of which the license sought to be collected is demanded, violates the constitution of the United States, and is void, in so far as it attempts to impose a license tax upon defendant company, because the said act denies to it the equal protection of the laws of the state, inasmuch as said act does not impose equally a license tax on all persons engaged in the business of refining sugar and molasses, but, on the contrary, discriminates in favor of planters who refine their own sugar and molasses, and in favor of planters who granulate sirups for other planters during the rolling season; that for the foregoing reasons said act conflicts with, and is violative of, the provisions of the fourteenth amendment of the constitution of the United States, which prohibits any state from depriving a person of his property without due process of law, and from denying any person within its jurisdiction the equal protection of the laws. On the trial of the exception the same was overruled, and on the trial of the rule the same was discharged; and from that judgment plaintiff in rule prosecutes this appeal.

1. The exception suggests that it is a condition precedent to proceeding by rule to collect delinquent licenses as contemplated by Act No. 150 of 1890, that the tax collector shall first enter the names of all delinquents upon the tax register, and shall also include the names of such delinquents in a list to be furnished to the attorney of the tax collector. In our opinion, that supposition is not supported by the terms of the statute cited. Instead of the entry upon a license register being a condition precedent to a proceeding by rule, it clearly appears from section 20 of the act that the tax collector is required to keep a license register of every person, with the trade, profession, etc., pursued, the class and graduation of the same, and the amount of the license applied for. Instead of that provision having any relation to delinquent li-

censes, it plainly specified the purpose of the legislature to have been to require tax collectors to prepare and keep a book in which they shall record the statements of all persons "who may apply for licenses to pursue any trade, profession, vocation, or calling," etc. Certainly it can have no application to those persons who, like defendant, made no application at all. Section 22 of the act has exclusive reference to collected, and not delinquent, licenses. The exception was properly overruled.

2. We will take the last proposition of the defendant first. The contention of counsel is that Act No. 150 of 1890 exempts planters who refine their own sugar from the payment of a license, and imposes a license upon persons who, like defendant, are exclusively engaged in refining sugar; thus depriving them of the equal protection of the laws, in violation of the fourteenth amendment of the constitution of the United States. On the other hand, the contention of the tax collector's attorney is that the sugar planter, who produces as well as refines his own sugar, belongs to a wholly different class from that to which the refiner belongs, who purchases manufactured sugar, and thereafter refines it, and sells it upon the market after same has been refined; that the planter is the real manufacturer of sugar, and the refining process carried on by him is merely one of cleansing and purifying it, and better fitting same for market, and only incidentally connected with his occupation of manufacturer, while, on the other hand, the business of the defendant is exclusively that of refining sugar,—an independent business,—consequently, there can be no discrimination imputed to the statute, in favor of one and against another of the same class; that the act clearly specifies two distinct and different classes, one of whom purchases, refines, and sells sugar, and the other of whom manufactures and refines his own product,—the two classes of persons being dissimilarly situated. The exemption clause of the statute is couched in the following terms, viz.: "Provided nothing herein shall be construed to apply to the business of grinding meal, ginning cotton, or making sugar by any farmer or planter." Proviso to paragraph 1 of Act No. 150 of 1890, under the heading of "Manufacturers"; same being the general license law. The objection to the foregoing provision of the statute appears to be that it is special in its character, and such legislation was held by the supreme court not to come within the provisions of the fourteenth amendment. They say: "The objection that the law [of Kansas] of 1874 deprives the railroad companies of the equal protection of the laws is even less tenable than the one considered. It seems to rest upon the theory that legislation which is special in character is necessarily within the constitutional inhibition. But nothing can be further from the fact. The greater part of all legislation is special, either in the objects sought to be attained by

it, or in the extent of its application." After analyzing the statute, the court made the observation, viz.: "Such legislation is not obnoxious to the last clause of the fourteenth amendment, if all persons subject to it are treated alike, under similar circumstances and conditions, in respect both of the privileges conferred and the liabilities imposed." *Railway Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161. The same rule of interpretation was announced in *Santa Clara Co. v. Southern Pac. R. Co.*, 118 U. S. 394, 6 Sup. Ct. 1132; *Pembina Consol. Mining & Milling Co. v. Pennsylvania*, 125 U. S. 187, 8 Sup. Ct. 737; *Wurts v. Hoagland*, 114 U. S. 606, 5 Sup. Ct. 1086; *Railroad Co. v. Richmond*, 96 U. S. 521. The statute in question exempts alike all planters and farmers who are engaged in "making sugar," and makes no mention of those persons who are engaged in the business of refining sugar and molasses. A very clear case is thus stated by the supreme court in *Express Co. v. Selbert*, 142 U. S. 339, 12 Sup. Ct. 250, in which Mr. Justice Lamar, speaking for the court, said: "The legislation in question cannot be considered as invidiously discriminating against the express companies defined by it, in favor of other companies or persons that may carry express matter on certain other conditions, or under different circumstances. There is an essential difference between express companies, defined by this act, and railroad and steamboat companies, or other companies that own their own means of transportation. The vital question is this: Railroad companies pay taxes on their roadbeds, rolling stock, and other tangible property, etc. * * * This distinction clearly places express companies defined by this act in a separate class from companies owning their own means of transportation. They do not do business under the same conditions or under similar circumstances. In the nature of things, and irrespective of the definitive legislation in question, they belong to different classes. There can be no objection, therefore, to the discrimination made, as between express companies defined by this act, and other companies or persons incidentally doing a similar business by different means and methods, in the manner in which they are taxed." In our conception, that decision is exactly applicable to this case, and puts the constitutionality of the act in question beyond doubt. We think the judge a quo correctly overruled the defendant's exception, and maintained the constitutionality of the statute.

3. Is the defendant a manufacturer, in the sense and within the meaning of article 207 of the constitution of 1879, and entitled to exemption? The language of that article is "that there shall also be exempt from taxation and license * * * the capital and machinery and other property employed in the manufacture of textile fabrics, leather, shoes, harness, saddlery, hats, flour, machinery, agricultural implements, and furniture and other articles of wood, marble, or stone; soap, sta-

tionery, ink and paper, boat building and chocolate; provided, not less than five hands are employed in any one factory." By a constitutional amendment, that article was so altered as to add thereto the following, viz.: "The manufacture of ice, fertilizers and chemicals." Act No. 92 1886. In *Shreveport Gas, Electric Light & Power Co. v. Assessor of Caddo Parish*, 47 La. Ann. 65, 16 South. 650, we had this constitutional amendment under consideration, and in the course of our opinion we said: "The words and terms of a constitutional article, like those of a law, are to be understood in their most usual signification; and, in order to ascertain the true meaning of a statute, the reason and spirit of it should be considered, and also the cause which superinduced its enactment. This is the accepted canon of construction of statutes, and equally so of the constitution." Accepting this as the proper view to be taken of the constitutional article and its amendment, the claim of the defendant to exemption from the payment of the licenses demanded is wholly groundless, for the very plain reason that the manufacturer of sugar and molasses—if, indeed, it be such—is not mentioned in either; and, as it is the universal rule that questions of tax exemption must be strictly construed, judgment must go against the claim of the defendant. There is, however, a doubt in our minds as to whether the law authorizes the state to recover, on rule, licenses for any year anterior to 1897. We will therefore give judgment for the sum of \$3,500, with 2 per cent. per month interest from the 1st of March, 1897, and 10 per cent. attorney's fees on said amount and interest, and enter a nonsuit as to the remainder of the plaintiff's claim. It is therefore ordered and decreed that the judgment discharging the plaintiff's rule be avoided and reversed; and it is further ordered and decreed that the plaintiff do have and recover from the defendant the sum of \$3,500, with 2 per cent. interest per month thereon from the 1st day of March, 1897,—10 per cent. attorney's fees on said amount and interest. It is further ordered that a nonsuit be entered on the balance of the claim, and that all costs of both courts be taxed against the defendant and appellee.

NICHOLLS, C. J., absent.

On Rehearing.

(March 7, 1899.)

WATKINS, J. Having in our original opinion treated the defendant's exemption from the payment of a state license as having been asserted under the provisions of article 207 of the constitution of 1879, whereas the exemption was actually alleged and claimed under the provisions of article 206 thereof, we granted a hearing of this cause. Recognizing this error to the defendant's prejudice, we now withdraw that portion of our opinion, and will examine the claim of the defendant to exemp-

tion under article 206 of the constitution. That article is couched in the following words, viz.: "All persons, associations of persons and corporations pursuing any trade, profession, business, or calling, may be rendered liable to such tax, except clerks, laborers, clergymen, school teachers, those engaged in mechanical, agricultural, horticultural, and mining pursuits, and manufacturers, other than those of distilled alcoholic or malt liquors, tobacco and cigars, and cotton seed oil. No political corporation shall impose a greater license tax than is imposed by the general assembly for state purposes." Under the provisions of this article, any manufacturer is exempted from license tax, unless he be a manufacturer of liquor, tobacco, cigars, and cotton-seed oil. Hence the answer claimed the exemption granted to all manufacturers not included in the exceptions just mentioned.

For the purpose of laying a foundation for its exemption, the defendant interrogated its superintendent as a witness, and from his testimony we have made the following extracts, viz.: "Q. Mr. McFetteridge, you are the superintendent of the American Sugar-Refining Company of this city, are you not? A. Yes, sir. Q. What has been your experience in the refining of sugar? A. I have had experience running over fifteen years in the North, and the past year in Louisiana. Q. Now you will please commence from the beginning, and go through the whole process by which crude sugars are converted into refined sugar, and do so deliberately; and, in making the explanation, exhibit the samples to the court, and the pictures of the machinery, and explain the operation. A. Well, necessarily, some of the samples and the photographs, to make a thorough explanation, will have to be shown together. Now, to begin with the process in the refinery: We receive the sugar either from plantations in the state, or from abroad, wherever produced, in barrels, or bags, packages,—in whatever way it may be packed. Our first process is to melt every bag or barrel of sugar so received, in suitable vessels, specially constructed for the purposes of melting sugar, and bringing it to a tendency for refining. There are suitable storage apparatus,—storage apparatus and steam-water storage; and they are connected with pumps run by power, with shafting, to pump the sugar after it is dissolved by these melters, and conducting it to the upper stories of this building for another operation. Q. Samples from No. 1 to No. 11 contain crude sugar and liquid before you have done anything with it? A. Yes; as we receive it. Sample No. 12 would show this crude sugar melted before clarification and filtration. Q. In the melter? A. Yes, after it has been brought to the density we require it. Q. Do you put all these sugars indiscriminately through the melter? A. It would not be my practice to put them in all, indiscriminately. It results better to follow high with low grades, although they have to go through the same process. * * * Q. I see a sam-

ple,—No. 5, I should imagine. What is that? A. That is what is called the 'third grade of raw sugar.' Q. Is this the most inferior grade of sugar that you receive? A. Yes; I judge, by looking at it, it is. We have some fourths, even poorer in quality than these thirds. After this sugar has been melted, and pumped to the upper story of one of our buildings, we conduct an operation that we call 'clarification.' This is done in blow-ups, and I have an exhibit of these raw-sugar blow-ups, which is No. 25 of our exhibits. * * * Q. What is a blow-up, and where is it on this vessel? A. Here,—iron tanks containing steam. The Witness: After leaving these blow-ups, the liquid is strained through these bags; the purpose being to remove the mechanical impurities—the insoluble impurities—that exist in the liquid form of the sugar. * * * The process following this straining through the bags is the filtering process through boneblack filters, which are iron vessels, in our establishment, about twenty feet in height and ten feet in diameter. * * * This speaks for itself. Now, I might speak of the process, and show those samples in connection with this fluid. This liquid, after it leaves the bag filters, is strained through the filters containing this burnt animal boneblack itself; and also after the liquid leaves the boneblack. I have already shown the liquid after going in the bag filters. Sample No. 14 is a sample of this burnt animal boneblack. This is used as an agent for decoloring and removing impurities. * * * No. 15 is an exhibit of this raw sugar after being melted, clarified in the blow-ups, strained through the filters, and decolorized by boneblack before boiling in vacuum pan. By the Court: Do you bring all the grades of sugar, from the lowest to the highest, to that condition? A. Sir? Q. Some of the other grades you have to filter more than once? A. Yes; to bring it to this color. The next photograph we have deals with the machinery that is used for revivifying the boneblack that has been used for the purpose of filtration. * * * Q. Please state what you mean by 'revivifying.' A. This boneblack, after being used for some length of time, more or less dependent upon the condition of the sugar that is run through it, becomes exhausted and unfit for further use. Consequently it is necessary, by the application of a greater or lesser quantity of hot water, to be run through these boneblack filters, to thoroughly wash this boneblack; and after this is done the boneblack is brought back to a condition fit for use again, while the reburning of the boneblack in what are called 'boneblack kilns'— By Mr. Semmes: Under great heat? A. Yes, sir. Q. What degree? A. Between seven and eight hundred. Q. Fahrenheit? A. Yes, sir. By the Court: What is boneblack? Animal bones reduced to a black powder by being burned or charred? A. Yes, sir; decidedly. By Mr. Semmes: Q. Made of bone? A. Yes, sir; made of animal bones. I have omitted one important photo-

graph in connection with the bag filters, that I wish to show. That is photograph No. 27, showing the scum press, in which the impurities that are collecting in the bag filters are collected in this scum press and burned out of the house; and the object of the scum press is to recover whatever existing liquid may be in these impurities. Of course, taking the bag out of the bag filters mixes with sand. A certain amount of liquid is in there, and we desire to recover the liquid, leaving the raw cake. By the Court: Q. How do you get all of that stuff out of the bags? A. By washing the bag in a tub, and pumping the residue of this stuff out; and it leaves the dry scum. By Mr. Semmes: Q. Have you a sample of the scum? A. Yes, sir; sample No. 13 is a sample of this scum and mud that is taken from the sugar in this raw state, and finally thrown out as worthless, containing no more sugar, and as valueless. Q. That comes out of the scum press? A. Yes, sir. We exhibit this to show the amount of impurity and dirt that we recover in this way, and that is taken from the sugar. I may say that frequently we take as many—depending, of course, on the amount of work we are doing—as seventy or eighty barrels of this dirt and scum daily, containing four hundred pounds to the barrel. By the Court: Q. What is done with that? A. Carried away into waste. It has no value that we know of. By Mr. Semmes: Q. Wouldn't it be good as manure? A. It might be, but we pay for removing it. We get no return for it. Photograph No. 30 is the vacuum pan. It is an exhibit of the first stage of manufacture after this liquid has left the bone-black filters. It is the vacuum pans of the refinery for the crystallizing of this filtered liquid into grains. Q. What happens to the vacuum pans? A. This filtered liquid is made into grains. The vacuum pan has a vessel (shown here) containing a series of coils, and the steam is turned on the pans. Q. Boiled in a vacuum? A. Yes, sir; at a low temperature. That is one of the operations of the refinery in which a good deal of skill is required, in filling this grain with liquid from time to time, and until finally the pan is finished. Q. What do you call it,—'finishing pan'? A. Yes, sir; we term it a 'strike.' By the Court: Q. Does the grain form in the pan? A. Yes, sir. Q. In the pan? A. Yes, sir; in the pan itself. I will show you. Photograph No. 30 shows the vacuum pan itself. This is a sample, No. 16, in our exhibits of the magma. Q. That is what you term this sugar at that stage in the process of refining? A. Yes, sir; after boiling in the vacuum pan, it is in that condition when it is dropped in the vacuum pan for the next stage of manufacture. Q. Before going into the centrifugals? A. Yes, sir; that, as I said before, requires a great deal of skill in the handling. Q. That is what might be called a 'wet refined sugar'? A. Yes, sir. Q. The next process is to dry it? A. Yes, sir; but the grain is already perfectly formed here in the vacuum pan. The next exhibit and the

next stage of manufacture is shown by our photographs marked 'No. 31,' showing the centrifugal machines, shafting, pulleys, beltings, etc. Q. What is the function of the centrifugal? A. The function is to remove this magma after it leaves the pan, and separate the grain and moisture, leaving the dry sugar. Q. The sirup goes out in one direction, and the sugar dries remain in the machine? A. Yes, sir. Here is an exhibit of the sugar from the machine, showing the contrast between the sugar leaving the vacuum pans and the sugar after being machined in the centrifugal. Our first photograph is marked 'No. 32,' and it is a view of our cube or black sugar machines, showing the machine by which the sugar is pressed into these cubes, as shown in sample marked 'No. 19.' The sugar from the centrifugal machines comes into this cube machine, and by a system of pressing is pressed into these cubes. The sugar is pressed in those by an application of hot air for a certain number of hours, and is perfectly dry, as shown by the form shown. Exhibit No. 33 is a photograph of the granulation machine, and sample marked '21' is an exhibit of sugar after being thus granulated in those granulating machines. The machine is simply a cylinder drum. This extends six feet in diameter and twenty-five feet long; and by the force of hot air being forced through at a great rapidity (through those drums), and the drum being kept in motion, the sugar is thoroughly dried of any moisture remaining in it after leaving the centrifugal machine, and becomes a finished product, with an attractive appearance, such as shown in this sample No. 21, which is a sample of finished granulated sugar. Q. It is merely a drying machine? A. This is the drying machine. We have to conduct an operation for making crystals in the vacuum pans. Q. The main function of that apparatus is to finish the drying process? A. Yes, sir; and make the grains more sparkling,—more handsome in appearance for table sugar. Q. It is what you might call a polishing machine, is it? A. Yes, sir; sparkles. * * * By the Court: * * * The next exhibit is photograph marked 34, showing our powder mills for making a special grade of sugar, known to the trade as 'powdered sugar,' which is considered the finest grade of crystallized sugar, used by confectioners for crystallizing fruits, etc. This is a sample of the pulverizing press. It goes through 13 disks, revolving at a great rapidity, shown in this photograph No. 34, completely pulverizing the grain, and leaving the product as shown in the sample marked 'No. 20, Powdered Sugar.' By Mr. Semmes: Q. Is that after granulation? A. Yes, sir; after leaving the granulation it is completed into powder, and there is absolutely no moisture left in the sugar; and both of these grades of sugars—granulated and powdered—undergo all these operations, as I described it. I have forgotten again to show one sample taken without a photograph. It is sample No. 18, which exhibits a sample of the sirup coming

from the centrifugal machines. While drying the sugar in these machines, this fluid is drawn from perforations or sieves in the machines, and runs into tanks, where it is again pumped to the pans, and taken in for boiling again through a number of skillful stages. By Mr. Semmes: Q. That No. 18 is the moist sugar that comes from the centrifugal? A. It has water and sirup between the grains of sugar as it comes through the vacuum pans, and is thrown out as it goes through the sieves of the centrifugal. Sample No. 22 is a grade of sugar manufactured by us, known as 'Confectioners' A,' in which the operation of granulating is omitted, and the grain is formed in the vacuum pans to the size desired by the trade, after the operation of machining in the centrifugal is, of course, conducted; but, after leaving that, it is packed in barrels for shipment, and afterwards retains some little moisture. * * * By Mr. Semmes: Q. How do the confectioners use that sugar? A. They use it in their confections. I am not familiar with that. Q. For what reason is that sugar manufactured? A. It is to satisfy the trade. Eventually they get better results out of this sugar. * * * No. 36 and No. 37 is a photograph of the apparatus called the 'Lily Evaporator'; its object being to bring to a greater degree of density the liquid resulting in sweet water, and such as comes from the washing of the tubs and boneblack apparatus, by which the liquid is drawn from the tubes, and through which steam is passed, and thickened up to the required density. Q. This is the residue after refining? A. Yes, sir; molasses, which is also a product of a refinery. I think I have exhibited all the manufactured samples in detail, and the raw material from which we manufacture, which are all here as exhibits. By the Court: Q. During what process in the stage of refining do you get this molasses? A. This molasses that we produce? Q. Yes. A. No. 23 is a sample. Here it is. We get it at the full final stage of the process. It is simply a substance containing sugar, but mixed with it are impurities that have been taken out at other stages of refining to such an extent as would prevent this from being turned out as granulated sugar. Q. Where does that come from? The final stage? A. In the process of crystallizing. Finally, throwing off sirups from time to time, we finally get to the stage where we cannot boil it into grain, as it would not be profitable for the refinery to attempt to extract the sugar in this molasses. It would not justify us to go to the expense of obtaining the sugar remaining in it from it. I think I have described the process."

Analyzing this testimony, we find that the process of refining sugar by the defendant company is conducted in the following manner, substantially, viz.: The sugar is received from the plantations where it is first manufactured, or from abroad, in barrels, bags, or packages in which it has been packed; and the first process, after it has been re-

ceived, is to put it in vessels specially constructed for the purpose, and melt it, and bring it to a tendency for refining. This is done through the instrumentality of large vessels called "melters." The next process is that of clarification, which is done by means of what are technically styled "blow-ups,"—large, wide tanks, containing steam; and the liquid is strained through bags, after leaving the blow-ups, for the purpose of removing any insoluble impurities which exist therein. Then follows the filtering process, through large boneblack filters (that is, filters containing "burnt animal boneblack"); and it is used for the purpose of "decoloring and removing impurities" from the liquid. The testimony of the superintendent explains the effect of the foregoing processes upon the raw or unrefined sugar to be as follows, viz.: "We exhibit this to show the amount of the impurity and dirt that we recover in this way, and that is taken from the sugar. I may say that we frequently take as many—depending, of course, on the amount of work we are doing—as seventy or eighty barrels of this dirt and scum daily, containing four hundred pounds to the barrel." The next is the "granulating" process, which is conducted by depositing into vacuum pans, wherein the liquid is crystallized into grains, which is accomplished by means of a series of coils of pipe, through which the steam is conveyed into the vacuum pan at a low temperature. Of this process the testimony of the superintendent speaks as follows, viz.: "That is one of the operations of this refinery in which a good deal of skill is required in filling this grain with liquid from time to time, and until finally the pan is finished." This is called the "finishing pan," and the drying process is technically termed a "strike"; and that is because the liquid becomes granulated by this process,—the grains forming in the pan. In that condition it is called "wet refined sugar." The next process is drying the sugar thus granulated by passing it through the centrifugal machines, which is described by the superintendent thus: "The function [of the centrifugal] is to remove the magma after it leaves the pan, and separate the grain and moisture, leaving the dry sugar." The sugar passes from the centrifugal machines into what is termed a "cube machine"; the sugar being pressed into cubes by the application of heated air, and made perfectly dry. The superintendent thus describes the process, viz.: "The machine is simply a cylinder drum. This extends six feet in diameter and twenty-five feet in length; and by the force of hot air being passed with great rapidity through these drums, and the drums being kept in motion, the sugar is thoroughly dried of any moisture remaining in it after leaving the centrifugal machine, and becomes a finished product, with an attractive appearance, such as is shown in the sample No. 21, which is a sample of the finished granulated sugar." The witness then describes the process of

making "a grade of sugar known to the trade as 'powdered sugar,'" which is considered to be one of the finest grades of sugar, and chiefly used by confectioners for crystallizing fruits, etc.; but this needs no special attention, as it plays no part in this controversy,—and the same may be said of the sirup which comes from the centrifugal machines during the process of granulating sugar. The latter process is described by the witness in this way, viz.: "The moist sugar that comes from the centrifugals has water and sirup between the grains as it comes through the vacuum pans, and is thrown out as it goes through the sieves of the centrifugals." Again, the superintendent says that the sirup is the final process of crystallization, in which it is thrown off from time to time; that "we finally get to the stage where we cannot boil it into grain, as it would not be profitable for the refinery to attempt to extract the sugar in this molasses," etc. On this state of facts, is the defendant a manufacturer, in the sense and within the meaning of article 206 of the constitution of 1879? Before expressing an opinion on that question, we will examine the adjudications of this court in which it has placed an interpretation upon that article, and defined the term "manufacturer," as applied to different industries and pursuits which were under investigation therein, so that we may the better draw the analogy between them.

In *City of New Orleans v. Leblanc*, 34 La. Ann. 597, this court said: "A manufacturer is not one who creates out of nothing, for that would surpass human power; neither is he one who produces a new article out of materials entirely raw. He is one who gives new shapes, new qualities, new combinations to matter which has already gone through some artificial process. A shoemaker is none the less a manufacturer because he does not tan the leather. The tanner is none the less a manufacturer of leather because he does not breed and raise the bullocks from which the raw hides are taken. The tanner makes leather to sell, but he does not buy the hides to sell again. He produces the article of leather, and depends upon the labor which he bestows upon the raw material." The court sustained the defendant's exemption from the payment of a license on the ground that his occupation was that of a cooper, and he made barrels and hogsheads from rough logs and splits, etc. In *City of New Orleans v. Ernst*, 35 La. Ann. 746, the court sustained the defendant's exemption as a rice miller, and in so doing employed this language, viz.: "A manufacturer is defined to be one who is engaged in the business of working raw materials into wares suitable for use; who gives new shapes, new qualities, new combinations to matter which has already gone through some artificial process. A manufacturer prepares the original substance for use in different forms. He makes to sell, and depending for his profit on the labor which he

bestows on the raw material. Rice is an agricultural product, extensively raised in this state. The milling of it is effected by different processes, during which it passes from its original roughness to conditions in which it is fit for different uses. Deprived of its outer shell, and of the silica enveloping the denuded grain, it becomes an object of marketable value. It is only after several manipulations that various substances or products are obtained, which are the hull, the bran, the flour, the red grain, and finally the clean and polished kernel, all of which become separate and distinct articles of commerce. It is not easy to distinguish between the several processes to which rice is subjected by the manufacturer, who, from beginning to end, works it up into various forms for use. It may be said to undergo one and the same process throughout. Even if a distinction could be realized, the working of the raw material is accomplished continuously. The person who puts it through the process gives to it gradually new shapes, new qualities, new combinations, and thus is a manufacturer, within the intent and scope, the spirit and letter, of the constitutional immunity." In *State v. Dupré*, 42 La. Ann. 561, 7 South. 727, the court maintained the defendants' exemption from the payment of a license for pursuing the business of editing, printing, and publishing a daily newspaper; and the court, after making the foregoing quotation from *City of New Orleans v. Leblanc*, used this language, viz.: "Keeping this definition in view, the statement of facts embodied in this record shows that defendants use in their business valuable machinery and implements; that, in addition to the clerical and editorial departments, they employ a large number of mechanical laborers, such as typesetters, engineers, pressmen, and their assistants; that they purchase and use great quantities of raw materials, such as paper, ink, glue, etc.; that by means of this machinery and mechanical labor they convert this raw material into a new and distinct article, for use, and in commercial demand, called a 'newspaper,' which they sell directly to dealers and consumers." But this court placed its decision principally upon the grounds (1) that the provisions of the license law of that year did not, in terms, embrace the defendants' business; (2) that the publishing of books and the manufacture of stationery being expressly exempt under article 207, by fair analogy like exemption should be extended to a newspaper under article 206 of the constitution. Hence that decision is somewhat *sui generis* and exceptional, and cannot be accepted as generally applicable as a precedent. In *State v. Manufacturing Co.*, 47 La. Ann. 160, 16 South. 750, this court maintained the exemption of the defendant as a manufacturer of crackers, biscuit, and Italian paste,—the proof disclosing that the "process of manufacture is that the flour leaves the barrels, and passes through a powder sifter; thence into a powder mixer;

from this into a dough box on tracks, and is worked into two different kinds of dough; goes into a cutting machine, and finally into the oven, from which the complete articles are taken, boxed, and shipped. The material is handled exclusively by machinery." Upon this statement the court say: "It will be perceived that the establishment is a manufactory in which raw materials are made into wares suitable for use. There are new shapes, new combinations, new qualities given to the raw material by the process of manufacturing the articles from the original material." After citing other cases, and distinguishing them therefrom, the court concluded its opinion as follows, viz.: "In the instant case the identity of the original material is lost in the new articles created, in the change of shape, new qualities, and new combinations which enter into their composition, which render them suitable for use in an entirely different manner from the manner in which the original material could be used." In *Southern Chemical & Fertilizing Co. v. Board of Assessors*, 48 La. Ann. 1476, 21 South. 31, we held that a process resulting in vaporizing the moisture in offal and animal matter, disposing of the grease, separating the grease or oils of such refuse and matter, and converting the residuum into a fertilizer, is the manufacture of such fertilizers, within the scope of the constitution. The foregoing are the cases in this court on which the defendant relies for the maintenance of its exemption.

In *State v. Hammond*, 23 La. Ann. 263, the defendant claimed exemption from the payment of a license as the proprietor of a cotton press because he employed the cotton pickery exclusively for his own use, and that, as a commission merchant, he was accustomed to purchase wet, damaged, and muddy cotton, and clean and prepare same for market in his cotton pickery, and sell it for his own account. The district court rejected his claim, and this court affirmed the judgment. In *City of New Orleans v. Mannesler*, 32 La. Ann. 1075, the defendant appealed from a judgment condemning him to pay a license as a peddler of ice cream, and made claim to exemption on the ground that he made sales exclusively of articles of his own manufacture; and this court denied the exemption. In *State v. Eckendorf*, 46 La. Ann. 131, 14 South. 518, we held that a baker who makes and sells his own bread exclusively is not entitled to exemption from the payment of a license as a manufacturer of bread; the proof disclosing "that bread is made from flour, the dough being prepared with yeast and salt, and required an experienced hand to bake it properly." In *Patterson v. City of New Orleans*, 47 La. Ann. 276, 16 South. 815, we find some very pertinent and controlling expressions of this court with regard to the import and meaning of the term "manufacture," as it is employed in the constitution, notwithstanding our opinion dealt with the exemption in article 207. We said: "The constitution uses the word 'manufacture'

in its ordinary sense. Its natural import is to produce an article, and its common application refers to changing the raw material into some new and useful form." And, in speaking of the exemptions which are contained in article 207, our opinion says, "In all these exemptions the constitution contemplates manufactories that produce an article, not a mere addition, or mode of use of an article already manufactured." In *City of New Orleans v. New Orleans Coffee Co.*, 46 La. Ann. 86, 14 South. 502, the defendant claimed exemption as a manufacturer of coffee, and same was sustained by the lower court; but this court reversed its judgment, and in the course of their opinion said: "The defendant corporation contends that by means of a secret, non-patented process, it is enabled to make a selection of green coffees, having the qualities required for the purpose intended,—said coffees, after being subjected to manipulation, being roasted, and allowed to cool in a particular manner,—produce certain brands of coffee, each having a recognizable taste and flavor. The defendant corporation says and insists that no chemicals of any kind are used during the secret process, and it is upon the production of its different brands of roasted coffee that it relies to be held to be 'a manufacturer of coffee.'" The court then observed that "we are satisfied that the defendant corporation does not claim that it is a manufacturer by reason of grinding coffee, and thereby changing its form," but that, on the contrary, "its claim to be a manufacturer of coffee is based wholly on the production of brands of unground roasted coffee." The opinion then cites with approval the following extract from *Hartranft v. Wiegmann*, 121 U. S. 609, 7 Sup. Ct. 1240, viz.: "We are of opinion that the shells in question here were not manufactured, and [complainants] were not manufacturers of shells. * * * They were still shells. They had not been manufactured into a new and different article, having a distinctive name, character, or use from that of a shell. The application of labor to an article, either by brand or by mechanism, does not make the article necessarily a manufactured article, within the meaning of that term as used in the tariff laws. Washing and scouring wool do not make the result a manufacture of wool. Cleansing and ginning cotton do not make the result a manufacture of cotton." The court in the principal case then said: "It is not every employment of labor which will make the thing upon which it is employed a manufacture. It has been held that the great and laborious pursuits of mining and shipbuilding are not manufacturing occupations." And upon the foregoing five cases counsel for the plaintiff relies, as well as upon those cited by the defendant's counsel.

This résumé embraces extracts from all the pertinent decisions of this court with regard to the terms "manufacturer" and "manufacture," as they are employed in the exemption articles of the constitution; and we propose

to add thereto a few extracts from the decisions of the courts of other jurisdictions, so as to make a complete consensus of judicial opinion on the question at issue.

The following cases are cited by the defendant's counsel in their brief, viz.: "In the case of *U. S. v. Semmer*, 41 Fed. 327, the court, after stating that, when certain materials found in nature are placed in a melting pot, the substance produced is crude glass, proceeds thus: 'It is a manufacture. The component materials are transformed into a new substance. Now that same glass may be, by the application of labor, transformed from the molten state, by a process of blowing and cutting, into an article which is known as cylinder or window glass, which is a manufacture of glass, because it is of a distinctive character, and has a distinctive name, and a distinctive use from the crude glass out of which it is made. And so, by a different process of manufacture, this same crude glass, when poured upon a table and pressed with a roller, becomes what is known in trade and commerce as rough or rolled cast plate glass. That, also, is a manufacture of glass. That, also, has a use, character, or name distinct from the use, character, or name of the crude glass in the crucible out of which it is made. By various processes, and by the application of a great deal of labor, this rough or rolled plate glass is eventually transformed into polished plate glass. It needs no witness to tell us that polished plate is a manufacture of glass, within the definition of the supreme court, and therefore a manufacture of glass.' Similar views are expressed by the supreme court of the United States in the recent case of *Tide-Water Oil Co. v. U. S.*, 171 U. S. 216, 18 Sup. Ct. 839. In that case the court said: 'The primary meaning of the word "manufacture" is something made by hand, as distinguished from a natural growth; but, as machinery has largely supplanted this primitive method, the word is now ordinarily used to denote an article upon the material of which labor has been expended to make the finished product. Ordinarily the article so manufactured takes a different form, or at least subserves a different purpose, from the original materials, and usually it is given a different name. Raw materials may be, and often are, subjected to successive processes of manufacture, each one of which is complete in itself, but several of which may be required to make the final product. Thus, logs are first manufactured to boards, planks, joists, scantlings, etc., and then by entirely different processes are fashioned into boxes, furniture, doors, windows, sashes, trimmings, and the thousand and one articles manufactured wholly or in part of wood. The steel spring of a watch is made ultimately from iron ore, but by a large number of processes or transformations, each successive step in which is a distinct process of manufacture, and for which the article so manufactured receives a different name.'"

The following are the cases cited by the plaintiff's counsel in their brief, viz.: Thus, in *Rex v. Tregoning*, 2 Younge & J. 132, "where a printer of calicoes was held not to be a manufacturer, it was said: 'It is contended that, for the purpose of this act, the printer is the maker and manufacturer of these goods; likening this, as I conceive, to the familiar case of the maker of a picture, who is, of course, he who spreads the colors upon the canvas which produce the impression upon the mind, and not the man upon whose canvas the picture is printed. There is, however, no resemblance whatever between the two cases. The maker and manufacturer of these goods, according to the plain sense and common understanding of these words, is he who manufactures the articles upon which the print is impressed. He who puts the stamp upon the goods is not the maker or manufacturer, within the common meaning of these words, upon the plain construction of which I have no doubt.' " Again: "In *Frazee v. Moffitt*, 20 Blatchf. 267, 18 Fed. 584, it was held that a process of baling hay was not a manufacturing; and the court said, among other things: 'Dried apples would not be called a manufactured article, though the apple is peeled and cored, and sliced, and dried by exposure to the sun and manipulation. The substance of dried apples is still apples. Change of name and manipulation do not necessarily constitute manufacture, under the meaning of section 2516.' Thus, it was held in *Com. v. Giltinan*, 64 Pa. St. 100: 'The rectifying process is not a manufacturing process. Webster says it means correcting; amending; refining by distillation; sublimation; adjusting. Rectifying distilled spirits made in another state does not constitute it spirituous liquors manufactured within this commonwealth. The spirits were not manufactured here. They were only corrected or refined in this commonwealth.' " In *U. S. v. Tenbroek*, Pet. C. C. 180, Fed. Cas. No. 16,446, "the use of a still for rectifying spirits already distilled is not the distilling of spirits, within the meaning of an internal revenue act, nor in the common understanding of mankind.' And affirming the case on appeal (*U. S. v. Tenbroek*, 2 Wheat. 247): 'The rectification or purification of spirits after their distillation has been complete, in order to fit them for certain purposes of combination with other materials, is no part of the process of distillation. The distillation of spirits, and the rectification of them after they are distilled, appear to be separate and distinct acts.'"

Considering these various expressions of opinion with regard to the term "manufacturer," what is the proper conclusion to arrive at in respect to the defendant's employment? This court said that a cooper who makes barrels and hogsheads from rough logs and splits of wood is a manufacturer, because he gave new shapes, new qualities, and new combinations to matter which had already

gone through some artificial process. It held that a rice miller is a manufacturer, because he works raw materials into wares suitable for use, and makes from the denuded grain, after several manipulations, various commercial products and substances, such as bran, flour, red grain, and the polished kernel. It held a corporation which made crackers, biscuit, and Italian paste from flour to be a manufacturer, because the raw materials were made into wares suitable for use,—new qualities being given to the raw materials by various manufacturing processes, whereby the identity of the raw material was lost; that the process by which the moisture in offal and animal matter is vaporized, and the grease and oil separated therefrom, and the residuum converted into fertilizers, is a manufacturing process. But it has held that one who purchases wet, muddy, and damaged cotton, and cleans and prepares same for sale, is not a manufacturer, because cleaning and ginning cotton do not make the result the manufacture of cotton; that one who makes ice cream from sugar, ice, milk, and other ingredients, is not a manufacturer; that one who makes bread from flour, salt, and other ingredients, is not a manufacturer; that the natural import of the term "manufacture" is to produce an article by changing the raw material into some new and useful form, and that to produce an article is not a mere addition, or mode of use of an article already manufactured; that a corporation which by a secret, nonpatented process, is enabled to make a selection of green coffee, possessing the requisite qualities for an intended purpose, after having been subjected to certain manipulations, is not a manufacturer; that one who, by the application of labor and mechanical skill, makes certain kinds of shells more polished and attractive in appearance, is not a manufacturer, because he did not manufacture them into new and different articles, having a distinctive name, character, or use from that of shells, for they remained shells still; that the washing and scouring of wool do not make the result a manufacture of wool; that mining and shipbuilding are not manufacturing occupations; that the printer of calicoes is not a manufacturer, because he does not make the goods, but only prints the colors upon them, and improves their salable value, unlike the painter, who with his brush spreads colors upon a canvas, and thereby creates a work of art, which produces a pleasing impression upon the mind, and captivates the fancy of the beholder.

The result of the evidence, as applied to the authorities, in our opinion, is that the process of refining sugar and molasses, as it is explained by the defendant's superintendent, is not a manufacturing process, and that defendant is not a manufacturer, in the general and common acceptance of that term. At its incipency, the defendant purchases on the market, or from planters, a supply of sugar in a completely manufactured state, and by

skillful manipulations, through the instrumentality of vast, elaborate, and complicated machinery, and by an application thereto of steam power and great air pressure, same is first melted, then cleansed of its impurities, then bleached and improved in color, then dried, granulated, and brought into sugar again, in exactly the same state it was when these manipulations were commenced, though greatly improved in purity and beauty of appearance, and rendered more merchantable. By this process sugar is refined in grade, improved in quality, and bettered for commercial use; but it remains sugar still, like the cotton and the shells. It is given no new name, use, shape, or combination. It is the selfsame, identical raw material, just as when first manufactured from the cane and marketed by the planter. Tax exemptions are strictly construed, and cannot be sustained except upon clear proof. Doubt is fatal to the claim.

In our former opinion we said, "There is, however, a doubt in our minds as to whether the law authorizes the state to recover, on rule, licenses for any year anterior to 1897," and consequently gave judgment only for the sum of \$3,500, as the amount of the license due by the defendant for the year 1897, with 2 per cent. per month interest from the 1st of March, 1897, and 10 per cent. attorney's fees. When, however, we granted a rehearing, that opinion was set aside, and the whole controversy set at large again; and on the resubmission of the case the counsel of both parties gave this question their attention in their briefs. We make the following quotation from the application of the defendant's counsel for a rehearing, viz.: "Third. Under these circumstances, we submit that the most satisfactory course to pursue is that the court grant a rehearing, and set the cause again for argument, as if it had never been considered, and that an oral argument be allowed on the rehearing. An oral argument is preferable, because the case is reduced to one of fact,—that is to say, whether the defendant company is a manufacturer of sugar or not; so that the oral argument can be confined by the court to the question of fact, and thus save consumption of time. This case is important, when the amount involved is considered, because, if decided against the defendant, *it will be compelled to pay the city license for the years claimed by the state in this suit, with penalties, and the excessive interest of two per cent. per month;* and in addition thereto the defendant becomes liable to pay the licenses, both state and city for the year 1898, with similar penalties, to say nothing of the claim of the state to institute a new suit for the licenses of the years disallowed in this proceeding because of the form of action, including the penalties for a delinquency, which was unintentional, because the defendant supposed it was exempt." (Our italics.) Counsel for the state cites the provisions of the license law of 1890, as follows, viz.: "That if any

business shall be conducted without a license * * * the officer whose duty it is to issue licenses, shall, through the attorney herein provided for, on motion in the proper courts * * * take a rule on the party, or parties doing such business, to show cause * * * why said party or parties should not pay the amount of the license claimed and penalties, or be ordered to cease from further pursuit of said business until after having obtained a license," etc. Act 1890, No. 150, § 18. Counsel cites the case of McGuire v. Vogh, 36 La. Ann. 812, in which this court placed the following interpretation on a similar statute of 1880, viz.: "A license could not be collected by sale of an occupation, and it is upon an occupation that the license is imposed. For that reason, doubtless, a rule is authorized to be taken on motion against the party who has not obtained his license to show cause why he shall not stop his business (Acts 1880, p. 152); and we see no reason why the rule should not also embrace the collection of the license, although it is not prescribed as the mode of collecting licenses," etc. But the legislature of 1886, doubtless recognizing the propriety of the court's suggestion in the Vogh Case, amended the license law in that respect so as to conform thereto. Act 1886, No. 101, § 17. And section 18 of Act No. 150 of 1890 is an exact reproduction thereof. In State v. Judge, 49 La. Ann. 764, 21 South. 591, this court construed and enforced the statute in question,—section 18 of Act No. 150 of 1890. In State v. Insurance Co., 43 La. Ann. 133, 8 South. 888, this court enforced provisions of Act No. 101 of 1886. In City of New Orleans v. Firemen's Ins. Co., 41 La. Ann. 1142, 7 South. 82, the plaintiff proceeded by rule under the act of 1886 to enforce the payment by the defendant of licenses for the two years, 1887 and 1888; and this court sustained the proceeding, and amended the judgment appealed from so as to give judgment for the 2 per cent. per month interest allowed by that act,—same being similar in that respect to the statute of 1890. The foregoing decisions, and the statutes they refer to, have resolved the doubt we entertained with regard to proceeding by rule for the recovery of the delinquent licenses in favor of the state for the years prior to 1897; and for that reason we are of the opinion that the state is entitled to recover judgment against the defendant and appellee for the amount of the annual license for each of the years in which the petition charges its delinquency,—that is to say, for the sum of \$3,500 for each of the years 1892, 1893, 1894, 1895, 1896, and 1897, with interest and attorney's fees and costs. It is therefore ordered and decreed that our former judgment and decree be annulled and set aside, and it is further ordered and decreed that the judgment appealed from be likewise annulled and reversed, and, proceeding to render such judgment as should have been rendered by the judge a quo, it

is adjudged and decreed that the state of Louisiana do have and recover of and from the American Sugar-Refining Company, defendant and appellee, the sum of \$3,500 for each and every one of the years 1892, 1893, 1894, 1895, 1896, and 1897, with 2 per cent. per month interest upon each of said respective amounts from the 1st day of March of each one of said years, respectively, and 10 per cent. upon the aggregate amount of said several sums, capital and interest, as attorney's fees, and all costs of both courts. The right to apply for rehearing is reserved to both parties.

(51 La. Ann. 667)

KIRK et al. v. KANSAS CITY, S. & G. RY. CO. (No. 13,042.)

(Supreme Court of Louisiana. March 20, 1899.)

RAILROADS—FAULTY CONSTRUCTION OF ROAD—
DAMAGES—COMMUTATIVE CONTRACTS.

1. An act by which landowners granted a right of way over their land to a corporation for the construction of a railroad, wherein the consideration stated was one dollar, and the advantages, benefits, and conveniences resulting from the building of the road, and the enhancement in value of their adjacent property, evidences, not a donation pure and simple, but a commutative contract.

2. While such a contract does not relieve the corporation from the affirmative continuing obligations devolving upon it from the building of the road, nor from responsibility for damages to the landowner subsequently actually accruing from its faulty construction, yet claims which would have been within and gone to make up the original damages, or compensation that would have been assessed against and paid by the company as the condition precedent to the right of way in an expropriation proceeding,—matter which must have been known, foreseen, and anticipated,—must be held to have been considered and included by the parties, as being within the consideration agreed upon when they balanced advantages and disadvantages.

3. It is the duty of a railroad company, where its road crosses a water course, or would interfere with its flow of water, or interfere with the drainage of adjacent lands, to construct the road so as not to impair its usefulness, or do injury to the owners of the lands along the route. This duty is a continuing one, and, where the road is not properly constructed, each overflow incurs new cause of action for damages.

4. A railroad company cannot, on the ground of its being a quasi public corporation, build its road so as to serve its own interest, and be permitted to do so to the injury of those who are as much entitled to the full benefit of their own property as the company is of theirs. If the exigencies of the situation should be such as to require absolutely and necessarily the building of the road in a manner which carries with it injury to other parties, the company is bound to hold them harmless from such damages; for usurpations and wrongs to private rights of property cannot be justified by considerations of benefit to commerce.

5. If the mill and mill site of the landowners have been injured by the acts of the railroad company, they would be entitled to require that it replace the property in thoroughly safe condition. It has no right to expect that the owners should advance money out of their own pockets to relieve themselves from an injurious

situation brought about by it, to which they in no way contributed.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Vernon; S. D. Read, Judge.

Action by J. I. Kirk and others against the Kansas City, Shreveport & Gulf Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Plaintiffs asked judgment against the defendant for \$6,000. The case was tried before a jury, which having returned a verdict for the plaintiffs for \$2,500, judgment was rendered accordingly, and defendant appealed.

Plaintiffs alleged that they were joint owners of certain property, which they fully described; that they had sold the defendant the right of way across the said land, consisting of a strip of 100 feet, as shown by copy of the act of sale, which they annexed to their petition; that there was situated on said land the home and family residence of J. I. Kirk, one of the plaintiffs; also a storehouse, at which he had theretofore conducted his mercantile business; also a valuable water mill, at which he had theretofore conducted his sawmill business. Petitioners further represented that, in the construction of said road, the said railway company negligently, carelessly, wantonly, and inexcusably, wrongfully, improperly, and unadvisedly, constructed said roadbed in such a manner as to greatly damage their property by reason of the manner of the construction of said roadbed. They further represented that the residence was situated about 200 feet from the mill and site, on or near the bank of the mill pond, in which water was collected for the use of the mill in running the same; that the storehouse was situated about 200 feet from the residence, and almost south of the mill house, and both of which were about 200 feet west of the residence. They further represented that their mill pond, which was very valuable, was the only place on their property where a mill pond could be constructed with a stream that afforded a constant flow of water, making it possible to operate said sawmill by water at least nine months of the year; that, with the water furnished by said stream made available by the situation of their mill pond, said mill was capable of cutting 10,000 feet of lumber a day during nine months of the year; that this amount of lumber could be cut at a very small expense, it not requiring over four hands to operate the mill, under these conditions. They also represented that, while it was not necessary to do so, said railway company wantonly, illegally, and improperly constructed its roadbed immediately across petitioners' mill pond, driving heavy piling in the construction of the same, building their roadbed immediately between the residence and the mill house, and between the residence and the store, constructing a very high embankment, closing

up all the drains across the swamp of the stream on which the mill is situated, thereby impeding the flow of water at high-water times, jarring, bursting up, and ruining the mill site by driving the enormous lot of piling near the mill house, so as to utterly destroy and ruin the present mill property as constructed, destroying the mill site for future use, and completely destroying the residence, the dwelling house, and the site on which it is situated for residence purposes, and completely destroying the business stand on account of the building of an immense embankment right at it, so that customers could not get to nor from, nor the proprietor to nor from, the mill house or the other house without crossing said embankment. They further represented that, with the construction of a railway through the parish of Vernon, the value of its water mill would be very much enhanced; that is to say, the possession of a water mill which could be operated for the purpose of sawing lumber near a railway line would become a very valuable piece of property, and that the manner in which this road was constructed utterly destroyed the present and all future value to the owners from such mill and mill site, place of residence, and place of business. Petitioners, therefore, represented that they had been damaged in the sum of \$6,000, for which they desired judgment against said railway company.

Defendant answered, pleading, first, the general issue. It admitted that it acquired the right of way through lands of plaintiffs, as described in the copy of deed annexed to plaintiffs' petition, and that the roadbed was constructed thereon. It also averred that the said road was properly located and constructed through said land, with all due regard to the topography of the country as well as the rights and interest of the plaintiffs. It denied that plaintiffs had suffered any special damage whatever from the construction of its road through said lands, or any damage of any kind, not contemplated and included in the right of way granted and conveyed by them to the railway company. And, further, it specially denied that the mill or mill site of plaintiffs was injured in any way or suffered any damage which was occasioned by any act or fault on the part of defendant, or its employes, contractors, or agents; that said mill was old, poorly constructed, of little value, and subject to washouts which had been of frequent occurrence prior to the location of construction of the railroad in its vicinity, and if any washout occurred subsequent to said location, and during the construction of the railroad, as alleged, same was due to inherent defects in the mill itself, and appurtenances, and not to any fault of defendant.

On the 26th of June, 1896, an act sous seing privé was passed between the plaintiffs and the defendant, in which the plaintiffs, for and in consideration of one dollar, and the ad-

vantages, benefits, and conveniences resulting from the building of the Kansas City, Shreveport & Gulf Railroad Company through their lands, and in further consideration of the enhancement in value of their adjoining lands by the construction of their railroad, did thereby sell, convey, and deliver unto said railroad company, its successors and assigns, the right of way over and across a certain tract of land situated in the parish of Vernon, described in the said deed; the right of way granted being 100 feet in width as then surveyed or might be located, with the privilege to the railroad company of cutting down all trees along the line of the right of way, outside of its limits, which in falling might reach the track. The right of way was declared to be given in perpetuity, so long as it should be used by said company, its successors or assigns, as a railroad company. The line of location was established by survey, and known to plaintiffs at the time the right of way deed was executed. On this tract of land was a water mill, storehouse, dwelling, and stable, etc. During the construction of the road, in January, 1897, and while piles were being driven in the mill pond, the sluiceway in which the gate was placed washed out, and also the mill foundation. The mill remained, and is still in place. The mill was a wooden structure, with similar foundation, built in 1858, and was used for ginning cotton, grinding corn, and sawing lumber. Its lumber manufacturing capacity is testified to as being from 600 to 4,000 feet a day, board measure. Its ginning and grinding capacity is not shown by the record with any degree of certainty. After the break occurred no effort was made to replace or repair the foundation, and it was, at the time of the trial, in the same condition as when the washout took place.

While the road was in course of construction, the store building was removed from the right of way, at the expense of the company, by Mr. Foster, the tenant of plaintiffs, to the place it occupied at the time of the filing of this suit, about 34 feet from the right of way. The embankment between the dwelling and store is 6 feet high, and at this point a crossing was put in at grade, with filled approaches, so as to make it an easy pull for teams. The mill is 119 feet 5 inches, and the dwelling 130 feet, from the center of the track. The mill is located on East Anacoco, about 14 miles from its source, at a point where the channel is about 300 feet wide, and the land on both sides makes what is known as a "bottom," having a width of 2,600 feet, including bed of creek. In the construction of the road it became necessary to cross this bottom or low land and creek, which was done by filling and bridging, the fill covering 1,956 feet and the bridge 644 feet. The entire mill pond and part of the low overflowed land was bridged, and the road was constructed so as to allow ample water way, according to defendant, and insufficient water way, ac-

ording to plaintiffs. The mill dam is 134 feet from the dam. At the time of the washing away of the gate in the sluiceway and the break in the foundation, there was about 7 feet of water in the pond, which, according to the testimony of plaintiffs and Foster, was not sufficient to cause the break, which they attribute to the jar caused by the driving of piles. Several breaks had previously occurred in the damaged mill foundations, some when one Dr. Payne was operating the mill, and others while it was in the possession of Foster, and as late as 1906. Foster and his son, both witnesses for plaintiffs, say that when the piling was being driven the jar could be felt in the mill, and the saw would ring at each stroke of the hammer. Knoble, the locating and constructing engineer in charge of the work, says that no damage was caused, in his judgment, on account of the construction of the road. Randall, the foreman in charge of the bridge gang at the time of the washout, says that the water was high, and the dam broke once in the night, and two or three days later it broke again at 12:30 in the daytime, the last break causing the washout of the foundation. He further says: "There was a quicksand foundation where the break occurred, and it was caused by the high water." John Franklin, one of the defendant's witnesses, testified that the mill had settled down at the northeast corner, the result of a former break in the dam. In describing the mill, Knoble says: "It was a small, primitive mill, operated by water power collected in a pond just above the mill. The total cost of construction probably was five hundred dollars when first constructed, covering both mill and dam." The value of the property testified to by the witnesses ranges from \$1,000 to \$5,000 at the time of the construction of the road, and \$500 after the washout. Plaintiffs and all of their witnesses fixed the value of the property, as an entirety, previous to the washout, at from \$2,500 to \$5,000, and after the break at \$500. T. O. Wingate, who had been for several years assessor, said that a fair valuation before the break would have been \$1,000, and that, if the dam and mill were repaired, it would be worth as much as before the railroad was built. J. P. Cain, also one of defendant's witnesses, testified that the reason that the mill was no longer valuable was because it was no longer profitable to operate it in competition with the large sawmills along the line of the railroad.

Tallaferro Alexander and Pujo & Moss, for appellant. Scarborough & Carver, for appellees.

NICHOLLS, C. J. (after stating the facts). While the plaintiffs in their pleadings describe the deed between themselves and the defendant as an act of sale, they maintain in their brief that such is not its character; that, to have made it such, it would have been necessary that there should have been a price in

money, and that the price should have been serious and in proportion to the value of the thing sold; that otherwise it would be considered a donation,—citing, in support of this position, Rev. Civ. Code, art. 2454; Allen v. Buisson, 35 La. Ann. 108; Groebel v. Ristroph, Id. 490; Barrow v. Wilson, 39 La. Ann. 410, 2 South. 809. They further contend that the right granted was a "mere floating permit to enter and locate a right of way"; that, to constitute a sale, the thing sold must be definite, or the act would be void for uncertainty,—quoting Pargoud v. Pace, 10 La. Ann. 613; Green v. Witherspoon, 37 La. Ann. 751; 1 Wood, R. R. (Ed. 1894) §§ 208-211. They insist that the deed was "a donation in disguise,"—in reality, a donation. Starting from this premise, they argue that where a citizen, out of a spirit of liberality, has seen fit to generously donate the right of way, requiring no compensation for the land taken, he does not lose any of his rights other than the right to demand compensation for the land actually taken; that in other respects the rights of the parties are just as they would be if a formal proceeding for the expropriation of the property had been instituted by the railway company. They refer the court on this subject to Stodghill v. Railway Co., 14 Am. Ry. Rep. 398; 1 Wood, R. R. (Ed. 1894) §§ 208-211; Bourdier v. Railroad Co., 35 La. Ann. 947; Railroad Co. v. Dillard, Id. 1045; Railway Co. v. Murrell, 36 La. Ann. 346; Payne v. Steamship Co., 38 La. Ann. 164.

Assuming this position to be correct, and that they occupy to-day precisely the same position which they would have occupied had no deed been passed between the parties (except as to nonliability by the railway company for the price of the land actually granted for the right of way), plaintiffs charge that the railway company, in locating the right of way, adopted that one of the three surveys which it had caused to be made which was most injurious to them; that the injury to them was so great that it practically destroyed the mill property and mill site; that the special use of the property as a mill and mill site was its chief, and almost exclusive, use; and that for this destruction the defendant company is liable.

In arguing as to the duties of railway companies in making the works necessary for the construction of their roads on lands legally expropriated, they say that this court has repeatedly announced as a rule of law that a railroad company, in enforcing its right of way over the lands of others, and in constructing its road, should leave the adjoining lands and fields which it crosses in the same condition, as regards the facilities of cultivation and as concerns the utility of these lands to their owners, as they were before the entry of the railroad company; that a railroad which constructs an embankment on the lands of a planter, and thereby stops up his ditches and other artificial drains, is responsible to such owner for all losses of crops and other damage

occasioned by such interruption of his drainage; that in obtaining the right of way a railroad company does not thereby obtain the right to divert the water from its natural flow to the injury of the landowner. They say that these views are in accord with those of the supreme courts of other states and of text writers, as would appear from examination of 3 Elliott, R. R. § 1005; 1 Wood, R. R. (Ed. 1894) p. 698; Id. §§ 208-211; 14 Am. Ry. Rep. 398; Fowle v. Northampton Co., 112 Mass. 334; Railroad Co. v. Keith, 53 Ga. 178; Railway Co. v. Gilleland, 56 Pa. St. 445; 1 Wood, R. R. (Ed. 1894) §§ 213, 214, 218-220; Hatch v. Railroad Co., 25 Vt. 49.

There can be no doubt that a railroad is not authorized, by reason of having obtained a right of way, to subsequently construct its works without reference to the rights of others, nor at liberty to consult simply its own interests, to the injury of the owners of the land expropriated. The decisions of this court, cited by the plaintiffs, command our approval, and would serve us as guides, under a proper state of facts; but we think they are not applicable, under those disclosed by this record.

We do not accept as correct the broad proposition advanced by the plaintiffs, that they occupied, after the execution of the deed between themselves and the defendant, the same position which they would have occupied had that deed not been passed, and the present suit were one by the present defendant, asking, as a plaintiff, an expropriation of the right of way, with the present plaintiffs, as defendants, advancing against the railroad all claims which the situation would warrant or justify it in making in order to fix the amount it would be entitled to receive as compensation for the right of way. We could not reach such a result without disregarding the conventional agreement made between the parties. The deed may not be technically a sale, but it is not a donation, pure and simple, nor a disguised donation. The parties were dealing with each other with reference to a matter in which they each had an interest, and as to which each had the capacity to contract. There is no charge that there was any error, fraud, or misconception as to what each was agreeing to. They measured each other's advantages and disadvantages, and the deed between the parties, as it stands, evidences a commutative contract, where what is done, given, or promised by one party is considered an equivalent to, or a consideration for, what is done, given, or promised by the other. Rev. Civ. Code, art. 1768.

How can it be asserted that the act evidences a mere donation, pure and simple, by the plaintiffs to the defendant, when they declare the consideration of the grant of the right of way to be, not only the one dollar mentioned therein, but the advantages and conveniences to be derived by the plaintiffs from the construction of the railroad and the enhancement of the value of their adjacent property? True, their expectations on

this subject may not only not have been realized, but the building of the road may have, on the contrary, resulted in great injury to their interests; but that fact does not alter the character of the deed. If there be a valid existing cause for a contract, it is immaterial that it should not fall under some contract particularly named or classified in the Code. Rev. Civ. Code, art. 1777; *Helluin v. Minor*, 12 La. Ann. 124. It is evident that if, the railroad company being plaintiff in an expropriation proceeding for a right of way over the lands of the present plaintiffs, the parties, pending the suit, should have drawn up an agreement couched in the identical language of the deed filed in this case, and the defendant in the suit should have consented that judgment be rendered in favor of plaintiffs according to the terms of the agreement, and judgment should have been rendered in the case, the railroad company would have been decreed the right of way, without any moneyed judgment against it. Could it be claimed that thereafter the owners of the land, without any damage having been subsequently actually sustained, could bring suit against the company for compensation for claims which might legitimately have been urged by them as the compensation for, or as the price of, the right of way? We think not. Claims which would have been within, and would have gone to make up, the original damages or compensation that would have been assessed against, and paid by, the railroad company, as the condition precedent to the condemnation of the right of way in an expropriation proceeding, must be held to have been considered and included by the parties, as being within the consideration agreed upon when they balanced advantages and disadvantages. 3 Elliott, R. R. § 937, p. 1300; Lewis, Em. Dom. § 567, and authorities; 1 Wood, R. R. (Ed. 1894) p. 698. Would the situation when a "judgment" has been rendered, resting upon the deed as a basis, be different from that which would exist where no judgment has been rendered, and the parties stand upon the deed itself? We are of the opinion that it would not. The judgment would have rested exclusively upon the rights and obligations fixed in the deed itself. The decree would neither have restrained nor broadened them. If so, the parties stand, without the judgment, precisely where they would with it. The plaintiffs cannot say that the line of the right of way was uncertain,—not fixed. The deed refers to the right of way as to be either on the line of the survey then made or on the line which might thereafter be located. There was no objection made to the location of the road, either at the time or since. If, however, the place for the exercise of the servitude had not been fixed in the deed of the right of way, the owners were bound to have fixed the place where they wished it to be exercised. Rev. Civ. Code, art. 779. It is too late for them to complain of the location after they have stood by and seen the road constructed

without complaint. *Patout v. Lewis*, 51 La. Ann. —, 25 South. 134.

Plaintiffs' claims (urged through the testimony) that the road had separated the buildings upon their property; that the residence was so near the embankment, and the latter so high, as to greatly disfigure the place and interfere with the comfort of the occupants; that the store was so close to the embankment as to frighten the horses of the parties dealing at the same; that the water in the trenches dug along the line for the fillings was calculated to breed disease; that the stock upon the property was liable to be killed by going upon the track,—have no merit in them. The company paid the tenant himself upon the place for the removal of the store from one side of the embankment to the other side, and there is nothing to show that it was not placed precisely where the parties desired it to be placed. It further constructed a road to and over the embankment, so as to enable the owners to have free communication between the different parts of the property. No stock has been shown to have ever been killed on the track, nor any disease to have been engendered by standing water.

We were under the impression, from plaintiffs' pleadings, that they would attempt on the trial to show that the washing out of the foundations of the mill while the railroad was in process of construction was due to the fact that the company, instead of carrying a trestlework over the entire flat bottom lying near the mill, as they claimed should have been done, had done so only partially, and thrown a solid embankment up along the balance of the way; that, by reason of this embankment, the escaping, overflowing creek waters had been backed up therefrom, the foundations of the mill had been washed out, and the mill itself destroyed. Instead of this, the testimony of the plaintiffs went to show an entirely different cause for the washing out of the mill's foundations. According to the plaintiffs' witnesses, the officers and employees of the defendant drove large pilings into the ground, with heavy pile drivers, in near proximity to the mill. This caused such violent vibrations that they reached the mill, shaking out a small portion of its foundations, and the waters rushed out, destroying the remainder or a large part thereof. Defendant, on the other hand, attributes the washing out to the fact that Foster, the tenant of the plaintiffs, had raised the dam two feet higher while the pile driving was going on, and the water was higher (though not on account of any freshet) than it was usually. Ransdell, the engineer of the company, testified that the natural flow of the water was not changed, but there was simply more pressure against the dam; that the mill foundations were bad. It would be exceedingly difficult for us to decide which of the two theories as to the cause of the accident is correct, for each is plausible. We are not called on to

do so, for the reason that, whether it be one or the other, the record does not, under our view of the evidence as it stands, disclose any proper basis for a present moneyed judgment in favor of the plaintiffs on that particular score. Instead of making the washing out of the foundations of the mill the subject of a substantive, specific claim for the damages occasioned thereby, showing the amount required to replace matters as they were, and what the amount of profits were which were lost during a reasonable time within which repairs should have been made after the break, the plaintiffs have merely sought to avail themselves of the washout as a fact tending to show the destruction or ruin of the mill site itself as a future place of business. Had plaintiffs' demand been one for damages to the mill, and had the amount of the same been shown, as also the fact that they were caused by the acts of the defendant company, the situation would have been different from what it is. We do not give to the fact itself of the washout the probative force, for the purpose for which it is sought to be utilized, which the plaintiffs, the jury, and the district judge have given to it. The testimony, we think, negatives the idea that the break was occasioned by water backed up by reason of a solid embankment having been placed where there should have been a trestle.

There was no evidence to show that at the time of the washout the condition of the waters around the mill had been in any way made more dangerous by the construction of the railroad. On the contrary, the water was not then at a high stage, although Foster seems to have held it himself higher than there was any necessity for. If the break was occasioned, as Foster and other plaintiffs declared it was, by the violent vibrations of the earth caused by blows of the heavy pile driver upon piles driven by the defendant company into it, that particular cause of danger will be eliminated for the future, as the necessity for such driving of piles will no longer exist. Plaintiffs' theory is that the worthlessness of the mill site, as such, for future time, by the improper construction of the railroad, is an absolute, present, existing fact, and that, this being the case, they are authorized to claim and show the amount of damage which they have sustained by that fact. This they have sought to show by establishing the value of the tract of land, including the mill site, just before the break, and comparing it with the present value. We do not think that the worthlessness of the mill site, as such, for future time, by reason of the improper construction of the railroad, has been shown to be an absolute, present, existing fact. There does not seem to have been, up to the time of the rendering of the judgment, any testing as to what effect the construction of the road as made would have, as a permanency, on the mill site. It has not been shown that the water has ever been since the building of the road as high as 14

feet in the mill pond,—a height which it had sometimes reached before the construction of the embankment without the mill's washing out,—nor shown that it had since that time ever been so high in the bottom lands as to cause a horse to swim there, as Foster says he had seen it before then. The strongest evidence in the case, in respect to an injurious effect of the construction of the road upon the mill and mill site, is found in the answer of Knoble, the engineer of the defendant, to the sixteenth cross interrogatory propounded to him, in which he was asked whether he considered that the old mill site was then as good for mill purposes as it ever was; that is, whether it had or had not been at all interfered with by the construction of the road. His reply was: "In time of very high water, it would require a stronger constructed building to withstand pressure of water at old mill site, as all the water which passed over low bottom north would have to pass under mill and sluiceway now. However, by making proper arrangements, this additional amount of water could be taken care of. If this was properly done, I consider the old mill site, under present conditions, more valuable than before road was constructed, as at times more water could be accumulated, and consequently more power could be had. The mill washed out last time with a rise of 8 inches in the channel. The low bottom north was not covered by water at all. A great deal larger body of water had collected many times, and passed under the mill, as creek was not full in banks when washout took place." Wingate, one of defendant's witnesses, testified upon the same subject as follows: "Q. Have you had occasion to be up there [at the Kirk Mill] during high water? A. I have been there when the creek was high. Q. Were you ever there when the swamp was overflowed to such a depth as to swim a horse? A. No, sir. Q. Your judgment, then, of the filling of two-thirds of the distance across that swamp does not interfere with the overflow to the extent of interfering with the mill purposes and operations? A. I do not consider it would interfere very much, for the reason that there is a slough on the other side of the mill, which has been filled up by the dump on the right of way; but at the same time there was a levee put across the mouth of this slough, emptying into the creek below the mill, and which I suppose was put there to hold the head water. By the Court: Do you mean that the making of the embankment there across the lowlands on the other side does not affect the condition of the mill site, for the reason that the slough which runs out and empties into the creek dams up a part of the year? A. That is it; I do not consider that it would interfere with the flow of the water. It would make a small difference, but not a material difference. Q. By Counsel: Not even if overflowed across the bottom on the other side to a sufficient depth to swim a horse? A. Not in my opinion; it would not overflow

where the mill is deep enough to swim a horse. Should it do so, it would, as a matter of course, make a difference." It may be that events in the future may develop as a fact that the mill site has been destroyed by the construction of the road, but that condition of things has not been shown by anything which has occurred up to the present time. If that fact should be developed by future events, plaintiffs will then have their remedy. We cannot act by anticipation and on possibilities, or even on probabilities. We do not think matters are in a condition to warrant us in dealing with the situation from the standpoint which plaintiffs urge us to view it from.

When we refer to the destruction of the mill site as a place of business by the construction of the road, we mean, of course, an improper construction of the road; for consequential damages resulting from the mere fact of the building of a railroad in the neighborhood would furnish no basis whatever for a demand against the defendant by the plaintiffs to recoup them for losses of that character. We are inclined to think that the witnesses who referred to the value of plaintiffs' property, as having at present a value of \$500 or \$600, as against a prior value of \$2,500 or \$4,000, had in their minds a falling off in value for just such reasons. Estimates made from that standpoint cannot be accepted. It is no unusual circumstance for persons living along the line of a projected railroad to entertain most exaggerated ideas as to the advantages which they will receive by reason of the building of the road. On the strength of such belief, they subscribe for stock, and grant rights of way, only to wake up later to a realization that, so far from being benefited, they have lost their land, their money, and their business. As against unexpected results of that character, however disastrous, the railroad company is not a warrantor. We question very much whether the value of the Kirk property would be very materially altered, even if the mill were replaced and put into such condition as to effectually withstand all possible pressure which could be brought to bear against it; certainly not to the extent claimed by the plaintiffs. The water mill would be there, it is true, and in good condition; but whether it would or could be operated so as to make it remunerative, and to make the mill site a factor in increasing, to any extent, the value of the property, is problematical, in view of the number of the large steam mills, controlled by large capital, which have recently sprung up in the parish of Vernon, on or near the line of the road of the defendant company.

Plaintiffs' counsel have, with ability and industry, collated a large number of decisions touching the rights of landowners along the line of a railroad where property has been injured by the interference by the railroad with the flow of natural streams and the responsibility by the companies for so doing. We do not question the correctness of the prin-

ciples announced in them, when proper existing conditions of fact call for the application to them. We recognize it to be the duty of a railroad company, where it crosses a water course, or would interfere with its flow of water, or interfere with the drainage of adjacent lands, to construct the road so as not to impair its usefulness or do injury to the owners of the lands along the route; that this duty is a continuing one; that, where the road is not properly constructed, each overflow incurs new cause of action for damages. *Railway Co. v. Thillman*, 43 Ill. App. 78. We repudiate the idea that a railroad company, on the ground of its being a quasi public corporation, acting for the public benefit, can build its road as to serve its own interests, and can be permitted to do so to the injury of those who are as much entitled to the full benefit of their own property as the railroad company is of theirs. We hold that, if the exigencies of the situation should be such as to require absolutely and necessarily the building of a road in a manner which carries with it injury to other parties, the company is bound to hold them harmless from such damage; for we hold now, as we did in *Bruning v. Banking Co.*, 12 La. Ann. 541, that usurpations and wrongs to private rights of property cannot be justified by any considerations of benefit to commerce. If the mill and mill site have, in point of fact, been injured by the acts of the defendant company, we think plaintiffs would be entitled to require that the defendant itself place their property in thoroughly safe condition; this, whether they be poor or whether they be rich. The railroad company has no right to expect that the plaintiffs should advance money out of their pockets to relieve themselves from an injurious situation, brought on by the defendant, to which they in no way contributed. Under our equity powers, we could see that the defendant do justice.

As matters stand, the verdict of the jury, and the judgment of the court thereon rendered, and appealed from herein, cannot be sustained. Plaintiffs' suit must be dismissed as of nonsuit, and without prejudice. For the reasons assigned, it is ordered, adjudged, and decreed that the verdict of the jury be set aside, and the judgment of the court therein rendered, and herein appealed from, is annulled, avoided, and reversed, and plaintiffs' suit is dismissed as of nonsuit, and without prejudice.

BLANCHARD, J., takes no part, having been of counsel.

(51 La. Ann. 661)

KIRK et al. v. KANSAS CITY, S. & G. RY. CO. (No. 13,044.)

(Supreme Court of Louisiana. March 20, 1899.)

RAILROADS—FARM CROSSINGS—DAMAGES.

1. This case is controlled by the principles announced in *Kirk v. Railway Co.* (No. 13,042; decided at the same time) 25 South. 457.

2. A railroad company must construct, at its

own cost, necessary crossings over its roadbed, so as to enable owners whose lands have been separated by the same to have access from one part to the other. The failure of the landowner, in granting the right of way, to stipulate that such crossings should be constructed, does not impair his right to have the same made. *Heath v. Railway Co.*, 37 La. Ann. 728.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Vernon; Robert R. Reid, Judge.

Action by Mrs. Jane Kirk and others against the Kansas City, Shreveport & Gulf Railway Company. Judgment for plaintiffs, and defendant appeals. Reversed.

The plaintiffs asked judgment against the defendant for \$2,300. The case was tried by a jury, which returned a verdict in favor of the plaintiffs for \$300, and judgment was rendered accordingly. Defendant appealed.

Plaintiffs alleged that they were joint owners of certain property described in their petition; that they sold to defendant a right of way over said land, consisting of a strip 100 feet wide, as would appear from a copy of the act of sale annexed to their petition; that the defendant had since constructed its road through the land described; that in doing so they had damaged petitioners' property in the sum set out; that they had destroyed the residence site of said place by building an immense embankment through, over, and near said residence, so as to completely destroy the value of the residence, and the site on which the residence was situated; that they had constructed their roadbed between the residence and the farm and pasture lands belonging to the property, so as to render its use almost worthless to petitioners; that the construction of said roadbed in such place was ill advised, unnecessary, and unlawful and unauthorized, interfering with petitioners' right of property, and an inexcusable destruction of values, the same having been constructed at a point where it caused the greatest possible damage that it could have done, expressly violative of the law made for the protection of petitioners in their right of property. Defendant answered (pleading, first, the general issue): (1) They admitted that they had purchased the right of way through lands of plaintiffs, as described in the copy of deed annexed to plaintiffs' petition, and that the roadbed was constructed thereon. (2) They averred that their roadbed was properly located and constructed through said land, with all due regard to the topography of the country, as well as the rights and interest of the plaintiffs. (3) They denied that plaintiffs had suffered any special damages whatever from the construction of their road through said land, or any damage of any kind, not contemplated and included in the right of way granted and conveyed by them to the railway company.

Tallaferro Alexander and Pujo & Moss, for appellant. Scarborough & Carver, for appellees.

NICHOLLS, C. J. (after stating the facts). The principles which controlled the case of *Kirk v. Railway Co.* (No. 18,042; recently decided by this court) 25 South. 457, control this one also. Defendant is operating a railroad over a right of way granted by the plaintiffs in a deed identical in terms, except as to property, with that granted to it by the plaintiffs in the former suit. The line was located, and the road constructed, without opposition from the plaintiffs. They now seek to claim damages from the defendant, on the ground that it threw up in front of their residence a high embankment, so close to the same as to render it uncomfortable, disfigure the property, and diminish its value; on the further ground that the railroad embankment cut the pasture land off from the main portion of the tract, making access to the same inconvenient and burdensome. Several witnesses testified that defendant had dug trenches on its right of way, in order to make the embankment in which water was permitted to stand, tending to the prejudice of the health of the place, and that their stock was liable to stray upon the track and be killed there. The plaintiff Mrs. Jane Kirk is the mother of the co-plaintiffs J. I. Kirk and Amos A. Kirk. The sons own the property adjoining that referred to in the present litigation. The railroad embankment fronts both places. It is quite high on this particular property, but gradually lowers, and reaches the level of the surrounding land before it leaves the place. The defendant company constructed a crossway over the embankment on the J. I. and Amos Kirk tract, so as to connect the two parts into which that property was divided by defendant's right of way. Plaintiffs could, therefore, reach their pasture land, by going a short distance either to the right or to the left of the residence. There is nothing to show that they demanded that defendant should construct a crossing over the embankment on their tract, if one was needed for their convenience. They were entitled to have exacted such a crossing, and, had it been applied for, it would have been defendant's duty, at its cost, to have furnished it. They have not lost that right. *Heath v. Railway Co.*, 37 La. Ann. 728. The claims for damages, as set up by the plaintiffs, are for matters which must have been known, foreseen, and anticipated by the parties at the time the deed between them was executed. For the same reasons which we assigned in *Kirk v. Railway Co.*, supra, they must be disallowed. It is hereby ordered, adjudged, and decreed that the verdict of the jury be set aside, and the judgment thereon rendered, and herein appealed from, be, and the same is hereby, annulled, avoided, and reversed, and plaintiffs' demand be, and the same is, dismissed.

BLANCHARD, J., takes no part, having been of counsel.

(51 La. Ann. 752)

SCHWAN & CO., Limited, v. FORGEY et al.
(No. 13,153.)

(Supreme Court of Louisiana. April 11, 1899.)
SUPREME COURT—REVIEW OF DECISIONS OF COURT
OF APPEALS.

The power vested by Const. art. 101, in the supreme court, to review the judgments of the court of appeals, will not be exercised because a judgment dissolving plaintiff's injunction gave damages when there was no basis therefor, where plaintiff made no attempt to have the error rectified by an application for a new trial or an amendment of the judgment, and the error involved only \$25.

Action by V. Schwan & Co., Limited, against I. J. Forgey and others. Application by V. Schwan & Co., Limited, for certiorari or writ of review to the court of appeals, Third circuit. Denied.

Andrew Thorpe and Thomas H. Thorpe, for applicant.

NICHOLLS, C. J. We do not think this case calls for the exercise of the powers vested by article 101 of the constitution in the supreme court, to have the judgment of the court of appeals reviewed. It presents no exceptional features calling for action on our part. The principal ground of complaint seems to be that portion of the judgment which dissolves plaintiff's injunction, with damages. It is claimed that there was no basis for damages, as the injunction was never made operative or enforced. Plaintiff made no attempt to have this error (if error it was) rectified by an application for a new trial or an amendment of judgment. This complaint involved only \$25, and plaintiff should at least have sought relief on rehearing.

(51 La. Ann. 909)

STATE ex rel. SEATON v. NEW ORLEANS
& C. R. CO. (No. 12,930.)

(Supreme Court of Louisiana. April 3, 1899.)
MANDAMUS—DELIVERY OF STOCK CERTIFICATE—
SECURITY.

1. Action by mandamus to compel delivery of certificate of stock to alleged owner.

2. Resisted because former certificate by predecessor company, in lieu of which the certificate claimed was issued, is not produced and surrendered for cancellation.

3. Willingness expressed, however, to deliver if security is given to indemnify against appearance of old certificate.

4. *Held* not a case for the application of that part of Rev. Civ. Code, art. 2279, which authorizes the court, "in case circumstances render it necessary," to order security.

5. *Held*, further, that respondent company may with safety deliver up the certificate without security.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frederick D. King, Judge.

Application by the state, on the relation of Walter Seaton, for writ of mandamus against the New Orleans & Carrollton Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

25 So.—30

Dart & Kernan, for appellant. Walter B. Sommerville, for appellee.

BLANCHARD, J. The single question presented is whether, under the facts disclosed by the record, the relator is entitled to obtain possession of certificate No. 134, for 41 shares of the capital stock of the respondent company, which certificate was duly executed to him, or in his name, by respondent, on the 10th of February, 1883, but never delivered to him. Since that date it has remained in the possession of respondent company, though the dividends on the stock have been regularly paid, all these years, to the relator. The reason averred by respondent for nondelivery of the certificate is that relator could not produce and deliver for cancellation certificate No. 1,537, for a like number of shares of stock, which had been issued by the former New Orleans & Carrollton Railroad Company. Relator could not produce and surrender certificate No. 1,537, aforesaid, because, he says, the same was destroyed by fire in 1882. The present New Orleans & Carrollton Railroad Company (respondent herein) is the successor of the former corporation of that name. The charter of the latter (the old company) expired in 1883, and thereafter all its rights, assets, property, etc., became vested in the new corporation, organized in 1882, which continued the business of the old. The relator was, at the time of this transfer, the owner of certificate No. 1,537 in the old company, and under the convention between the two corporations, by which the new absorbed the old and became its successor, he was entitled to the same number of shares in the new that he held in the old corporation. Before, however, he could demand the delivery to him of his stock in the new company, he was required to surrender for cancellation his stock in the old company. As he could not do this, the new company retained possession of his stock, though recognizing him as the owner thereof. If at any time he had produced and surrendered the certificate issued by the old company, the new company would have delivered the certificate issued by it to replace the former. This condition of affairs has continued from 1882 down to this time. In 1898, relator advertised in the public press the loss of certificate No. 1,537, and through the same medium gave notice that application had been made for a new certificate. It appears from the evidence that no one other than relator has ever appeared as claimant of the certificate of stock; no one has ever demanded payment of dividends; no one has ever given notice of possession or ownership of the certificate issued by the former company, nor that held by the present company in the name of relator. Sixteen or seventeen years have now elapsed since the organization of the present respondent corporation, since the alleged destruction by fire of certificate No. 1,537 of the old company, and since the execution, in the name of relator, of cer-

tificate No. 134 of the present company. Surely, if there existed outstanding, valid, adverse rights to those claimed by relator, the same would, ere this, have been asserted. To the proceeding by mandamus to compel delivery of the certificate, respondent company admits that it stands on its books in his name, that it was issued in his name, and that the company has possession of it. It claims, however, it cannot safely surrender the certificate until return is made of the old certificate, that it does not know the old certificate is lost or destroyed, and that in any event it is entitled to security against the appearance of the old certificate in the hands of innocent third holders. The judgment below directed the delivery of the certificate to relator. The trial judge did not consider that the circumstances justified the demand of respondent for security. The latter appeals.

It is apparent that the respondent company believes the relator to be entitled to the certificate, but, through abundant caution, looking to its own safety in the premises, wants either security holding it harmless against the possible reappearance of the old certificate, or else the judgment of the court that it may with safety deliver it up without security. It is taking no chances. It is evidently acting upon wise and prudent counsel. Like our brother of the district court, we do not think this a case for the application of that part of Rev. Civ. Code, art. 2279, which authorizes the court, "in case circumstances render it necessary," to order security to be given to indemnify against the appearance of the missing certificate. We consider its destruction by fire reasonably established. But, if not destroyed, the fact remains that it was issued in the name of relator. He testifies he never parted with its ownership; that it was never indorsed by him in blank, or otherwise, for pledge or transfer; and it is certain that no demand from any one has been made in all the 16 years for transfer on the books to another claiming rights adverse to those set up by him. If any third person holds the missing certificate, he has slept on his rights, and after this long lapse of time would hardly be listened to in a court of justice to assert rights of ownership or pledge antagonistic to those claimed herein. Judgment affirmed.

MONROE, J., takes no part, as he was not a member of the court when this case was heard.

(51 La. Ann. 511)

HARPER et al. v. CITIZENS' BANK OF LOUISIANA et al. (No. 12,720).¹
(Supreme Court of Louisiana. Jan. 9, 1899.)

CONTRACTS—CONSTRUCTION—SALES.

1. Decision of the case involves the interpretation of an explanatory agreement, or counter

letter, as affecting or controlling a contemporaneous act of sale.

2. What is doubtful in an agreement is to be interpreted against him who has contracted the obligation.

3. A sale with the right of redemption is none the less a real sale. After the lapse of the redemptory period without the exercise of the equity of redemption, the conveyance is as complete and absolute as though the right had not been reserved.

4. For a right to be destructible by a condition, such condition must be expressed with clearness and precision.

Nicholls, C. J., and Miller, J., dissenting.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Nicholas H. Rightor, Judge.

Action by Mrs. Charles W. Harper and another against the Citizens' Bank of Louisiana and another. A judgment was rendered, from which the Citizens' Bank appeals. Modified.

Branch K. Miller, for appellant. James McConnell, for appellee State Nat. Bank. James Wilkinson and E. Howard McCaleb, for other appellees.

BLANCHARD, J. In 1892 a small sugar plantation in the parish of St. Bernard, known as "Creedmoor," was owned jointly by plaintiffs and defendants; that is to say, Mrs. Charles W. Harper (then the widow of W. P. Green) and Mrs. Charles H. Stewart, plaintiffs, owned an undivided half, in the proportion of two-thirds to the former and one-third to the latter; and the Citizens' Bank of Louisiana and the State National Bank of New Orleans, defendants, owned equally the other undivided half. The banks were the holders of eight notes, each for \$1,000, with 8 per cent. interest thereon, drawn by Mrs. Green and Mrs. Stewart, and secured by special mortgage on their interest in the plantation. The aggregate of this indebtedness, principal and interest, on the 21st of June, 1892, was \$8,825.55, and the same was past due and unpaid. The banks were pressing for payment, and the debtors stood in danger of the institution of foreclosure proceedings against the mortgaged property. The cultivation of a crop of cane on the plantation was then under way for the year 1892, for the joint account. It would seem, of the owners thereof, and some advances for conducting the planting operations had been made, procured through the credit of the banks. It was figured that, besides the indebtedness on the notes as aforesaid, Mrs. Green and Mrs. Stewart owed the banks at the date mentioned (June 21, 1892), on account of advances to the plantation, the further sum of \$704.26, making at that date a total of \$9,029.81 due the banks. To settle this indebtedness, the plaintiffs agreed to sell and convey to the banks their interest in the plantation, and, accordingly, an act of sale was executed carrying the agreement into effect. This sale, by its terms, purports an absolute conveyance of the property to defendants for the price and sum of \$9,029.81. It was duly registered in the conveyance records of the parish, and the

¹ Rehearing denied February 20, 1899.

banks entered upon full ownership and possession. On the same day, June 21st, this act of sale was executed, the parties entered into another agreement or contract, styled in plaintiffs' petition and in the briefs a "Counter Letter." No reference whatever to the same was made in the act of conveyance. This contemporaneous writing recites the sale made by plaintiffs of their interest in the plantation to defendants, declaring, in that connection, that "the said banks now own the whole of said plantation." Then it stipulates that the banks, having assumed and taken charge of the place, are to cultivate the same so as to make a crop of sugar and molasses thereon during the then year 1892, advancing the necessary funds for the purpose, with the proviso added that Mrs. Green was to approve all orders or drafts for necessary expenditures. This is followed by a clause setting forth that the right and privilege of redeeming and buying back the property was given to the vendors, which right was to continue in force up to the 1st of February, 1893, and the price at which they were to buy back was stipulated to be the same they had sold the property for, with 8 per cent. interest thereon from that date, and the payment to the banks of any balance that may be due them on account of advances made to cultivate the crop left after the sale of the crop. And then is added, with only a semicolon separating the same from the preceding part of the clause, these important words: "And the said Mrs. Green and Mrs. Stewart will have one-half of the profits of said plantation credited to them in case the place makes any profits this year." Following this is a paragraph reciting that, in case plaintiffs did not redeem the property as stipulated for within the time fixed, the plantation was to sold at public auction on or about the 15th of February, 1893, after 15 days' advertisement, on the terms of one-third cash, the remainder in one, two, and three years, with retention of mortgage and vendor's privilege, etc. The next and last clause declares that, inasmuch as the only object of the banks in acquiring the property was to secure the debt due them, it is agreed that, in case the property sold for such a price that the undivided half which plaintiffs had conveyed brought a sum in excess of what the banks had paid them for it, with 8 per cent. interest from the date of conveyance, such excess or surplus, plus one-half of the profits, if any, made on the place during the year, or minus one-half of the losses, if there be losses, was to be paid over to them. The plantation was cultivated by the banks, and the crop of sugar and molasses taken off at the end of the year. This sugar and molasses was sold, and the bounty due thereon under the act of congress collected. A statement of account was then made up. This is styled, "Creedmoor Plantation Crop Account of 1892, in a/c with the Citizens' Bank of Louisiana and the State National Bank of New Orleans." It showed the debts of the plantation, its expenditures during the year, and exhibited its credits, and

the sums realized by sale of crops and from bounty collections. The result of the year's business was a profit of \$2,256.05, as shown by this account. The limit of time fixed in the counter letter for the redemption of the sale by plaintiffs expired without the exercise of the right. Whereupon the plantation (the whole of it) was duly advertised for sale, as agreed on in the counter letter, and offered at public auction. At this offering it brought \$8,000, and was knocked down to the defendant banks. Some time later this action was brought by Mrs. Green and Mrs. Stewart to enforce a demand for \$4,430.24 alleged to be due them, under the terms of the counter letter, as their share of profits averred to have been made on the Creedmoor plantation in 1892.

The contention is that the account kept by defendants against the plantation for the crop year 1892 should commence only at the date of the sale of plaintiffs' half interest in the property to defendants, for the reason that by said sale and conveyance all indebtedness then due by plaintiffs to defendants, whether by note or on account of previous advances made to the place, was settled. So, it is averred, there should be deducted from the account all items of expenditure, charged thereon prior to June 21, 1892, the date of the sale, and certain other items, and, this done, the account would show a profit to the plantation of \$8,860.48, one-half of which is represented to be due plaintiffs, for which judgment is demanded. The banks do not agree in their defense. The Citizens' Bank avers that no profits were made, as a matter of fact, on the Creedmoor plantation in 1892, and that, if there were any made, plaintiffs are entitled to no share therein because of the fact that they did not redeem and buy back the plantation within the redemptory period; the exercise of such right of redemption being the condition upon the happening or consummation of which only could they claim participation in the profits. The State National Bank takes the position that, as shown by the explanatory agreement or counter letter, the only object the banks had in acquiring plaintiffs' half interest in the plantation was to secure the debt due the banks; that plaintiffs failed to exercise the equity of redemption as stipulated for; that thereupon the property was offered at public auction, as directed in the counter letter, and adjudicated to the banks for \$8,000; and that the net proceeds of the crop of 1892, shown on the account kept by the banks with the plantation to have been \$2,256.05, in which plaintiffs claim to have had a contingent interest, were entirely absorbed and extinguished by the indebtedness due the banks.

It will be thus seen that the position of the first-named bank is: (a) No profits to be divided; (b) if profits, plaintiffs lost the right of sharing therein by the failure to redeem the sale. That of the other defendant bank is, virtually, that there were, it is true, profits,

but plaintiffs are entitled to no share therein, because, having failed to redeem, the property was sold at auction for only \$8,000, one-half of which, or \$4,000, credited to plaintiffs on their general indebtedness to the bank, with the further credit of their share of the profits, would still leave a balance against plaintiffs, instead of in their favor. In other words, treating the first sale—that of June 21, 1892—as merely a security for the debt, and as no longer having any effect upon and after the adjudication of the plantation at public auction, and treating the latter sale as the only one transferring the title and its price, the only one to be considered, and calculating all the indebtedness, with interest, accruing to the banks, and crediting plaintiffs with their portion of the auction price realized and one-half the profits of the plantation for 1892, nothing is left for them to base the present action upon. One bank denies profits; the other admits profits. One interprets the agreement or counter letter to mean that, if profits were made, plaintiffs could not avail of them, unless they redeemed the sale; the other does not hold to this interpretation, relying upon another defense. One affirms the conclusiveness and finality of the sale of June 21, 1892; the other, that it was only a kind of security for the debt.

Plaintiffs' position is one of affirmance of the sale of June 21, 1892, and in this respect they are virtually supported by the Citizens' Bank, and actively opposed by the State National Bank. Their further position is there were profits made on the plantation in 1892, and in this they are supported by the State National Bank, and opposed by the Citizens' Bank. Their further position is they are entitled to one-half of these profits, whatever they are, and in this they are opposed by both banks,—one because they did not redeem the sale as stipulated for; the other because they must be held to the auction price of the plantation in figuring the credit they are entitled to on account of its sale, and because the account, cast up on this basis, with their part of the crop profits added, would leave a balance against them. Their further and last position is that the profits of the crop of 1892 amounted to the sum they claim in their petition, and in this they are opposed by both banks, who assert that, if plaintiffs are entitled to anything at all in the way of a judgment for profits, it cannot exceed the one-half of \$2,256.05 shown on the account as a credit to the plantation as the result of its cultivation in 1892.

From this analysis of the positions occupied in this litigation by the parties thereto are deduced, as aids to a proper interpretation by us of the explanatory agreement or counter letter, the following conclusions: (1) That the weight of opinion among the parties, construing their own argument, is that the sale of June 21, 1892, of a half interest in the plantation by plaintiffs to defendants, was a real conveyance, and not merely a security for

debt. (2) That the weight of opinion among them is that, if the plantation made a profit in 1892, plaintiffs were to share therein to the extent of one-half, and this right to share in the profits was not dependent on the redemption of the sale.

And we think this view of the meaning and intent of the counter letter is supported by the terms of that instrument. Undoubtedly, plaintiffs were, on the day the counter letter was executed, making a present sale of their half interest in the plantation to the banks for the price there stated, and the banks were acquiring the same, so that thereafter the banks, in the language of the counter letter, "now own the whole of said plantation." A sale with the right of redemption is none the less a real sale. After the lapse of the redemptory period without the exercise of the equity of redemption, the conveyance is as complete and absolute as though the right of redemption had not been reserved. Nor does the subsequent clause in the counter letter, that, if the property was not redeemed by the vendors, it was to be sold at auction, weaken this position. That clause is construed as granting merely a concession to the vendors by the vendees,—a giving to them of a later chance to see if their half interest might not be made to realize more than the sum defendants had paid for it, and, if so, allowing them the excess over what they had received at the previous sale. That this was the intention of the parties is shown by the fact that it is nowhere stipulated that in the event the place, when sold at auction, brought less (for the half interest belonging to plaintiffs) than what the banks had paid them for it previously, they (plaintiffs) were to make good to the banks their part of the deficit. They were to have the excess, if any (that was stipulated in the agreement), but not to be held for the deficit, if any (that was not stipulated in the agreement). "*Expressio unius est exclusio alterius*."

Undoubtedly the purpose of the banks in acquiring the property was to realize the debt they held against it, and they were willing to hand it over at the auction sale to any one who would pay sufficient for it to return them the entire amount of money it represented to them, with interest, and hand over to the plaintiffs their share of the surplus, if any. It is in this sense that the words in the counter letter, "inasmuch as the only object of the said banks in acquiring said property was to secure the debt due to said banks," are held to have been used. The banks were willing to buy, and did buy, the half interest of plaintiffs in the property, at the price (\$9,029.81) representing the sum agreed upon as that which plaintiffs then owed them. Besides this, they undertook "to run" the plantation, and divide the profits, if any, with plaintiffs. This was reasonable, when it is considered the crop was already pitched, and under way for the year; the time being towards the end of June. Plaintiffs were, un-

der cress of debt, selling in the middle of the year, with reservation of certain rights, one of which was participation in the profits of the crop already under cultivation, and another was the equity of redemption of the sale. This division of profits was an obligation the banks, who took charge of the plantation under their purchase, assumed towards plaintiffs. If there be doubt whether plaintiffs' right to participate in the profits exists as an independent proposition, or was dependent on the condition of the redemption of the sale, such doubt must be construed against the obligor. "In a doubtful case," says Rev. Civ. Code 1957, "the agreement is interpreted against him who has contracted the obligation." *Mithoff v. Byrne*, 20 La. Ann. 383; *Hoover v. Miller*, 6 La. Ann. 204. While the banks were to cultivate the plantation, making the necessary advances therefore, it was stipulated that Mrs. Green was to supervise the expenditures; she was to approve all orders or drafts. This is strongly corroborative. Why was she to have anything to do with the expenditures relating to the crop if she did not have an ultimate interest in the same? A profit could only be made by keeping down the expenses, and she seems to have been invested with a veto power over the expenses. It is true this might be said to apply as well to the case of participation in the profits only in event the sale was redeemed. But, at most, it leaves the true meaning and intent doubtful, and the law just quoted applies. For a right to be destructible by a condition, such condition must be expressed with clearness and precision.

Holding, therefore, that plaintiffs are entitled to an accounting for the profits and to one-half of same, if any, the next inquiry is, were there profits, and, if so, how much? The lower court held there were profits, and fixed the amount thereof at \$7,316.52, awarding plaintiffs a judgment for one-half thereof, or \$3,658.26. The plantation, the evidence satisfies us, made a profit in 1892, but we have reached a far different conclusion as to the amount thereof, and as to what plaintiffs are entitled to a judgment for on that account, than did our brother of the court a qua. The account of the plantation with the banks shows total expenditures for the year of \$15,557.79. It shows total receipts from sale of sugar and molasses and from bounty collections of \$17,813.84. This leaves a balance of \$2,256.06 in favor of receipts over expenditures. This is profit. The correctness of this account was admitted on the trial. This meant that all the items of debit and credit thereon were correct. This admission was made with the reservation on part of plaintiffs that they would contend the first item on the debit side of the account was covered and extinguished by the sale made of their half interest in the plantation in June, 1892, while defendants would contend it was not. This first item appears on the account under date of June 18, 1892, and reads as fol-

lows: "To advances made through Pierre Lanaux, as per account rendered from January 23, 1892, to June 18, '92, \$5,061.47." This was an indebtedness due by the plantation at the date of the sale by plaintiffs of their half interest to defendants. The effect of plaintiffs' admission of the correctness of the account is to fix this item as a debt incurred on behalf of the crop of 1892. It was undoubtedly an expense incurred in behalf of the crop of 1892. Being such, it must figure against the profits. If this item is excluded as paid by the transaction resulting in the sale of plaintiffs' half interest in the plantation, which is the contention of plaintiffs, then it would show a very much larger sum to be credited to them as "profits." But, when we turn to that clause of the counter letter on which alone is predicated their right to demand an accounting for the profits, we find it reads: "And the said Mrs. Green and Mrs. Stewart will have one-half of the profits of said plantation credited to them in case the place makes any profits this year." It will be seen it was not considered by the parties that they started with a clean score on the 21st of June of that year, and the profits were to be reckoned only on the basis of expenditures on the place to be thereafter made. If they had, they would have said so. What they wrote into their agreement was that, if the plantation, counting all expenditures for that year, made a profit, there was to be a division of the same.

Now, counting all the expenditures for the year, the plantation made a profit of only \$2,256.06. The admission aforesaid covers the disputed item as an expenditure of the plantation for the year, and the memorandum of indebtedness of plaintiffs to defendants, made out when they conveyed their half interest in the plantation to the banks, does not include this item. The most that can be claimed for it is that it includes part of it. That memorandum refers to "\$1,408.53 crop advances due Pierre Lanaux, merchant, on 21st June, 1892," and debits plaintiffs with one-half thereof, or \$704.26; the same being one of the items going to make up the sum of \$9,029.81, which figured as the price of the sale. This "\$1,408.53 crop advances" due Lanaux may have been a separate account altogether from the one which afterwards figured in the plantation account as the first item for \$5,061.47. It is not, at least, certain that it entered into it. But we will, still interpreting the agreement "against him who has contracted the obligation," give plaintiffs the benefit of the doubt, and hold that \$1,408.53 of the item of \$5,061.47 was covered by the transaction resulting in the sale aforesaid, and plaintiffs' part thereof extinguished by being included in the price of the sale. Deducting this \$1,408.53 from the expenditures to be figured against the receipts or credits of the plantation, we have this result: Expenditures, \$14,149.26; receipts, \$17,813.84; difference, representing profits to be divided, \$3,664.58; plaintiffs' one-half thereof, \$1,832.29,—for which sum they are entitled to

judgment, with 5 per cent. interest from July 27, 1893, the date of the last collection of bounty and of the rendition of the account. It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by reducing same to the sum of \$1,832.29, with 5 per cent. per annum interest thereon from July 27, 1893, until paid, and, as thus amended, the same be, and is hereby, affirmed; costs of the lower court to be borne by defendants, and those of this court by plaintiffs and appellees.

NICHOLLS, C. J., dissents, and hands down dissenting opinion. MILLER, J., dissents on independent grounds.

(51 La. Ann. 314)

**HAWLEY-DOWN DRAFT FURNACE CO.
v. SOUTHERN CHEMICAL & FERTILIZING CO., Limited.** (No. 12,915.)¹

(Supreme Court of Louisiana. Feb. 6, 1899.)

SALES—WARRANTY—ACCOMPLISHMENT.

1. As parties choose to bind themselves in their business agreements, so must they be held bound.

2. Where, in a contract of sale of certain boiler furnaces, a guaranty as to results is stipulated, and a particular test is provided for to demonstrate these results, and the test fails in the particular guarantied, the vendee may, in the absence of proof showing the test was conducted under conditions, accidental or otherwise, rendering it unfair, decline acceptance.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

Action by the Hawley-Down Draft Furnace Company against the Southern Chemical & Fertilizing Company, Limited. From a judgment for plaintiff, defendant appeals. Reversed.

Branch K. Miller, for appellant. Fenner, Henderson & Fenner, for appellee.

BLANCHARD, J. Plaintiff company submitted in writing a proposition to defendant company to furnish the latter three Hawley-Down draft furnaces, and lower portion of fronts for ash doors, for the sum of \$2,160. These furnaces were for horizontal tubular boilers in use at defendant company's works in the city of New Orleans. Certain guaranties as to the work of the furnaces were embodied in the proposition, as follows: (1) To consume 95 per cent. of the smoke, burning any grade of bituminous coal; (2) will increase the efficiency of the boilers over 35 per cent. over their rated capacity; (3) burning any bituminous coal, will save over 15 per cent. in cost of fuel over ordinary method of making steam, to be compared with smaller size boilers at the Louisiana Electric Light Company; (4) burning a certain kind of coal (naming it), will evaporate over 9 pounds of

water per pound of coal making steam; (5) burning any bituminous coal, will evaporate water into steam as dry as ordinary furnaces. It was stipulated that final test was to be made on completion of the work of setting the boilers, making necessary attachments, connections, etc., and that, if the furnaces failed to do as guarantied, plaintiff company was to remove them, and replace former setting, at its expense; also that the furnaces were to remain its property until accepted and paid for by the purchaser. Defendant company accepted the proposition in writing. The furnaces were delivered, fitted to the boilers, all attachments added, all connections adjusted, and everything made ready for the test. The test came first on the boilers fitted with the Hawley-Down furnaces, and three days later on those with the ordinary furnaces. By agreement, the horizontal tubular boilers, with ordinary furnaces, at defendant's works, were substituted for similar boilers at the Louisiana Electric Light Company's works; that is to say, the comparison of the results achieved by the boilers with the Hawley-Down furnaces at defendant company's works was made with results obtained under similar conditions on boilers with ordinary furnaces in use at defendant's works. The test in each case was seven hours,—from 9 a. m. to 4 p. m. The result showed that 9.82 pounds of water per pound of coal had been evaporated during the seven hours by the boilers with the Hawley-Down furnaces, and 10.16 pounds of water per pound of coal by the boilers with the ordinary furnaces. This was a superior showing for the ordinary furnace over the Hawley-Down furnace, and defendant company thereupon refused to receive and pay for the furnaces supplied by the plaintiff company, basing its action on the failure of the guaranty of the contract. This suit was the outcome.

It is brought to recover the purchase price of the three furnaces, the substantial averments of the petition being the sale and delivery of the furnaces, the compliance by plaintiff company with its obligations under the contract of sale, and the fulfillment of the guaranties of the contract. Mention is made of the test of the furnaces sold with the ordinary furnace, and it is represented that this test demonstrated, to the satisfaction of experts, the superiority of plaintiff's furnaces over the other furnaces. And the further allegation is made that, defendant having expressed dissatisfaction with the results of the test, complainant had stood ready to make another test, which defendant company refused to assent to, except upon such onerous and unreasonable conditions with regard to the expense thereof, and its imposition upon plaintiff company, that the latter was forced to decline it. The defense is non-liability of defendant company because of the utter failure of the guaranties of the contract upon the practical application of the test as agreed upon; and it is averred that, upon

¹ Rehearing denied April 17, 1899.

the failure of plaintiff's furnaces to render the service contracted to be performed, it (plaintiff) requested the privilege of another test, to which defendant company consented, provided the same be made immediately, or within two days thereafter, to which plaintiff agreed, and a day was fixed for the second test, on which day defendant was in readiness and prepared for the test, but plaintiff company declined to proceed, stating it preferred the test should be postponed, not, however, naming another day for it. It is further represented that nothing more in relation to the matter was heard from plaintiff for some two weeks, when a demand for payment of the price of the furnaces was made, and that, subsequently, to wit, some 20 days after the first test was concluded, plaintiff company again requested a second test, to which defendant company again assented, provided the expense necessary and incident to the same be borne by plaintiff. The answer then goes on to describe the situation existing at that time at defendant company's works, different from what it was when the first test was made, what would have to be done, what changes effected in order to prepare for the second test, and avers that the same would have entailed a total expense of \$2,000, which, under the circumstances, it was contended, plaintiff company should bear. The right of defendant to refuse the second test was averred, but its willingness to agree to same if the expense thereof were assumed by plaintiff was signified. There was judgment favorable to plaintiff in the court below, and defendant company appeals.

The case presents mainly questions of fact. We find that this sale has never been completed; that defendant has never accepted the furnaces; and that, under the contract, they remain the property of plaintiff company until accepted and paid for. On the question, as to whether defendant company was justified in refusing to accept them, we find that, in the seven-hours test provided for in the contract, the guaranty of plaintiff company as to the superior evaporating qualities of its furnaces failed; that is to say, the third guaranty mentioned in the contract, viz. "burning any bituminous coal will save over 15 per cent. in cost of fuel over ordinary method of making steam," was not fulfilled. As to the other guaranties of the contract, plaintiff affirms their fulfillment, while defendant denies it. Plaintiff does not claim that the third guaranty, quoted above, was fulfilled, taking the seven hours the test lasted as the gauge, but does claim that it was fulfilled taking the first three hours of the test as the gauge, at the end of which time, it is contended, the results as to evaporation on the boilers equipped with ordinary furnaces showed only 7.92 pounds of water per pound of coal, whereas for the last four hours it showed 12.2. It is insisted, on behalf of plaintiff company, that this showing as to the last four hours is abnormal, and demonstrated that something was wrong in the test. Just what

was wrong is not asserted, nor does the evidence show it. There is an intimation that some of the water must have escaped in some other way than by evaporation into steam, but no proof of this appears. On the contrary, the evidence seems to negative the same. The test provided for by the contract was for seven hours. This being so, plaintiff's contention as to the showing for the first three hours cannot be accepted. Nor does defendant admit its figures as to 7.92 evaporation for the first three hours, and 12.2 for the last four hours. It insists that no figures were to be taken, and no results calculated, except those appearing at the end of the seven hours, and that these showed 10.16 evaporation. Plaintiff introduced expert testimony to show the results thus obtained were abnormal, and, because abnormal, the test an unfair one. The trial judge took this view of the case, and hence his decree favorable to plaintiff company. But, judging the case by the testimony in the record, we can reach no other conclusion than that plaintiff company has not sustained its contention in this regard. Just as much expert testimony, and apparently as strong and weighty, is found in support of the contention of defendant company that the results achieved at the test on the boilers with the ordinary furnaces were not abnormal as is found in support of the other contention, that they were abnormal.

Under the circumstances, however, while no second test was provided for by the contract between the parties, plaintiff's request for another test was a reasonable one, and, had it been refused, the consequences thereof might well be visited on defendant company by an affirmance of the judgment below. But we do not find that defendant refused it. On the contrary, while plaintiff's representative at the test entered no formal objection, nor filed any protest, at the close thereof, when, after wiring the result to his principals in Chicago and receiving their instructions, he asked for another test, the manager of defendant company agreed to it, and the same was to be conducted the next day, but plaintiff's representative did not appear until 3 o'clock of that day, and then asked for a postponement until Monday. On Monday he informed defendant's representative he had been ordered to return North, and that another expert would be sent to conduct the test on behalf of plaintiff. It does not appear that this second representative came for the purpose of conducting the test, and the next demand made was by plaintiff's attorneys, some two weeks later, for payment of the price of the furnaces. And when, in connection with this demand, they expressed a desire or willingness for a second test, defendant company answered that the situation at their plant was then such that it would entail an expense of some \$2,000 to make another test of the Hawley-Down furnaces against their ordinary furnaces, and a reasonable explanation was made why this was so. They added that plaintiff company would have to bear this expense. It thus appears that a sec-

ond test was not denied by defendant company, and the same might have been made without the extra expense, had plaintiff chosen to proceed with it in due time. It was not to be expected that defendant would keep matters in statu quo, awaiting plaintiff's pleasure in this regard. Changes and improvements were needed at defendant's works, and these were made, and thereafter the extra expense referred to would have to be incurred to enable the test to be made at its works. It does not appear that plaintiff offered or demanded that the test be made elsewhere than at defendant company's plant. It, perhaps, might have been made elsewhere without the extra expense, and, in this connection, it must be borne in mind that the contract stipulated for the test of the boilers with ordinary furnaces, to be made at the Louisiana Electric Light Company's plant. This stipulation, it is true, had been waived at the first test, and the same had been conducted on the boilers with ordinary furnaces at defendant's plant; but when the situation had changed at defendant's works, and the second test could not be made there without the extra expense, it might still have been in plaintiff's power to have conducted the same at the place named in the contract,—the works of the Louisiana Electric Light Company. Under the circumstances, we cannot say that defendant was in fault with regard to this second test.

As these parties chose to bind themselves in their business agreement, so must they be held bound. While the testimony shows the Hawley-Down draft furnace to be a superior furnace, the test, and the only test, the parties chose to provide, as showing its superiority, failed; and as this was a guaranty of the contract of sale, without the fulfillment of which there was to be no sale, defendant company had the legal right to refuse acceptance and payment. It follows that plaintiff must be nonsuited on the principal demand of its petition.

On July 8 and 12, 1895, it sold defendant certain small furnishings, aggregating \$14.05. These appear upon the account annexed to the petition, and do not seem to be contested. Judgment in its favor for the same must be given.

As to defendant's demand in reconvention, we think the interests of justice require that it, too, be disallowed, as in case of nonsuit. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that plaintiff's demand for \$2,160, the contract price for three Hawley-Down draft furnaces, be rejected, as in case of nonsuit. It is further ordered, etc., that plaintiff do have and recover of defendant the sum of \$14.05, remainder of account sued on, with legal interest from judicial demand until paid. It is further ordered, etc., that defendant's demand in reconvention be rejected as in case of nonsuit; and that costs of the lower court be borne by defendant, and those of appeal by plaintiff.

(51 La. Ann. 352)

WELCH v. GOSSSENS et al. (No. 13,087.)
(Supreme Court of Louisiana. March 20, 1899.)

STATUTES — IMPLIED REPEAL — MUNICIPAL CHARTERS.

1. The provisions of the legislative charter of a municipal corporation, with regard to the election of its officers, are not impliedly repealed by the provisions of a subsequently enacted general election law, which makes no mention thereof.

2. Where there exists positive legislation upon the same subject-matter, providing for the very case in hand, it must be interpreted as not having been repealed by a subsequent enactment which contains different provisions, but not those contrary thereto.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Rapides; Edwin G. Hunter, Judge.

Action by Frank M. Welch against Henry S. Gossens and others. From a judgment for defendants, plaintiff appeals. Reversed in part.

Horace H. White and Robert P. Hunter, for appellant. John C. Ryan, for appellees.

WATKINS, J. The plaintiff takes this appeal from the judgment dismissing his suit contesting the election of the plaintiff as mayor of Alexandria. The petition alleges that plaintiff and defendant were candidates for the office of mayor of Alexandria; that plaintiff received a plurality of the votes cast, but was deprived in the count of a number of the ballots in his favor, resulting in giving to his competitor the election, according to the returns. The petition then proceeds to assail the election as not held in accordance with the constitution and laws, but under laws superseded by the constitution of 1898, and, if there had been an election, it was without result; the town charter of Alexandria requiring a majority of all the votes cast to elect, and that no candidate received such majority. The prayer of the petition is that the ballots cast for him be counted; that he be decreed elected mayor of Alexandria; and, if the court should find there has been no election, that an election in accordance with the constitution and laws be ordered. The defendant answered with the general issue, and by pleading that plaintiff is estopped from disputing the legality of the election, having been a candidate and a participant in the election. The count of the votes ordered by the court was adverse to the plaintiff, and that issue is withdrawn from the discussion in this court.

The contention of the plaintiff is that the defendant, not having received a majority of the votes, was not elected, and that, if it be held that a plurality was sufficient to elect, it is insisted the election was not held in accordance with the law. Section 2 of Act No. 111 of 1868, "to incorporate the town of Alexandria," was introduced in evidence. But, while admitting the force of this statute, the contention of the defendants' counsel is that same was repealed by the provision which is

contained in section 7 of Act No. 152 of 1898. The act last referred to is the general election law of 1898, and the provision relied upon is of the following tenor, viz.: "That in all elections by the people, the person or persons having the *highest number of votes*, shall be deemed and declared to be elected," etc. (Our italics.) The repealing clause of that statute declares "that all laws or parts of laws contrary to or in conflict with the provisions of this act, are hereby repealed." Id. § 81. The defendants in their answer aver that the plaintiff "is estopped from denying the legality of the laws under which the said election was held, even if illegal, which is denied, having participated in the election, and submitted his name as a candidate." We are of the opinion that the plaintiff is neither estopped from alleging that no election at all was held, nor, if any election was held, that the defendant Gossens was not legally chosen thereat as mayor of Alexandria, by reason of the fact of his candidacy for that office. Notwithstanding his own defeat, he has the right to assert in a court of justice that his adversary was likewise defeated because he failed in obtaining a majority of votes, as required by the city charter, and, by this means, reopen the controversy, and obtain another chance of being himself elected.

Recurring to the principal question, whether the general election law of 1898 had the effect of repealing the legislative charter of the city of Alexandria of 1868, we find the current of decision in opposition to that theory. It is a well-recognized canon of construction that a statute of a general nature does not repeal a particular statute which has been enacted for the benefit of a public corporation, as a part of its charter. We have an instance of that kind stated in *Douglas v. Oraig*, 2 La. Ann. 919, of which the court said: "In 1839 the legislature granted to the corporation of Shreveport the exclusive right of establishing ferries across Red river, within the limits of that town, and to the revenues arising therefrom. In virtue of this authority, the corporation established a ferry within its limits, of which the plaintiff is the lessee, running to the opposite shore, which is one of the boundary lines of the parish of Bossier. In 1843 the parish of Bossier was created, and among the powers granted to its police jury was that of establishing ferries across the lakes and rivers within that parish. A ferry was established under this authority across Red river, immediately opposite to the town of Shreveport, and leased to the defendant, who was using it for purposes of profit, when he was restrained by an injunction obtained by the plaintiff, who claims the exclusive privilege of a ferry at that point," etc. With regard to the controversy thus outlined, the court said: "The exclusive right granted to the corporation of Shreveport to establish ferries across the Red river, within its limits,

was not repealed by the subsequent act of 1843, creating the parish of Bossier. There is no express repealing clause in the latter act, and we do not understand that the legislature, in creating a parish, and conferring upon its local authorities the powers which they would equally have had under the general law if those powers had not been specially granted, intended to repeal this special privilege given to the corporation. There is no conflict between the two acts. They both exist, and must be construed together. The power to establish ferries, granted to the police jury of Bossier, must be subordinate to that conferred upon the town of Shreveport, within the corporate limits of the latter." The case of *Bank v. Farrar*, 1 La. Ann. 49, rests upon a like principle. As applicable to the question of an implied repeal of a criminal statute, the court stated, in *State v. Lewis*, 3 La. Ann. 398, that, "as there has been no express repeal of the act of 1843, a repeal is only implied in so far as the last act contains provisions contrary to, or irreconcilable with, those of the first. Civ. Code, art. 23. The repeal of prior laws by those subsequently enacted is not to be presumed, although the latter may contain provisions different from the former. To produce the effect of a repeal, in the absence of positive enactment, the provisions of the respective laws must be clearly repugnant. The silence of the legislature in relation to powers conferred by the first act is not to be construed into an intention to abrogate them." That discussion had reference to two general statutes upon identically the same subject-matter. Where it is readily possible, two different statutes upon the same subject-matter should be construed so as to harmonize their provisions. *Waldo v. Bell*, 13 La. Ann. 329. In *Saul v. His Creditors*, 5 Mart. (N. S.) 569, the court put the proposition very forcibly and in very few words. "But," say the court, "where there already exists positive legislation on the same subject-matter, providing for the very case which it is presumed is excluded, the argument loses almost entirely its weight. The law must then be interpreted by a well-known rule of jurisprudence, that an intention to repeal laws can never be supposed; that subsequent statutes do not abrogate former ones by containing different provisions on the same subject; they must be contrary, to produce such effect." In *Albert v. Brewer*, 9 La. Ann. 64, the plaintiff enjoined the collection of a license tax from him as keeper of a coffee house, on the ground that the law under which it was levied had been repealed, the subsequent enactment of a general revenue law providing for the assessment and collection of taxes, which statute contained a clause to the effect that all laws or parts of laws upon the same subject-matter are thereby repealed. The court said: "The object of this act [the alleged repealing statute] was to provide for the assessment and collection of taxes. The repealing clause

must be interpreted with reference to that object, and cannot reasonably be extended to a statutory enactment imposing a tax like the enactment in question." In *Succession of Fletcher*, 12 La. Ann. 498, it was held that it "is only where there is an obvious and necessary inconsistency of the provisions of two statutes that the former must be considered as repealed." In *Bond v. Hiestand*, 20 La. Ann. 139, the court applied the foregoing principle to an alleged implied repeal of a special statute. "The law of 1859," said the court, "aforesaid, is a special statute, forming part of the charter of the city of New Orleans, and cannot be considered as repealed, unless expressly or by conflicting legislation is *pari materia*. Subsequent laws do not repeal former ones by containing different provisions; they must be contrary. *Lacroix v. Coquet*, 5 Mart. (N. S.) 528; *Jarreau v. Choplin*, 6 La. 135; *Nixon v. Piffet*, 16 La. Ann. 379. A particular law is not repealed by a general law, unless they be so repugnant that both cannot stand under any circumstances." The same principle is announced in *State v. Labatut*, 39 La. Ann. 516, 2 South. 550. In *State v. Natal*, 39 La. Ann. 439, 1 South. 923, the court said: "The legislature did not, however, formally cancel its provisions [those of a former charter], although it changed the form of the municipal government. * * * By irresistible and clear implication, this section contemplates, in effect, the maintenance and continuation in force of special laws not falling within the purview of the act, namely, not conflicting with it." In *St. Martin v. City of New Orleans*, 14 La. Ann. 113, it was held that "the minute and particular provisions of one act, prescribing the salary of the register of voters in the city of New Orleans, are not repealed by a general grant of power, in another act, to the common council, in relation to all city salaries." In *Garrett v. Mayor*, etc., 47 La. Ann. 618, 17 South. 238, we had under consideration this question, and held that "the legislative charter of a municipal corporation being a special act, apart from the body of general laws of the state, it cannot be repealed by a general law of the state, unless that intention clearly appears from the terms of the general act; and, that the general act shall repeal the special law, it must appear that the provisions of the former are irreconcilably inconsistent with those of the latter." *State v. Judge of Second City Court*, 40 La. Ann. 844, 5 South. 525; *State v. Judge of Civil Dist. Court for Orleans Parish*, 37 La. Ann. 574.

To clearly indicate the force of the principle which underlies all of the foregoing authorities, we particularly refer to the views expressed on this subject in *Mayor, etc., v. White*, 46 La. Ann. 449, 15 South. 15, in which the court, speaking through Mr. Justice Miller as its organ, said: "The defendant contends, on the contrary, that the charter of Alexandria should have been amended under Act No. 110 of

1880, providing for amendments to charters of towns or cities; and, it is urged, it was by such amendment the power to tax occupations could have been conferred upon the plaintiff. While, under the act of 1880, the town might have obtained the necessary amendment conferring the power to exact licenses, still the competency of the legislature, by general act, to deal with the subject, is, in our view, undoubted. Again, the defendant urges that the charter of Alexandria, being special legislation, is not to be deemed affected by provisions applicable to towns generally, contained in the revenue acts of 1886 and 1890. But the express purpose of the provisions of the revenue laws under consideration was to supplement, with the right to tax occupations, the powers of all parochial and municipal corporations not clothed with that right by their charters. The charter of Alexandria, not conferring any taxing power in respect to occupations, was clearly within the scope of the provisions in the revenue acts." But it will be observed that in that case there was no question of an implied repeal of a special law by the enactment of a general statute, but it simply recognized the power of the legislature, by the enactment of a general law with regard to all towns, to confer upon any one of them the power of taxation, which it did not possess under its charter.

In our opinion, the provisions of the general election law of 1898 cannot be considered to have repealed the provisions of the charter of the town of Alexandria of 1868, relative to the election of mayor, aldermen, treasurer, and comptroller; for the reason that the former contains no provision that is plainly indicative of that purpose. Consequently, while the provisions of the former are different to those of the latter act, they are not contrary thereto, and that is the test of all the decisions we have consulted and referred to. Section 2 of the charter of Alexandria declares, in express terms, that there shall be chosen by ballot the officers specified, "who shall, when elected by a majority of the votes of the whole city, enter upon the discharge of the duties of their respective offices," etc.; while the terms of the election law of 1898 are "that, in all elections by the people, the person or persons having the highest number of votes shall be deemed and declared elected." An inspection of the title of the act, and the tenor of its text, discloses clearly that it was a general law, relative to state, congressional, and parochial elections; and that it was not the clearly-expressed intention of the legislature to take from any municipality a power which had been expressly conferred by its charter. The general election law of 1896 contains a similar provision to that of the law of 1898, viz.: "In all elections by the people, the person or persons having the highest number of votes shall be declared and deemed to be elected;" and its repealing clause is similar. Acts 1896, No. 137, § 7. Similar provisions occur in previous election laws. Indeed, such has been the character of all general election laws of the state;

hence the argument in favor of the repeal of the charter of Alexandria by the enactment of one is just as applicable to any other. But it seems that elections have been conducted under the charter in previous years without complaint on the score of its implied repeal. The rule is that "the provisions of the charter, as to time and mode of election, the appointment, qualification, and duration of the terms, of officers, must be strictly observed," and the laws applicable thereto must be strictly construed. 1 Dill Mun. Corp. § 148. It appearing from the record that the defendants, Gossens and associates, only received a plurality of votes, and not a majority, as required by the charter, and were not elected mayor and aldermen, etc., consequently the election must be declared void, and, as a necessary consequence, another election must be held according to law. It is therefore ordered and decreed that the judgment appealed from be annulled and reversed; and it is further ordered and decreed that the election at which the defendants claimed to have been elected be declared illegal, null, and void, and that another election for the various offices named be had and held in conformity to law and the charter of the town of Alexandria, and that the defendants be taxed with all costs of both courts.

On Application for Rehearing.

(April 17, 1899.)

BREAUX, J. 1. In answer to defendants' position that Act 1868, No. 111, requiring the mayor to receive a majority of the votes cast, is repealed by section 7 of the statutes of 1898 relative to elections, we can only reiterate that the special law was not repealed by the statute; that a statute framed in general terms, or treating the subject in a general way not contradicting the first act, is not to be regarded as affecting a more particular or positive previous clause; that repeals by implication are not favored usually. The idea is that statutes drawn up with attention and care (*hujus modi statuta tanta solemnitate et prudentia edita*) shall be supported until they are repealed by a repealing statute, or by implication arising from the context of a statute. Carrying out that view, it has been held that the special exemption of particular property from municipal taxation is not repealed by subsequent general statute taxing all property, there being no express repeal; that a special charter of statutes prevails over the general law. *Burke v. Jeffries*, 20 Iowa, 145,—a case having some similarity to the case before us. In the former particular statute or charter of Alexandria, the word "majority" is used, and in the general statute of 1898 "plurality." Nothing suggests difficulty in carrying out the particular statute in a municipality in matter of electing officers, nor does there arise any "irreconcilable inconsistency" between the two statutes. Though it is settled that statutes may be repealed by implication, and without express words, still the courts lean against the

doctrine, if it be possible to reconcile the two acts of the legislature together.

2. On the part of the aldermen, treasurer, and comptroller, defendant insists that the judgment should not be made to apply to them. The suit, it appears, is between Welch and Gossens; there are no other parties before us; and we are, in consequence, asked to eliminate and exclude from the effects of the judgment the aldermen, treasurer, and comptroller. It being a fact that they were not parties, our decree should not affect their right in any manner. But, to make things entirely clear, and remove them from all doubts, an amendment will be made to clear away any adverse impression in regard to their tenure, restricting our decree entirely to plaintiff and defendant, parties to the suit. It is therefore ordered, adjudged, and decreed that our original decree remain unchanged, save as to the aldermen, treasurer, and comptroller. They, not being parties, are eliminated as before stated. With this modification of our decision, the application for a rehearing is refused.

MONROE, J., not having been a member of this court when the case was submitted, takes no part in this opinion.

(51 La. Ann. 871)

NOTT v. STATE NAT. BANK. (No. 12,885.)

(Supreme Court of Louisiana. April 3, 1899.)

PLEDGE—CONSIDERATION—NEGOTIABLE INSTRUMENTS—FRAUDULENT CONVEYANCE.

1. This was a suit for the amount realized on property pledged, brought on the ground that the pledgor had pledged his property without consideration, and within 90 days preceding his insolvency. The act of pledge contained the declaration that the pledge was made to avoid the sale and sacrifice of securities already pledged, and for further security. The declaration was sustained by the facts, and there was, in consequence, sufficient consideration for the pledge.

2. A note payable on demand is a negotiable instrument, which becomes past due after demand, and is not subject to equities prior to demand.

3. An amount given, or a pledge made, to obtain a creditor's forbearance not to sell the property pledged, by which the note payable on demand was secured, was not a gratuity, as time for payment was granted (in effect), although the note secured by pledge was made payable on demand.

4. Failure growing out of sudden unforeseen events does not affect the validity of a transaction made in good faith, for a full consideration, entered into within three months preceding failure.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

Action by George W. Nott, syndic, against the State National Bank. Judgment for defendant, and plaintiff appeals. Affirmed.

Saunders & Miller, for appellant. James McConnell, for appellee.

BREAUX, J. Plaintiff, syndic of the creditors of A. R. Brousseau, sued to set aside a pledge made by the insolvent within three

months preceding his *cessio bonorum*, and to compel the pledgee to pay over to him the amount realized on the pledge. Plaintiff's position is that, the insolvent having pledged certain values to the State National Bank without any consideration passing at the date of the pledge, but to secure an indebtedness, prior to the date, due to that bank, the pledge was null, and the amount realized on the values pledged is, in consequence, due to the syndic of the insolvent. The defendant, on the other hand, joined issue with plaintiff, and insists, in defense, that the pledge is valid, that a considerable sum was due the bank on demand notes, and that the debt was secured by pledge securities. These securities had fallen in value, and the bank, in its own interest, had concluded that something must be done to place its claim on a proper footing, and, in consequence, had concluded to sell the values unless the debt was paid or additional security given. Upon being informed of the desire of the bank in the premises, Mr. Brousseau, the debtor, found it to his interest to pledge additional securities of values to the bank, and thereby to prevail upon it not to sell the securities which he had pledged some time before. The date of the respective pledges appears of record; also, it appears of record that the proceeds realized from the sale of the values pledged to the bank amounted altogether to the sum of \$3,515.82. It also appears of record that Mr. Brousseau made a cession of his property on the 30th day of September, 1896, within 90 days after the last pledge (the one assailed here) was made by him. The principal clause in the pledged notes, material to the issues here, reads, "and agree to give additional security to keep up the present margin whenever the market value of the above collateral should decline." The cause for giving the consideration appears by the pledge of August 13th, as shown by the following: "Now, therefore, in order to avoid the sale and probable sacrifice of the said securities already pledged as aforesaid, and for further security to secure the payment of the three said pledged notes so already held by said bank, the said A. Brousseau's Son hereby pledges and delivers to said State National Bank the merchandise described in the inventory thereof hereto attached." We are notified that Mr. Brousseau carried on business in the name of A. Brousseau's Son. That accounts for the name as written in the pledge. There is no question here about the name. The pledged securities held by the defendant under the original pledge having greatly depreciated in value, the pledgee demanded of the pledgor payment or additional security upon the pledge, and notified the pledgor of its intention to sell the pledged property and realize on it, unless the notes were paid or additional security given. After some delay, Mr. Brousseau, the debtor, as set forth in the contract from which we have

quoted, executed another pledge in favor of defendant, and gave additional security. The judge *a quo* sustained the last pledge made,—that is, the pledge of August 13th,—on the ground, as we are informed, that it was given to purchase an extension from the bank.

From the foregoing statement of the case, it is manifest that the bank (pledgee) was the holder of the values in the utmost good faith, and that the borrower himself (pledgor) could not have the least cause to suspect the reverses in business which came upon him in less than 90 days after he had made the deposit of the additional values, and obtained the delay which he had found greatly to his interest to get. If contracts, entirely legal and binding at the date they are made, can thus be rendered null by unforeseen subsequent failure, under the circumstances as disclosed by the record in the case before us, then many transactions in commerce, considered safe and legal, would become very unsafe. Many securities in the community would have but very little value. But this, we take it, was not the intention of the legislature in adopting the statute we are called upon to interpret in this case. It orders that a debtor who shall, within three months preceding his failure, engage or mortgage any of his goods and effects in order to give an unjust preference to a creditor, shall be prohibited from taking the benefit of the insolvent laws, and the contract itself shall be declared null, unless the pledgee proves that the property was pledged to him in good faith and for ample consideration. Rev. St. § 1808. The unjust preference in this case does not appear, but, on the contrary, it does appear that the property was pledged to the bank in good faith and for ample consideration. Plaintiff himself has not only not denied the *bona fides* of the pledge, but has been forced by the facts of the case expressly to admit that there is no question or doubt as to the entire good faith of both parties to the contract and pledge last made.

But the insistence of plaintiff is that, as to the creditors of one who is declared insolvent within the three months prior to the declared insolvency,—that is, as to third persons,—there was no consideration for the pledge, inasmuch as it does not appear that further time was granted by the pledgee to the pledgor on the notes held by the former, secured by the pledge before mentioned. It is true that the notes held by the bank were made payable on demand, and that the creditor did not obtain in written words, at the time of the additional pledge of values, a delay. From this plaintiff argues that there was no consideration, and that the bank obtained security without giving anything in return. The contract sets forth a specific consideration, and the evidence also shows a consideration. It was, in point of fact, satisfactorily shown, and was ample, as we think. The mere indeterminate period as to

time of delay does not invalidate a contract, if the agreement implies a reasonable time within which payment would be expected. Judge Story, in his work on Contracts (section 43), says that "the law will presume that the promise to forbear for a reasonable time is sufficient consideration." We do not understand that there was the least advantage taken, in this case, of the distress or embarrassment of a debtor. The transaction has every appearance of fair dealing. Its purpose was to obtain a delay, and, although the delay was not expressed, it was, from the nature of the transaction, understood. It was not essential to the validity of the contract to express on the face of the papers the delay granted to the pledgor. "The purpose was evidently a reasonable delay to the debtor, saving the purpose of the order to save the values pledged, and the delays obtained to that end were in themselves legitimate and full consideration." Story, Cont. § 429. Evidently, the purpose of the last pledge was as just mentioned, and delay was granted as agreed upon.

Now, with reference to notes made payable on demand, as those here, on the grounds urged, plaintiff, in our judgment, is not entitled to the relief asked. The fact that the notes secured by pledges were made payable on demand could not have the effect of impairing their obligation or their negotiability. They had a binding effect, which has repeatedly been recognized by the courts. A demand note, as relates to presentment for payment, differs from a bill or check. While the latter is intended to be paid immediately, the former, payable on demand, is often intended as a security for an investment and as evidence of the investment made. Such notes become past due after demand, and prior to demand are considered as negotiable notes. Wood's Byles, Bills, § 333. These notes are transferable before maturity,—that is, before presentment for payment,—and, when so transferred, are as free from equities as any other notes made payable on demand expressed on their face. The pledges by which they are secured follow them, as in case of other notes payable on demand, fixed as expressed in the note itself. As a matter of fact, the extension of time on the original notes and pledges was granted by the creditor as a consideration for obtaining an additional pledge. The securities having declined in value, a second pledge given to supply the decline was equally as valid as the first. The date of the pledge, made less than 90 days before the insolvency of the pledgor, valid at the time it was made, did not become invalid by the unexpected reverses which impoverished the pledgor, and compelled him to resort to proceedings of insolvency. Therefore, the judgment appealed from is affirmed.

MONROE, J., takes no part, as he was not a member of the court when this case was heard.

(31 La. Ann. 804)

ROSETTA GRAVEL, PAVING & IMPROVEMENT CO. v. JOLLI-SAINTE et al. (No. 12,988.)

(Supreme Court of Louisiana. April 3, 1899.)

PUBLIC IMPROVEMENTS—LOCAL ASSESSMENTS—LIEN.

The lien and right of pledge resulting from a local assessment for street paving attaches to property of the abutting proprietor, without reference to the person in whom title is actually vested; and proceeding taken against same for the enforcement of such lien and pledge is one in rem, notwithstanding the title holder be cited for the purpose of carrying same into effect.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

Action by Rosetta Gravel, Paving & Improvement Company against Mary A. Jollisaint and others. Rule on the Mutual Loan & Building Association to show cause why it should not take title to certain lands sold by the sheriff. Judgment for plaintiff, and the Mutual Loan & Building Association appeals. Affirmed.

Dart & Kernan, for appellant. E. Evariste Moise, Junio F. Socola, and John Wagner, for appellee.

WATKINS, J. This is a proceeding by rule taken against the Mutual Loan & Building Company to compel it to show cause why it should not accept title to certain improved real estate situated in the city of New Orleans, which was made by the sheriff under a writ of *fi. fa.* in the above-entitled cause, and tendered to it according to law; said property having been regularly adjudicated to said company, at a public judicial sale, for the price of \$2,025. The ground upon which defendant in rule refuses to accept the title tendered, and complete the adjudication, and to pay the purchase price, is that the title of the defendant in execution is one by donation *inter vivos*, and that, the donor being yet alive, the title by donation was and is revocable, and subject to revocation at the death of the donor; that such a title is consequently uncertain, and not such a title as it can be compelled to accept. The contention of the plaintiff in rule is that it instituted suit against the defendants upon two certificates for street paving,—all then being absentees, and represented by curators *ad hoc*,—and obtained judgments, with recognition of lien and privilege upon the abutting property as securing the debt, and maintaining and enforcing its judicial sequestration thereon. All the parties in interest were cited, one of the defendants having made a donation *inter vivos* to a co-defendant, the seized debtor. On this judgment a writ of *fi. facias* was issued; the aforesaid property seized, advertised, and sold, after due notice and full compliance with all the requirements of law; and at the sale thus made the property was adjudicated to the Mutual Loan & Building Association, as stated

supra. On this state of facts, its contentions are that the judgment was one in rem, and that the title thereunder made is good and valid, irrespective of any latent imperfection or ambiguity in the title of the donor. On the trial the rule was made absolute, and the Mutual Loan & Building Company has appealed.

There is in the answer of defendant in rule an averment to the effect that no such title as respondent is bound to accept has been tendered, for the reason that said property was acquired by one of the defendants by donation *inter vivos* from Samuel Barrett, who is still alive, and has living issue of his marriage, all of whom were minors; and, consequently, said title is subject to attack in the future by his heirs, should it be made to appear on the settlement of his succession that said donation infringes upon their legitime. That is the only question with which we are called upon to deal.

The statement of plaintiff's case is as follows, viz.: "The judgment is one in rem under the statute. It is in rem under the law. It is in rem under the practice. The defendants not having been personally served, the property being in the custody of the court, under the writ, the judgment was and is necessarily in rem. It cannot bind the parties, save to the extent of the value of the property in the custody of the court. The judgment is therefore absolutely a judgment in rem, not extending beyond the value of the property seized under the writ of judicial sequestration, and held by the court in its custody, at the time of the rendition of the judgment. The debt for which suit was brought, and on which the writ of judicial sequestration issued, and for which judgment was recovered, is a debt of the property, under the statute. It is true, under the statute, it is also a debt of the owner. The statute makes both the owner of the property and the property liable for the debt. The debt is therefore, under the statute, due both by the owner and the property. The property, under the statute, owes the money, irrespective of the question in whom is title. The donor had title; possession. It was recorded. That title, it may be, was defeasible, but still it was a good and valid title, until action was had to defeat it. The action would not have defeated the title, only to the extent the donation infringed on the legitime of the forced heirs of the donor. The title was therefore defeasible in part; not necessarily entirely. All parties in interest were before the court, represented by a tutor and curators *ad hoc*. The property which owed the debt was before the court. The property was there to be condemned. All the parties who could have defeated the donation were there before the court, to be condemned to the extent of the value of the thing which owed the debt. The judgment condemned the property,—logically, by the force of the practice; legally, under the statute. • • • The title in the donee is good,

not bad. It may be proved partially bad, if the donation infringes the legitime, and also if the heirs (children) of the donor see fit to take action; but, if sold for a real charge, the charge for which the property is liened and burdened with a privilege superior to all others,—a charge which is a debt on the property, irrespective of the person owning,—the defendant had a good title by the adjudication." Per contra, the contention of the defendant in rule is as follows, viz.: "The debt on which suit was brought is in its nature an assessment against the property, and the name of Mrs. Barrett is used solely because the title stands in her name upon the books of the conveyance records. The assessment necessarily appears in the name of whoever appeared to be owner of the conveyance records. By statute, it is a charge against the property, having rank superior to any mere conventional mortgage or ordinary debt. The only method of enforcing the collection of this assessment is through the medium of a suit instituted against the person in whose name the bill is made, prosecuted to judgment, and thereafter the issuance of a *fi. fa.* to sell the thing against which the lien bears. It was sought in this case to charge all the parties who might hereafter have an interest in the property with notice that the assessment for the improvement of the property was being enforced, and to that end Samuel E. Barrett, the donor, his wife and his four children, who are now alive, were made parties through curators *ad hoc*, and served with process for the collection of the assessment. It is questionable whether such proceedings are sufficient to destroy the right of action of the minor children of Samuel E. Barrett for a revindication of the property, should it hereafter appear that the donation made to Mrs. Barrett, the assessment debtor, exceeds their legitime. Their rights are not yet in existence, and it may be that the conditions under which they could exercise them will never arise; hence they could not be bound by this suit in respect to an advantage which may result to them in the future. It is only present and actual rights that courts sit to hear. The making them parties to this suit can in no way affect them, as under no theory could it be held to divest the interest of the children now living, nor of those who may hereafter be born to Samuel E. Barrett, as they have the right to institute this action of revindication. The theory on which they were made defendants is, perhaps, founded on the married woman's title cases. See, particularly, that of *Duruy v. Musacchia*, 42 La. Ann. 357, 7 South. 555, and the decisions there cited. But, if this practice is apposite, we nevertheless have the case of *Tessier v. Roussel*, 41 La. Ann. 474, 6 South. 542, 824, declaring that the title to property subject to this action is never safe until the donor's death and a settlement of his succession. We conclude, therefore, that the adjudicatee cannot get a good, valid, and unincumbered title to the property, and the

judgment below was erroneous in so holding, and should be reversed."

The city charter, among other things, provides that for the paying or banquetting of any street, or portion thereof, the city council may, in its discretion, "force, impose, and collect of the front proprietors of lots fronting on such streets, a special local assessment in proportion to the frontage, not exceeding the increase in the value of the property, occasioned by the local improvement; and such levied assessment shall have a first privilege superior to vendor's privilege, and all other privileges and mortgages." Act 1882, No. 20, § 87; Act 1876, No. 73, § 3. The language employed in the latter statute is that the abutting property "shall be deemed, considered and treated as pledged for the payment of said cost." In *Paving Co. v. Gogreve*, 41 La. Ann. 251, 5 South. 848, we held that those two acts were in no sense "in conflict, inconsistent with, or contrary to each other"; and that section 119 of Act No. 164 of 1856, which is identical therewith *ipsisssimis verbis*, was examined and applied to a similar paying contract for the grading and shelling of a street, in *Marquez v. City of New Orleans*, 13 La. Ann. 319. To a like effect is *Correjolles v. Succession of Foucher*, 28 La. Ann. 362, construing the similar provisions of an act of 1868. See, also, *Fayssoux v. Succession of Dechaurand*, 36 La. Ann. 547, construing similar provisions of Act No. 76 of 1876. In quite a number of cases this court has held that local municipal assessments for local improvements are valid, although the organic law provides that all taxation shall be equal and uniform; and the reason for that rule is that such assessments are not "taxation," within the meaning of the constitution. *Yeatman v. Crandall*, 11 La. Ann. 220; In re *New Orleans Draining Co.*, Id. 371; *Wallace v. Shelton*, 14 La. Ann. 498; *O'Leary v. Sloo*, 7 La. Ann. 25; *Municipality No. 2 v. Guillotte*, 14 La. Ann. 297; 2 Dill. Mun. Corp. §§ 617, 619; *Cooley, Tax'n*, pp. 117, 416, et seq.; *Charnock v. Levee Dist. Co.*, 38 La. Ann. 323; *Manufacturing Co. v. Green*, 39 La. Ann. 461, 1 South. 873.

We think it unnecessary to analyze those decisions, inasmuch as the principles therein announced have been so generally accepted and acted upon by this court, in many more recent decisions, that they may be accepted as in some respects axiomatic in its jurisprudence. The following cases may be appropriately cited in support of that proposition, viz.: *State v. Judges of Court of Appeals*, 46 La. Ann. 1293, 16 South. 219; *Railroad Co. v. Sheriff*, 47 La. Ann. 708, 17 South. 249; *Fayssoux v. Denis*, 48 La. Ann. 850, 19 South. 760; *State v. Circuit Court of Appeals*, 49 La. Ann. 1221, 22 South. 368.

In quite a number of decisions this court has held that in matters of ordinary taxation, which are uniformly construed strictly, it is permissible for tax assessors to list real property for taxation in like manner as the title

thereto stands upon the books of the recorder's office; and that the title conveyed in expropriation thereof for delinquent taxes is valid and indefeasible, notwithstanding same might have been defeated in an action at law by reason of some latent ambiguities therein. On this proposition the following opinions may be cited, viz.: *Sewell v. Watson*, 31 La. Ann. 589; *Mason v. Bemiss*, 38 La. Ann. 935; *Carter v. City of New Orleans*, 33 La. Ann. 816; *Insurance Co. v. Levi*, 42 La. Ann. 432, 7 South. 625; *Oteri v. Parker*, 42 La. Ann. 374, 7 South. 570; *Prescott v. Payne*, 44 La. Ann. 650, 11 South. 140; *Augusti v. Bank*, 46 La. Ann. 530, 15 South. 74; In re *City of New Orleans*, 51 La. Ann. —, 25 South. 686.

On this theory, we feel safe in holding that the lien and right of pledge resulting from such assessments of necessity attach to the property of the abutting proprietor, without reference to the person in whom the title is vested, and that proceedings taken for their enforcement are proceedings in rem, notwithstanding the owner is cited for the purpose of carrying same into effect. If this were not so, the enactment of such laws would be a vain and fruitless proceeding. Judgment affirmed.

(76 Miss. 874)

BROOKS v. MISSISSIPPI COTTON-OIL CO.
(Supreme Court of Mississippi. April 3, 1890.)

RAILROADS—CORPORATIONS—MASTER AND SERVANT.

Const. 1890, § 193, gave the employes of any railroad corporation the same rights and remedies for injuries as those not employes, and authorized the remedies to be extended to any other class of employes. Code 1892, § 3559, is an exact copy of the constitution, and limits the remedy to railroad employes. Acts 1896, c. 87, and Acts 1898, c. 66, re-enacted section 3559, omitting the word "railroad." *Held*, that the intention was to extend the fellow-servant rule of the constitution to employes of all corporations.

Appeal from circuit court, Washington county; F. A. Montgomery, Judge.

Action by Walter Brooks against the Mississippi Cotton-Oil Company. There was a judgment for defendant, and plaintiff appeals. Reversed.

Appellant, Walter Brooks, was an employe of appellee, the Mississippi Cotton-Oil Company. His duty was to attend to 12 delinters, which were arranged 6 on either side of a narrow aisle, fronting each other. The delinters were made on the same plan as a gin stand, with a breast board to cover the saws; and in front of each delinter there was an apron, it being used for the purpose of preventing the seeds from falling in the aisle, and to precipitate them into a hole running parallel and in front of the delinters, over what is known as the "conveyor,"—this exposed place being about 1 foot wide, and running along all the way in front of each delinter. When these aprons are removed, planks or boards are used to cover up this hole, and, when down, they become part of the floor.

Seabrook, the assistant engineer, whose duty it was to keep the machinery in repair, but had no part in operating the same, for the purpose of putting in a cylinder of sharpened saws had removed the apron from one of the delinters, and also removed the breast board from that delinter, and put down the board or plank over the hole in front of the delinter, and had put the saws in rapid revolution, by steam power, while the breast board was off, and saws exposed, and called appellant to this delinter to look at a belt which had been improperly sewed. The appellant, observing instructions, went to him, looked at the belt, and, seeing that another delinter had become choked with seed, started to it; and, stepping on this board that had been placed over the hole in front of the delinter by Seabrook, it tilted beneath his feet, and he was thrown against the saws of the delinter, which were exposed, and his right arm was caught in the saws, and so badly lacerated that it had to be amputated. This suit was brought to recover damages for injuries thus sustained. The declaration contains three counts: The first charged that the injury was caused by the failure of the appellee to provide a safe foundation for him to stand and walk upon while in the discharge of his duties, and also by the negligence of the assistant engineer of appellee in putting the saws of the delinter in rapid revolution while the breast board was removed and the saws exposed; setting out that said assistant engineer was not a fellow servant, but a superior, of appellant. The second charged that said injury was caused by the assistant engineer in putting the saws of the said delinter in operation while the board was off and the saws exposed, and that this was negligent, unusual, and dangerous to persons walking around the delinter. The third charged that said injury resulted from the failure of appellee to provide a safe floor for appellant to stand and walk upon while engaged in his duties; that, by reason thereof, appellant was thrown against the saws of a delinter while the breast board was off. To this declaration appellee (defendant below) pleaded the general issue. On the trial the court granted a peremptory instruction for defendant, and plaintiff appeals.

J. H. Wynn and B. F. Wasson, for appellant. Miller, Smith & Hirsch, for appellee.

WOODS, C. J. Section 193 of our constitution of 1890 is in these words, viz.: "Every employé of any railroad corporation shall have the same rights and remedies for any injury suffered by him from the act or omission of said corporation or its employé, as are allowed by law to other persons not employé, where the injury results from the negligence of a superior officer or agent, or of a person having the right to control or direct the services of the party injured, and also when the injury results from the negligence of a fellow servant, engaged in another department of labor from that of the party injured, or of a

fellow servant on another train of cars, or one engaged about a different piece of work. Knowledge by an employé injured, of the defective or unsafe character or condition of any machinery, ways, or appliances, shall be no defense to an action for injury caused thereby, except as to conductors and engineers in charge of dangerous or unsafe cars, or engines voluntarily operated by them. Where death ensues from any injury to employé, the legal or personal representatives of the person injured shall have the same right and remedies as are allowed by law to such representatives of other persons. Any contract or agreement, express or implied, made by any employé to waive the benefit of this action shall be null and void; and this section shall not be construed to deprive any employé of a corporation, or his legal or personal representative, of any right or remedy that he now has by the law of the land. The legislature may extend the remedies herein provided for to any other class of employés." Section 3559, Code 1892, is an exact copy of this constitutional provision, omitting the last sentence; thereby limiting the fellow-servant rule, as thus defined, to railroad corporations and their employés. In the year 1896 (Acts 1896, c. 87), Code 1892, § 3559, was amended by conferring upon the employés of any corporation the rights and remedies theretofore enjoyed by railroad employés only. By an act of the legislature subsequently enacted (Acts 1898, c. 66; Code 1892, § 3559, as amended by Acts 1896, c. 87), those rights and remedies were preserved undisturbed to the employés of any corporation. These acts of 1896 and 1898 were plainly intended to extend the rights and remedies theretofore enjoyed by the railroad employés of railroad corporations only to the employés of all corporations, as was provided in the last sentence of section 193 of the constitution. The language of the acts of 1896 and 1898 is plain and unambiguous, and leaves no room for construction. The employés of all corporations were placed under the wise and beneficent constitutional rule prescribed for railroad employés, and all the allegations of the plaintiff's declaration, if established by evidence to the satisfaction of the jury, would have entitled him to a verdict. The peremptory instruction given appellee in the court below, as we are informed by counsel for it, was based upon the theory that the acts of 1896 and 1898 did not extend the fellow-servant rule propounded in section 193 of the constitution, and declared in the code provision (section 3559), to employés of corporations other than railroads; and this must be true, for otherwise the court's action is inexplicable. This view was incorrect, and the instruction should not have been given; and the case should have been submitted, on all its facts, to the determination of the jury. We forbear any comment on the evidence, as the case must be tried again on the lines indicated in the foregoing opinion. Reversed and remanded.

(76 Miss. 324)

HOLDER, Auditor, v. WINEMAN et al.

(Supreme Court of Mississippi. April 17, 1890.)

PUBLIC LANDS—DEFECTIVE TITLE—RECOVERY OF PRICE.

Code 1892, c. 73, § 2588, providing for refunding the price of public lands to purchasers whose title shall fail, applies only to those purchasing since the adoption of chapter 73, providing the new scheme for a land office and land commissioner, and this though in 1896 section 2588 was amended to read, "shall fail or shall have failed."

Appeal from circuit court, Hinds county; Robert Powell, Judge.

Mandamus by J. R. Wineman and others against W. D. Holder, auditor. There was a decree for petitioners, and defendant appeals. Reversed.

The petition alleged: That petitioners were the sole heirs at law of Marx Wineman, deceased. That on May 2, 1882, Robert Lowry, then governor of the state of Mississippi, and Henry O. Meyers, secretary of state, acting under the authority of the legislature of the state of Mississippi of February 1, 1877, executed patents to certain purchasers, named in the petition, of the lands therein described. On the same day, May 2, 1882, all said patentees conveyed the lands patented to them, respectively, to Marx Wineman, by deeds duly recorded in Adams county, in which county said lands are situated. That, in 1896, Mrs. Lucy E. Gastell having asserted a title to said lands, claiming under and through a grant from the state antedating said patents, Marx Wineman filed his bill in the chancery court of Adams county against said Lucy E. Gastell and John M. Simonton, state land commissioner, to establish and confirm his title to said lands, and to cancel the title or claim of title of Mrs. Gastell and the state. Pending said suit, Marx Wineman died, and petitioners, as sole heirs at law, were admitted as claimants, and filed a supplemental bill, setting up title through said patents, and seeking to establish their title to said lands; and prayed that, if the title, derived as above, failed, such failure be determined, that they might avail of their right to collect purchase money and fees from the state paid for said lands. The land commissioner answered, and denied that the state set up any title or claim to said lands. Mrs. Gastell answered, and asserted her title to said lands to be prior and superior to complainants' title. The patents issued by the state to said lands were sufficient in form to pass title, and would have passed title if the state had owned the lands. That petitioners' title had therefore failed, and they had presented their claim to the auditor, and made demand on him to audit and allow the claim for purchase money and fees. Petitioners prayed for a writ of mandamus to compel the auditor to audit their claim and to issue a warrant on the state treasury for the principal, interest, and fees due them. With this petition, as exhibit thereto, was filed a tran-

script of the record of the proceedings in the chancery court of Adams county. The proceedings in the chancery court of Adams county show that a demurrer to the bill filed by Marx Wineman was sustained, and the bill dismissed; but, Marx Wineman having died just before that decree was rendered, the fact of his death not being known at the time, the decree was treated as a nullity, and his heirs filed their supplemental bill, which was annexed, and, on final hearing on bill, answers, and proof, the bill was dismissed; the court reciting in the decree of dismissal that it appeared "complainants' title to the lands in controversy has failed." To this petition for mandamus, defendant pleaded: First. That the state was not indebted to complainants, as alleged in the petition; and gave notice of certain evidence that would be offered under said plea. Secondly. Defendant pleaded that these lands had been conveyed by the state to Marx Wineman's grantors, and the same lands had been conveyed to the commissioners of Homochitto and Leaf rivers, and that these facts had been made to appear to the land commissioners, who had not reported the same to the legislature, with information of the amount of purchase to be refunded, and asked for an appropriation therefor, and that no appropriation had been made to pay the money claimed by petitioners. Thirdly. Defendant pleaded that Marx Wineman fraudulently obtained title to said lands from the state. The fourth, fifth, and sixth pleas were the ten, six, and three years' statute of limitations. Petitioners demurred to the second, fourth, fifth, and sixth pleas of defendant, and the demurrer was sustained to those pleas, to which action of the court defendant excepted, and assigns error therefor. Issue was joined on the first and third pleas. The proof in the case shows that the patents to the lands described in the petition and exhibits thereto were issued and dated the 2d day of May, 1882, at the auditor's office at Jackson, Miss., and that the patentees on the same day signed and acknowledged the deeds to Marx Wineman, conveying to him the several parcels of land patented to them, respectively. That Marx Wineman, through his attorney, paid the money for said patents, and that the several patentees were mere figureheads, and not bona fide purchasers from the state; Marx Wineman being, in fact the purchaser. That, at the time Marx Wineman had these lands patented to his confederates, the deeds from the commissioners of the Homochitto river to Mrs. Gastell, conveying these same lands, were of record in Adams county. That the act of the legislature, passed in 1852, conveying these same lands to said commissioners, was in the statute books, and he was charged with the knowledge of its existence. In 1869 Lucy E. Gastell filed her bill in the circuit court of the United States against Marx Wineman, and litigated with him the title to these lands, and canceled his title against her right and title thereto, and the case was appealed to the court of appeals, and was by

that court affirmed. In November, 1890, the state of Mississippi filed a bill in the chancery court of the First district of Hinds county against Marx Wineman, and charged that the said patents to said lands were void, and sought to cancel the same; and Marx Wineman resisted said suit, and contended that said patents were valid; and said cause was dismissed by the state. Petitioners presented their patents, with the transcript of record in the Adams county court case, to the land commissioner, and asked for cancellation of the patents, which was refused by the land commissioner, unless the attorney general would so advise him. The same papers were presented to the auditor, and he was requested to audit the claim and issue warrant, which was refused, whereupon petitioners brought this suit. From a judgment in the circuit court in favor of plaintiffs, defendant appeals.

Williamson & Potter and Wiley N. Nash, Atty. Gen., for appellant. Brame & Alexander, for appellees.

WOODS, C. J. By the enactment of chapter 73 of the Code of 1892, the legislature wisely devised a new scheme for the regulation, sale, and disposition of the public lands of this state. A new office was created, and a new officer provided for to take charge of and administer the important duties of the office. In effect, a new department of the executive branch of the government was called into existence. The first section of chapter 73 of the Code is in these words: "Sec. 2558. Land-Office. There shall be a land-office, to be kept at the capitol by the land-commissioner, wherein shall be deposited the records of the surveyor-general's office turned over to this state by the United States, all field-notes, plats and maps of surveys of lands belonging to the office of swamp land commissioner, and all the papers, documents and records which ought to be kept in the land-office; and all such records now in the possession of any other officer shall be delivered to the land-commissioner." Section 2566 is as follows: "There shall be a land-commissioner appointed by the governor, to hold office until the qualification of his successor to be elected at the general election in 1895; and he shall succeed the swamp land commissioner, and have charge of the swamp and overflowed lands and indemnity lands in lieu thereof, the internal improvement lands, the Chickasaw school lands, for supervisory purposes the Choctaw school or sixteenth section lands, the lands forfeited to the state for non-payment of taxes after the time allowed by law for redemption shall have expired, and of all other public lands belonging to or under the control of the state; and the regulation, sale and disposition of all such lands, except the Choctaw school lands, shall be made through the land-office." As a part of this wholly new scheme of dealing with the public lands through the agency of this new-

ly-created land office, and by the land commissioner called into being by the Code, section 2588 of chapter 73 of that Code makes provision for refunding to purchasers of lands through the land office the purchase money and fees paid, with interest at 6 per centum per annum, where the title to the land so sold by the state through the land office shall fail. The whole new system of dealing with the public lands was prospective, and contemplated future failures of titles to lands thereafter to be sold through the land office. The language of the statute is, "If the title to any public land sold by the state through the land office shall fail, the state shall refund," etc. Plainly, no reference was made to lands theretofore sold through the office of the swamp-land commissioner, or the office of the auditor of public accounts, or otherwise. For the first time the legislature pledges the state to refund purchase money to purchasers of its public lands on failure of its title when the sale should thereafter be made through its land office. By no stretch of application of any rule of construction can section 2588 have any reference to sales made through the office of swamp-land commissioner, or of the auditor's office, or otherwise, under the old and unsatisfactory system which had long prevailed prior to the adoption of the present Code. In 1896, section 2588 was amended (Acts 1896, p. 60) so as to read: "If the title to any public land sold by the state through the land office shall fail, or shall have failed, the state shall refund the purchase money and all fees paid, with interest at six per centum per annum," etc. The amendment does not have the effect supposed by counsel for appellees. The employment of the words, "or shall have failed," only confers upon purchasers of lands from the state through its land office that which they already had by section 2588 of the Code. It was an inartificially drawn provision, thought by the legislature to be necessary to secure a refunding of the purchase money from the state in cases where the title had failed after the adoption of the Code of 1892, by which the land office was created, and which was already provided for by the terms of section 2588. But its chief purpose, disclosed by the remainder of the section, was to enable residents of the state, in certain cases, to secure patents to other land equal in quantity to that which such purchasers had lost by reason of the failure of their title acquired by sale through the land office; and the words, "shall fail, or shall have failed," applied to this chief object of the amendment, are accurate. The language of the amendment demonstrates that only sales made through the land office are embraced in its terms; for, despite the words, "or shall have failed," the refunding is to be confined to sales made by the state through the land office. By every rule of grammatical and legal construction, the sales for which refunding is provided are sales made through the land office. The amend-

ment must be read, "If the title to any public lands sold by the state through the land office shall fail, or if the title to any public lands sold by the state through the land office shall have failed," etc. The amendment shows that the legislature had in mind only lands sold by the state through the land office, embracing those sold between 1892 and 1896 as well as those that might be sold after 1896. Had the legislature purposed to bind the state to refund the purchase money of all lands ever sold by the state, at any time since the organization of the state government, whether made by the swamp-land commissioner, the auditor, or otherwise, it would have used the plain and simple language indicative of such purpose. But it intended no such universal rule, and one so far-reaching in its effect. The legislature was amending an act confined exclusively to a new office and a new officer, and was providing relief, in certain cases, for purchasers who might buy from the state through the land office, under the new scheme then inaugurated, and was not opening the doors of the treasury to purchasers for the last 50 or more years who had bought, not in reliance upon any promise to refund where the title had failed. Such purchasers bought at their peril, and the state was under no obligation to make them whole. It follows that the appellee has no standing in court, and that the decree in his favor must be reversed, and the petition for mandamus dismissed. Decree here accordingly.

(77 Miss. 68)

WOODRUFF et al. v. STATE et al.

(Supreme Court of Mississippi. July 1, 1898.)¹

LEEVE DISTRICT—ASSESSMENTS—LIABILITY OF LANDS—TRUST FUND—SALE FOR DELINQUENT TAXES—LIABILITY OF LANDS PURCHASED BY TREASURER—EQUITY—JURISDICTION—MANDAMUS—LIMITATIONS—STATE TAXATION—EXEMPTIONS—IRREGULARITIES IN SALES.

1. Act March 17, 1871, organized levee board No. 1, and provided that the lands of the district should be liable, as declared in the act, for the expenses of the levees and improvements in the act. It also provided for an annual assessment of 2 per cent. per annum for 12 years on the lands in the district, and for the sale of bonds. Section 10 provided that the assessments as they were collected should constitute a special fund for the payment of the bonds. *Held*, that the lands in the district were liable for the charges and assessments levied on the land at 2 per cent. per annum for 12 years.

2. The charges and assessments existed only as a tax levied on land until collected, and when collected the taxes became, under section 10 of the act, a trust fund pledged to the payment of the bonds.

3. Under section 13 of the act the lands struck off to the treasurer at a sale for levee taxes, and not redeemed, were declared to be a part of the levee fund, subject to sale as the board should order. *Held*, that the lands themselves were not the trust fund, nor a part of the trust fund, pledged to the creditors of the board, but were held by the board chargeable with state and county taxes, their collection

alone being suspended during the time the board held the land.

4. Lands struck off to the treasurer on a sale for levee taxes, and not redeemed, were subject also to accrued liquidated levee taxes, which were to be paid by the board during its holding.

5. Equity has jurisdiction of a bill filed by bondholders of a levee district to enforce a trust created in their favor by the statute creating the levee district.

6. As Act March 17, 1871, creating levee district No. 1, provided a scheme for collecting the taxes authorized in the act, equity has no jurisdiction to assess and collect them.

7. Where the proper officers of a levee district have not assessed and collected the levee taxes imposed by the act creating the district, or have failed to sell the lands when delinquent, equity is without jurisdiction to have such taxes assessed and collected, the remedy being by mandamus.

8. The right to compel, by mandamus, officers of a levee district to assess and collect the taxes therein, is barred by the six-years statute of limitations.

9. As under Act March 17, 1871, establishing levee district No. 1, it was provided for the levy of taxes annually to create a fund for the payment of bonds issued by the district, the act of 1884, abolishing the board and repealing the act of 1871, was void so far as it sought to repeal that part of the act which imposed the charges and assessments on the land, and its repeal was therefore no obstacle to the right of the bondholders under the act of 1871 to enforce the assessment and collection of the taxes as provided therein.

10. As a trust fund was created for the payment of the levee bonds, and as the right to sue for trust funds is controlled by the 10-years statute of limitations, the holders of such bonds were barred from seeking to enforce the same after 10 years.

11. Lands held by the state subject to levee taxes under Act March 17, 1871, which had been sold to the state for the taxes of such district in whole or in part, and levee taxes of district No. 1, due on all the lands held by the state at the time suit was filed by the bondholders of such district, title to which had been transferred to the state under the act of 1876, providing that title to all lands held by the commissioners of district No. 1 should be vested in the state, and all funds at that time in the state treasury to the credit of district No. 1, were held by the state as trustee in possession, for which it must account to the bondholders.

12. Under Act 1887, § 13, providing that lands purchased by the liquidating levee board at tax sales, and not redeemed, should not be subject to state taxation for levee purposes or otherwise, such lands, while owned by the liquidating levee board, were exempt from state taxation for levee purposes.

13. Lands embraced in levee district No. 1 were legally sold to the liquidating levee board for levee taxes due thereon prior to the act of 1871, and subsequently thereto were conveyed by valid title to the liquidating levee board, and while held by it were not subject to state, county, or No. 1 levee taxes, and could not be sold therefor.

14. Where lands claimed by the liquidating levee board under void sales were legally sold for levee taxes due to levee district No. 1, the sale would pass title, and such lands purchased by levee board No. 1, or by the state for it, were a part of the levee fund of district No. 1, and to the extent of the taxes due thereon would be a trust fund for the benefit of the holders of district No. 1 bonds.

15. Sales for liquidated levee taxes to the liquidating levee board are not void because not made on the proper day.

¹ Held up, on suggestion of errors, till March 4, 1899.

16. Sales to liquidating board were not void because the tax collectors had not duly executed their bonds before making sales.

17. Sales to the liquidating board were not void because deeds as required by law were not executed by the tax collectors.

18. Curative Acts Feb. 10, 1860, and April 10, 1873, and Code 1871, being in force while the liquidating levee board held title to lands sold for delinquent levee taxes, perfected the title of the levee board to the land after the expiration of the several limitations fixed therein as to all irregularities in the sale.

19. The extension by the legislature of the time for the registration of debts as required in the liquidating levee act did not render void bonds issued to pay debts registered within the time fixed under such act.

20. Act April 11, 1876, seeking to avoid legally due taxes, or release any portion of the land embraced in levee district No. 1 by the act of 1871, which lands and taxes were to a certain extent a trust fund for payment of bonds issued by such district, was unconstitutional and void.

21. The abatement act of 1875, in so far as it undertook to abate taxes legally due levee board No. 1, which taxes were to constitute, when collected, a trust fund for the payment of bonds issued by the district, was unconstitutional and void.

22. Under Acts March 14, 1884, relating to levee lands held by purchasers, and providing for quitclaims by the state on the payment of all levee taxes up to date, if any taxes legally due were omitted to be collected at the time of making said quitclaims by the state, the lands are still liable therefor.

23. As Act March 17, 1871, creating levee district No. 1, and authorizing the issue of levee bonds, provides that bonds and coupons of the board shall be received in redemption of lands sold for nonpayment of its taxes, Act March 5, 1884, permitting the state auditor to receive bonds and coupons of levee board No. 1 in redemption of lands sold for nonpayment of its taxes, does not affect the contractual rights of the bondholders under the act of 1871.

24. A bill to enforce a trust in relation to bonds issued under Act 1871 by levee district No. 1 should specifically state lands sold to and held by levee district No. 1 as part of the trust fund for the payment of such bonds.

Appeal from chancery court, Hinds county; Warren Cowan, Chancellor.

Bill by Amos Woodruff, trustee, and others, against the state of Mississippi and others. Demurrer to the bill was sustained, and complainants appeal. Affirmed.

This was a bill filed in the chancery court of Hinds county by complainants as the bondholders of levee district No. 1, created by an act of March 17, 1871. The purpose of the bill was the collection of their bonds, amounting in this case to the principal sum of \$350,000. The act of March 17, 1871, provided for the issuance, by the board of levee district No. 1 of bonds not to exceed \$1,000,000, and levied a tax of 10 cents per acre on the lands of the district for a period of 12 years, including the year 1871. At the sale made for taxes the board was authorized to buy in the lands in default of bidders, and with power to sell the lands. At the time levee district No. 1 was created, there was then existing a board of liquidating levee commissioners, created by the act of 1867, an act which liquidated the large debt of about \$750,000 of a former general levee board, and levied a tax of five cents

per acre on the lands of the district, to be continued until the other debt was paid. In default of bidders, the liquidating levee board was required to purchase all lands sold at liquidating levee tax sales, and the lands thus acquired were made a trust fund for the payment of the liquidated bonds issued under the act of 1867. After the expiration of two years, the title vested absolutely in the liquidating levee board, and the commissioners were given full discretionary power in respect to the sale or disposition of said lands for the benefit of the bondholders of the district. This act further provided that all lands, while held by the liquidating levee commissioners, should be exempt from all state and county taxation, as well as all levee taxes. Almost all the entire territory forming the original general levee district and the liquidating levee district was included in district No. 1, created by the act of March 17, 1871. The larger part of the lands in controversy were sold to the liquidating levee commissioners, and subsequently purchased from the board by the defendants. A portion of the land claimed by the complainants in their bill had been sold to levee district No. 1, which sales in part embraced lands held at the time by the liquidating levee commissioners. The act of March 17, 1871, made the taxes levied by that act a lien on the land, and made the taxes, when collected, a trust fund for the payment of the bondholders of that district; but it did not make the lands held by the board under tax sales a trust fund for the payment of the bondholders, but the lands simply constituted general assets of the board of district No. 1. But the act of April 11, 1876, abolished the board of commissioners of district No. 1, and made the auditor and treasurer ex officio commissioners of said district, with all the power of the original commissioners of the district. This act also provided that the title to all lands held by the commissioners of the district No. 1 should be vested in the state and the auditor and treasurer, ex officio land commissioners, with full power to settle up the unfinished business of levee board of district No. 1. By another act of April 11, 1876, the office of liquidating levee commissioners was abolished, and the auditor and treasurer of the state were made ex officio liquidating levee commissioners, with all the powers of the former liquidating levee commissioners. It was also provided by the first named of these two acts that thereafter the taxes levied and assessed for district No. 1 should be collected by the sheriffs of the several counties composing that district at the same time of the collection of the state and county taxes. In selling the lands held by the state under tax sales, the taxes of district No. 1 were required to be paid by the purchaser, and these taxes thus collected stood as a trust fund for the creditors of district No. 1. It is claimed in the bill that lands were sold by the state to purchasers without requiring the payment of all taxes of said lands to commissioners of dis-

trict No. 1, and that these sales were illegal and void, and that such purchases had been made of some of these lands by these defendants. It is also claimed by the bill that the state now holds title to a large portion of the land in controversy, which is being sold without the collection of the taxes of district No. 1; that these taxes should be collected by the state, and when collected from the purchaser from the state as part of the purchase money, should be paid over to these complainants. It is insisted in the bill that a large part of the lands in controversy were acquired by the liquidating levee board at sales which were irregular and void, and therefore these lands were subject to the payment of said taxes. It is specifically objected in the bill that the tax sales at which the liquidating levee commissioners purchased these lands were made on the wrong day; that special bonds were not given by the tax collector, as required by the law, prior to making the sales; that the lands were not sold in the smallest legal subdivisions, and that the sales were made for several years' back taxes. By the act of February 10, 1860, it was provided that no tax sale should be impeached or invalidated for any cause except for fraud or mistake in the assessment or sale, or upon proof of the payment of the taxes prior to the sale. This statute also provided that no suit to set aside any title acquired under such sale should be brought unless within five years from the date of the sale. The general purpose of the bill was to charge these lands with the payment of these taxes on the several theories stated.

Calhoun & Green, for appellants. Yerger & Percy, Nugent & McWillie, Frank Johnston, J. R. Yerger, Mayes & Harris, and Wiley N. Nash, Atty. Gen., for the State.

WILLIAMSON, Special Judge. The proper decision of the questions raised by the demurrers in this case involves necessarily the construction of the act of March 17, 1871, creating the levee board No. 1, under which act of the legislature the levee bonds sued on were issued, and the construction of the act passed in 1867, known as the "Liquidating Levee Act," also the construction of the many other acts of the legislature in dealing with the subject of levee taxes and the sales of lands for levee taxes, passed subsequently to the two acts referred to. The object of appellants' bill is to compel the administration of a trust for the payment of the bonds of the levee board No. 1 held by them, which trust the bill charges has been wasted and mismanaged under the administration of the trustee by void sales of the trust property under acts of the legislature, by failure to demand taxes due the trust estate, and by conveying away property belonging to the trust estate without enforcing the collection of the purchase money due the estate. The demurrers to the bill plead the six, seven, and ten years' statutes

of limitations in bar of appellants' right to maintain the suit. They also raise the question of the jurisdiction of a court of equity to entertain the bill and grant the relief asked for. Numerous other grounds are assigned against the sufficiency of the bill.

Let us first examine the provisions of the act of March 17, 1871, to see what constitutes the trust fund to which the holders of the No. 1 levee bonds may look for their payment. After creating the corporation, declaring its object and purposes, providing for the organization of the levee board, the selection of its officers and members, and prescribing their powers and duties, the act fixes the boundaries of the Mississippi levee district No. 1, and then uses this language at the close of section 7: "And the lands embraced and included in said levee district shall be, and are hereby declared to be and are made chargeable and liable, as hereinafter declared, for all the costs, outlays, charges and expenses to be incurred or made for the levees, works and improvements provided for and contemplated by this act, or in maintaining the same." Section 8 contains the following language: "That for the purpose of building, repairing, constructing and maintaining the levees and works aforesaid, and for carrying into effect the purposes of this act, a uniform charge and assessment of two per cent. per annum on the value of every acre of unimproved and improved land and cultivated lands in said levee district is hereby fixed, levied and made, which shall continue for twelve successive years from the date of this act, and shall be due and payable the first day of September in each year for said period." The remainder of the section provides for fixing the value of the several kinds of land in the several counties embraced in the district. Section 9 provides for the issuance and sale of \$1,000,000 of bonds, to enable the board of levee commissioners to carry out the purposes of the act. Section 10 provides: "That the charges and assessments levied and made as aforesaid by this act shall be, as they are from time to time collected, and they are hereby constituted a special fund and trust to be used by said board; first, in payment of any bonds that may be sold or used as before provided under this act, and of any money that may be borrowed under its provisions; secondly, for the payment of any other debts and liabilities of said board, and when collected the same shall be paid into the treasury of said board for the purposes aforesaid." It is clear, from the language used in section 7, that the lands in the district were made chargeable and liable for costs, outlays, and expenses as therein-after declared; that is, to the extent and in the manner provided in the sections which followed. By section 8 the charges and assessments levied on the lands were fixed at 2 per cent. per annum for a period of 12 years on the value of each acre of land in the district. To this extent only were the lands in the district made liable for the costs, outlays, and

expenses mentioned in section 7. The charges and assessments levied and made by section 8 of the act are the charges and assessments which, by section 8, are, as they are from time to time collected, constituted a special fund and trust, to be used by the board to pay bonds, borrowed money, etc. Until they were collected, the charges and assessments were not a trust fund, but existed only as a tax levied on the land; a charge against it, which the levee board had a right to collect under the law, and which the creditors of the board had a right under the law to compel it to collect. When collected, the taxes became a fund which the act declared should be a trust fund, and pledged to creditors. *Shotwell v. Railway Co.*, 69 Miss. 542, 11 South. 455. The lands struck off to the treasurer at a sale for levee taxes, and not redeemed, were declared by section 13 of the act to be a part of the levee fund, subject to sale, as the board should order; but this vesting in the board of the title to the lands purchased for taxes was simply a means to secure the collection of the charges and assessments imposed by section 8 of the act, which charges and assessments, when collected, constituted the trust for the benefit of creditors. The lands themselves were not the trust fund, nor a part of the trust fund, that was by the act pledged to the creditors of the board. The lands were held by the board, charged with state and county taxes, which had to be accounted for with interest, their collection being suspended only during the time the No. 1 board held the lands. Not only were these lands held by the board subject to the suspended state and county taxes, but they were subject also to accrued and accruing liquidating levee taxes, which must be paid by the No. 1 board during its holding. Only state and county taxes, not liquidating levee taxes, were suspended. The right to have collected No. 1 levee taxes due on lands purchased by the board at tax sales, and held by it, after the expiration of the period of redemption expired, is the full extent of the rights and interests the creditors of the No. 1 levee board had in the lands.

The subject-matter of this suit being a trust, it comes especially within the jurisdiction of a court of equity, and we think the chancery court of Hinds county has territorial jurisdiction, since the state and its officers are sued, and the Delta & Pine Land Company, one of the defendants, is domiciled at Jackson. *Gibbs v. Green*, 54 Miss. 592. But the chancery court of Hinds county has no jurisdiction to assess and collect taxes in levee district No. 1. The legislature provided the scheme for collecting the taxes in the very act which imposed them, and jurisdiction over this subject was given the courts in this district. If the proper officers in the several counties embraced in levee district No. 1 have not assessed and collected the levee taxes imposed by the act of 1871 on any of the lands therein, or have failed to sell any of the lands, when delinquent, at the time and within the

period required by said act, the chancery court of Hinds county is without jurisdiction to have said taxes assessed and collected by sale of the lands or otherwise. If the Hinds county chancery court had jurisdiction to assess and collect said taxes, the relief could not be granted in this proceeding. Complainants' right to apply to the court, and compel the collection of the taxes, is provided for in section 10 of the act of 1871. The remedy provided was either mandamus against the levee board to have the taxes collected, or the appointment of special commissioners by the court, with full powers to assess, collect, and pay over the taxes. The six-years statute of limitations bars these remedies. It may be urged against this that the act of 1884 abolished the levee board, and repealed the act of 1871, so that there was no one to sue. We reply that this provision was a part of complainants' contract. The holders of the levee bonds could not enjoy the benefit of the trust fund without the means of collecting it, hence the attempt of the legislature to repeal the only remedy for compelling collection of the taxes was tantamount to a repeal of that part of the act which imposed the charges and assessments upon the lands, and was therefore null and void. The act of 1884 was no obstacle to complainants' right to apply to the courts of the district for a speedy enforcement of the remedy, guaranteed to them by the very act and contract under which their bonds were issued. There was always a trustee to be proceeded against, and the courts were open. The levee board, the auditor and treasurer of the state, and the state itself were successively trustees, and could have been proceeded against. The right to sue for trust funds is controlled by the 10-years statute of limitations, and as against all the lands held by defendants the Delta & Pine Land Company, the L. N. O. & T. R. Co., N. T. Burroughs, and other purchasers holding and claiming in their own right, complainants are barred of their right to sue on all bonds which fell due 10 years or more prior to the filing of this suit, but on all bonds which fell due within the 10 years suit may be maintained. As to No. 1 levee taxes due on all lands held by the state at the time this suit was filed, which had been sold to the state for district No. 1 taxes, in whole or in part, and as to No. 1 levee taxes due on all the lands held by the state at that time, title to which had been transferred to the state under operation of the act of 1876, and as to any taxes, money, or funds that may, at that time, have been in the state treasury to the credit of district No. 1 levee board, or that belonged to it, the state was trustee in possession, and must account to the cestui que trust for the fund; and as to these matters the appellants are entitled to report from the trustee, and a discovery as to the true amount of the trust estate on hand. Such funds collected will be applied to the payment of bonds not barred.

It is alleged in the bill, and earnestly con-

tended in the briefs for appellants, that the lands held by the liquidating levee board under titles acquired at sales for liquidating levee taxes, made in accordance with the provisions of the Acts of 1866-67, were subject to the levee taxes of the No. 1 board, levied by the act of March 17, 1871. We cannot assent to this proposition. Under the provision contained in section 18 of the act of 1867, the lands purchased by the liquidating levee board at tax sales, and not redeemed, were not subject to state taxation for levee purposes, or otherwise. During the time they were owned by the liquidating levee board such lands were exempt from state taxation for levee purposes. This is a most valuable provision in the legislative contract made with the holders of the liquidating levee board, and doubtless was most potential in persuading them to sacrifice a large part of their claims against the old board, and to accept, in lieu thereof, the new bonds for much less amount. Being a material part of the contract, the legislature was without authority to repeal or modify it; nor did the legislature repeal or modify this clause by any of the provisions of the act of 1871 creating district No. 1. This was the law at the time the act of 1871 was passed and the bonds now sued on were sold. The holders purchased the bonds of the No. 1 board while this exemption was in force, and they took the bonds with full notice that no revenue from this source could be realized for their payment. It was not necessary to specify in the act of 1871 the exemption of lands held by the liquidating levee board from the charges and assessments therein imposed and levied. Such lands stood exempted by an ir-repealable law. It follows that sales of lands embraced in levee district No. 1, legally made to the liquidating levee board for liquidating levee taxes due thereon prior to the act of 1871, and even subsequently thereto, conveyed valid titles to the liquidating levee board; and while held by the liquidating levee board said lands were not subject to any state, county, or No. 1 levee taxes, and could not be sold therefor. Void sales to the liquidating levee board would, of course, not exempt the lands from state, county, and No. 1 levee taxes while such lands were claimed by the liquidating levee board under such void title; and a legal sale of lands thus held by the liquidating levee board under void titles for levee taxes due the No. 1 board would pass title, and such lands purchased by levee board No. 1, or by the state for it, would be held as a part of the levee fund of the No. 1 board, and to the extent of the taxes due thereon to the No. 1 board would be a trust fund held for the benefit of the holders of district No. 1 bonds.

The sales to the liquidating levee board are not void for the reasons assigned in appellants' bill of complaint, to wit: (1) That they were not sold on the proper day; (2) that bonds were not duly executed by the tax collectors before making the sale; (3) that deeds,

as required by law, were not executed by the tax collectors. These irregularities would not avoid the sales to the liquidating levee board. It is not averred in the bill that no liquidating levee taxes were due, nor is it averred that the taxes due were paid before the sale, that no deed of any kind was made, nor that any fundamental or constitutional requirement had been dispensed with in the assessment of the lands, the levee of the taxes, or in the sales for taxes. Besides, the acts of February 10, 1860, the act of April 10, 1873, and the provisions of the Code of 1871, were curative statutes in force during the time the titles were held by the liquidating levee board, and perfected the titles, after the expiration of the several limitations fixed in the law, as to all irregularities in the sales.

We do not think the extension by the legislature of the time for the registration of debts, as required in the liquidating levee act, rendered void the bonds issued to pay debts registered within the time fixed; nor would any defective registration, as charged in the bill, avoid the liquidating bonds issued to pay said debts. The legislature could not abate any taxes legally due the No. 1 levee board on any of the lands embraced in levee district No. 1, and any act of the legislature which attempted to abate any such legally due taxes, or to release any portion of the lands embraced in said district by the act of 1871, is unconstitutional, null and void. Hence we hold the act approved April 11, 1876, being an act to relieve the lower part of Coahoma county and the counties of De Soto and Tallahatchie from levee taxes of district No. 1 to be unconstitutional, null and void, and it was the duty of the tax collectors of levee board No. 1 to have proceeded to collect the levee taxes due on the lands attempted to be exempted by this act; but if this was not done, and if the holders of the bonds have stood by, and have not resorted to the remedies prescribed in their contract to enforce the collection of said taxes or to have the lands sold, it is now too late. Complainants were barred of their rights and remedies to collect said taxes at the time this proceeding was begun.

The abatement act of 1875 was null and void in so far as it undertook to abate any taxes legally due levee board No. 1. The levee taxes legally due the No. 1 levee board on any lands which had been struck off or sold to the No. 1 board or to the state after the law required the title to be made to the state must have been paid when said lands were purchased from the state, else the lands are still liable for such taxes as were legally due levee board No. 1 at the time of the purchase. None of these levee taxes was abated by the act of 1875; and the acts of the legislature approved March 14, 1884, and March 2, 1888, which dealt solely with levee lands held by purchasers under the decree of the Hinds county chancery court in the case of Gibbs v. Green, 54 Miss. 592, did not attempt to abate any No. 1 levee taxes that may have been due at the

time of the quitclaim of the state's title. The act of 1884 distinctly required that all state, county, and levee taxes due on the lands up to the date of the execution of the quitclaim deed should have been paid before the deed could be executed. By section 2 of the act of 1888 it is expressly provided that the deed to be executed by the auditor in pursuance of that act "shall have the effect of passing the title of the state to the lands embraced therein, whensoever the same may have been acquired, and of releasing all taxes, state, county and municipal, which may have accrued prior to the date of the purchase from said commissioners, notwithstanding any error or miscalculation by the auditor of the amount of taxes to be paid under the provisions of this section, and no such error or miscalculation shall be held to invalidate such conveyance or impair the effect hereinbefore declared, but the land conveyed shall, nevertheless, be liable for any deficiency in the amount stated or demanded." It will be perceived that the lands were relieved only from state, county, and municipal taxes which may have accrued prior to the date of the purchase from the commissioners. No clause in the act undertakes to release the lands from levee taxes. The law required levee taxes legally due the No. 1 board to be paid before a quitclaim could be obtained under either of the acts, and, if any taxes legally due levee board No. 1 were omitted to be collected at the time of making said quitclaims by the auditor, the lands are still liable for them. Now, the bill alleges generally, that these lands were quitclaimed to defendants without collecting the taxes due levee board No. 1, and complains further that for the levee taxes which were paid in the purchase the bonds were accepted instead of requiring cash. We cannot agree with counsel for appellants that it was a violation of the contractual rights of complainants that the act approved March 5, 1884, by its third section, permitted the auditor to receive the bonds and coupons of levee board No. 1 in the redemption of lands sold for nonpayment of its taxes. The very act under which complainants hold their bonds and assert all their rights stipulates, in so many words, that "said bonds or coupons shall be receivable after maturity, at par, in payment of any charge or assessment fixed, levied or made by this act." If at the time the quitclaims were executed to defendants under the acts of 1884 or 1888 taxes due levee board No. 1 were paid in bonds or coupons issued under the act of 1871, it was a legal payment and satisfaction of said taxes, and the holders of other levee bonds may not complain.

We do not think the bill of complaint is sufficiently specific in some respects. It should more specifically describe the lands claimed by the several defendants against which relief is sought. It should more specifically state the amount of taxes claimed to be due on the lands held and claimed by the several defendants respectively. It should state more

specifically what lands were sold to and held by the levee board No. 1. These matters are disclosed by the public records, which are open alike to complainants and defendants, and as to them the bill does not make showing sufficient to call for discovery. If the bill stood confessed in its present shape, no specific relief could be decreed against any particular lands. As we stated above, complainants may properly call upon the state, as trustee in possession, to report and discover any funds on hand at the time of commencing this suit which belonged to the trust estate. It follows from the views of the court expressed above that the decree of the lower court sustaining the demurrers of defendants must be affirmed, but the bill will not be dismissed. Leave to amend their bill within 90 days from the filing of mandate in lower court will be granted the complainants, and the cause will be remanded to be proceeded with in accordance with this opinion.

McALEXANDER v. COOPWOOD et al.
(Supreme Court of Mississippi. April 17, 1890.)
WRIT OF ASSISTANCE—RES JUDICATA—UNLAWFUL
DETAINER.

A decree in partition establishing defendant's title to land, and authorizing the issuance of a writ of assistance to put him in possession, justifies a dismissal of an action of unlawful detainer commenced by defendant after he had filed his answer in the partition suit.

Appeal from circuit court, Marshall county;
Z. M. Stephens, Judge.

Unlawful detainer by W. F. McAlexander and others against Bettie Coopwood and another. From a dismissal of the complaint, plaintiff W. F. McAlexander appeals. Affirmed.

Strickland & Gary, for appellant. D. M. Featherston, for appellees.

TERRAL, J. On the 19th of October, 1897, Mrs. B. A. Coopwood, John Edwards, Willie Edwards, and Mrs. M. M. McAlexander filed their bill in the chancery court of Marshall county against W. F. McAlexander, alleging complainants and the defendant to be the tenants in common, as the heirs at law of W. C. McAlexander, who died in January, 1896, intestate, of 240 acres of land in section 29, and of 240 acres of land in section 32, and of 110 acres of land in section 28, parcels specifically set out in the bill, all of township 2, range 3, in Marshall county, and praying for a partition thereof according to their respective rights as averred in the bill. On November 22, 1897, W. F. McAlexander filed his answer to said bill, admitting that complainants and himself were the heirs at law of said W. C. McAlexander, and were tenants in common of the land described in section 28; but claimed that he, the said W. F. McAlexander, was the sole owner of the land set out, in sections 29 and 32. At the May term, 1898,

of the chancery court, a decree was entered in said suit establishing a title in W. F. McAlexander to the lands in sections 29 and 32, and decreeing that, if they were not delivered up to him by Mrs. B. A. Coopwood within 30 days, a writ of assistance issue to put her off, and to put W. F. McAlexander in possession. And by the same decree the lands in section 28 were ordered sold for a division of the proceeds between the parties to said bill. On the 29th of December, 1897, W. F. McAlexander, B. J. Babb, and Mrs. M. M. McAlexander brought unlawful detainer against Mrs. B. A. Coopwood and her husband for the lands in sections 29 and 32, claimed in the partition suit to be common property, and this unlawful detainer suit came on to be tried at the August term, 1898, of the circuit court of Marshall county, when the proceedings in the chancery suit above recited were set up by way of motion, in bar of the unlawful detainer suit. The court sustained the motion, dismissed the suit, and W. F. McAlexander appeals.

As the chancery court had fully established the title of W. F. McAlexander to the lands embraced in the unlawful detainer suit, and had decreed him possession, and ordered a writ of assistance for that purpose, and as the chancery proceeding was instituted, answer of W. F. McAlexander was filed, and the suit was depending, long before the action of unlawful detainer was brought, we do not perceive that W. F. McAlexander can obtain better right or higher security by a judgment in the unlawful detainer suit than he now has by the decree of the chancery court, and it would seem a vain thing to have judgment in the circuit court for the possession of the very lands for which he has a decree in the chancery court. As the decree of the chancery court seems to be valid, and there is no suggestion of invalidity against it, we think the parties and the court might be spared to be further vexed about the possession of said land. Affirmed.

(76 Miss. 763)

HILLIARD et al. v. CHEW.

(Supreme Court of Mississippi. April 17, 1899.)

JUSTICES OF THE PEACE—JUDGMENTS—DISTRICTS.

A judgment by default on personal service before a justice of the peace in a different district than that in which defendant is a resident householder and freeholder, and in which the debt was contracted, and in which there is an acting justice of the peace qualified to try the action, is void.

Appeal from chancery court, Coahoma county; A. H. Longino, Chancellor.

Injunction by George Chew against H. E. Hilliard and another. Decree for complainant, and defendants appeal. Affirmed.

Butt & Butt, for appellants. Fitzgerald & Maynard, for appellee.

TERRAL, J. On the 12th of August, 1895, at Clarksdale, in the Fourth district for the

election of justices of the peace of Coahoma county, before a justice of the peace thereof, a judgment was rendered in an action of assumpsit in favor of H. E. Hilliard against George Chew for \$195.63. The said judgment was rendered by default upon personal service. George Chew, at the time of the bringing of the suit and of the judgment, was a resident householder and freeholder of district No. 5 of said county, where said debt was contracted, and where there was an acting justice of the peace qualified to try said suit. Execution, issued upon said judgment, was levied upon seven bales of cotton as the property of Chew, when he filed his bill herein, and obtained a perpetual injunction against the enforcement of said judgment. As the justice of the peace of district No. 4 did not acquire jurisdiction of the cause of action between the parties, the judgment against Chew was void, and the decree giving him a perpetual injunction against it is approved. Affirmed.

(76 Miss. 813)

HORNE v. HIGGINS.

(Supreme Court of Mississippi. April 10, 1899.)

PAROL TRUSTS—EVIDENCE—ADVERSE POSSESSION—FRAUD—PLEADING.

1. Code, § 4230, making void all parol trusts in land, precludes a grantor in a deed from proving by parol that the deed was executed to enable the grantee to manage the land for the grantor's benefit, and not to divest him of his interest in the land.

2. One seeking to set aside a deed for fraud, and to establish a resulting trust to other land purchased by the grantee with the proceeds of the sale of the land conveyed by the deed, does not show any bar to adverse possession by alleging that he joined in the deed executed by his grantee when he sold the land.

3. A son cannot avail himself of a presumption of fraud and undue influence in the execution of a deed by him to his mother for a grossly inadequate consideration, where he alleges that she did not intend to defraud him, and that the deed was executed to protect him from squandering his property.

Appeal from chancery court, Lauderdale county; N. C. Hill, Chancellor.

Bill in chancery by Charles B. Higgins against John H. Horne. Defendant's demurrer to the bill was overruled, and he appealed. Reversed.

The bill alleges that Peter H. Higgins, complainant's father, died September 19, 1881, intestate, leaving, surviving, Mrs. C. M. Higgins, his widow, and two sons, complainant and John Higgins; that Peter Higgins was seized and possessed of real estate worth \$75,000 at his death; that John Higgins died, leaving no wife or children; and that complainant inherited a one-third interest in his father's estate at his death, and also inherited the one-third interest in said estate from John Higgins at his death; that complainant attained his legal majority on the 3d day of April, 1886, and was then of rather unsteady habits, and disposed to be wayward, and his mother, recognizing this, was unwilling to

trust him with the possession of his estate; that his mother, Mrs. M. C. Higgins, was duly appointed administratrix of his father's estate, and paid all of his indebtedness out of the personal property owned by him; that complainant was desirous of embarking in a small business, requiring the immediate advancement of \$500, and applied to his mother for that sum of money, which request was denied; that his mother suggested that, if he would execute to her a deed of conveyance to his two-thirds interest in the estate property, she would furnish him the money desired; that complainant recognized her purpose to be the protection of his estate against his own improvidence, and, having more confidence in her ability to manage it, assented, and executed the deed, as required, on the 17th day of April, 1886, the deed reciting a consideration of \$500, which was in fact the true consideration; that it was not the purpose or intention of his mother to perpetrate any fraud or imposition upon complainant; that he, as well as she, knew and were advised that the said transaction was a legal fraud, and a nullity, and for the purpose, only, of preventing complainant from squandering his estate, and that the invalidity was so patent that no one would accept a deed to any of the property, without his joining in the deed; that, after the execution of this deed, his mother made divers sales of parcels of said property, and executed mortgages on other parcels, and, at his mother's request, complainant joined with her in the execution of all these deeds; that his mother received large sums of money in this way, in all about \$52,000, and that she invested this money in other property, and expended it in making improvements on said property; that Mrs. M. C. Higgins intermarried with defendant, Horne, in September, 1897, and died in December, 1897, intestate; that complainant acquired a two-thirds interest in all the property owned by his father at his death, and one-half interest in all property owned by his mother at her death; that Mrs. M. C. Higgins purchased and paid for the property acquired after the death of her husband with funds derived from sales of said property inherited as aforesaid; and that the improvements made thereon were likewise paid for out of money so derived, and Mrs. M. C. Higgins held said property, so acquired in trust for the benefit of complainant, to the extent of an undivided two-thirds interest. The prayer of the bill was for the cancellation of the deed of April 17, 1886, to complainant's mother, and that a resulting trust be decreed in favor of complainant in all the property acquired by his mother, after his father's death, with the proceeds of the property owned by him at his death.

Fewell & Son, for appellant. G. Q. Hall & Son, for appellee.

WHITFIELD, J. In so far as the bill seeks to establish a trust by parol, in the face of

the deed that Mrs. Higgins was to manage the estate conveyed, etc., for her son, it is obnoxious to section 4230, Code 1892. As to the statute of limitations, it is to be said that the claim of no adverse holding relied on as an answer thereto is far from the fullness and detail of statement, as to the facts making out the adverse holding, necessary. Mere joinder in the deeds, the mother getting all the money, is not enough. If there are facts, as there may be, answering the statute, they must be pleaded. The purpose of the bill seems to be to first set aside the deed for fraud and undue influence; and, that deed thus put out of the way, to then establish a resulting trust arising from the investment of what would then be the money of appellee in lands the title to which was taken in the mother. And that is the true line of attack, if the facts warrant it. But the averments of this bill leave all that in a mist.

Coming, then, to the marrow of the case, the bill states two facts: That the deed was made by the son to the mother 15 days after he came of age, and that the consideration was grossly inadequate; and the argument built on these two averments is that the law will presume fraud and undue influence from these two facts. But what is to become of this mere presumption of fraud and undue influence, which is the whole case made by the bill, when the pleader makes a summary end of the presumption, by proceeding to aver that, in truth and fact, there was neither fraud nor imposition in the transaction? The pleader has stated himself out of court. There may be merit in the case, but this bill does not show it.

The decree is reversed, the demurrer sustained, and leave granted appellee to amend, as he may be advised, in 60 days from the filing of the mandate in the court below. So ordered.

JONES v. ILLINOIS CENT. R. CO.
(Supreme Court of Mississippi. April 17, 1899.)

DAMAGES—WITNESSES—CHARGE.

A peremptory charge as to the amount of damages cannot be predicated on the opinion of witnesses.

Appeal from circuit court, Yalobusha county; W. A. Belk, Special Judge.

Action by Henry Jones against the Illinois Central Railroad Company. There was a judgment for plaintiff for less than the amount demanded, and he appeals. Affirmed.

Brewer & Wilson, for appellant. Mayes & Harris, for appellee.

TERRAL, J. The appellant sued the railroad company for the value of his dog Tag, negligently killed, as he averred, by the running of a train of the company, through the incorporated city of Water Valley, at a greater rate of speed than six miles an hour. The

jury found for the plaintiff, and assessed the value of the dog at \$5; but he is dissatisfied, because he says that he should have had a peremptory instruction fixing the value of the dog at \$100. Henry and his wife testified that Tag was a good dog for hunting, and they said they thought Tag to have been worth \$100. Henry further testified, without objection, that he had been offered \$25 by one person, and \$50 by another person, for his dog; and there was other evidence that Tag was a good hunting dog.

The opinion of the owner and his wife that Tag was worth \$100 did not oblige the jury to find for that amount; nor did the offer of \$50 for the dog necessarily fix that sum as the value of the dog. The opinion evidence and the offers were merely persuasive before the jury. Value is an inference from description and quality, and is to be fixed by the jury, and not by the court or the witnesses. The evidence said that Tag was a good hunting dog; and what a good hunting dog imported, and what such a dog was worth on the upper waters of the Yoknapatawpha river or the adjacent hills, was a question which a jury of Yalobusha county was perhaps well fitted to determine. That province, at least, is assigned to them by law.

Affirmed.

(76 Miss. 728)

SMITH et al. v. STATE.

(Supreme Court of Mississippi. April 10, 1899.)

SCIRE FACIAS—SERVICE—VARIANCE—ERROR.

1. A judgment final on a scire facias is erroneous, where the scire facias was not served, nor two writs returned "Not found," as required by Code 1892, § 1396.

2. Where sureties on a recognizance have been served, but fail to appear on the scire facias, they cannot predicate error on a variance between the bond and the scire facias; the bond not being properly a part of the record of the scire facias proceedings.

3. A variance between a judgment nisi and the scire facias, as to the date of the former, is fatal to the judgment final rendered on the latter.

Appeal from circuit court, Claiborne county; W. K. McLaurin, Judge.

Scire facias by the state, on the recognizance of D. H. Smith, Jr., given for his appearance to an indictment for keeping a gaming table. There was a judgment final for the state, and defendant and the sureties appeal. Reversed.

D. H. Smith, Jr., was indicted, for keeping a gaming table, and was arrested in February following, when he gave bond, with D. H. Smith, Sr., and J. S. Porter sureties on his bond, for his appearance at the June, 1897, term of the court. At the June, 1897, term, defendant D. H. Smith, Jr., appeared, and pleaded guilty of gaming. Sentence was by the court suspended, and defendant taxed with costs, and committed to jail until said costs were paid. At the January, 1898, term, upon the default of defendant and his sureties, judg-

ment nisi was rendered against them, and a writ of scire facias issued, returnable to the June, 1898, term. This writ is founded on the judgment nisi rendered on the 11th day of January, 1898, while the judgment nisi in this case was rendered on the 12th day of January, 1898. This writ was executed personally on D. H. Smith, Sr., and J. S. Porter, but D. H. Smith, Jr., was not found.

Martin & Anderson, for appellants. Wiley N. Nash, Atty. Gen., for the State.

WHITFIELD, J. As to D. H. Smith, Jr., the principal, the judgment is erroneous, being by default, because there was no personal service on him, nor were there, as required as an equivalent therefor by section 1396 of the Code of 1892, "two writs of scire facias returned, by the proper officer of the county where the bond or recognizance was entered into, 'not found.'" *Saffold v. State*, 60 Miss. 928.

The sureties, having been personally served, and having failed to appear, cannot predicate error here of a variance between the bond and the scire facias; because in such case the bond is "not properly a part of the record of that proceeding, but must be brought before the court by plea of nul tiel record or other appropriate plea." *Ditto v. State*, 30 Miss. at page 128.

But there is a fatal variance between the judgment nisi and the judgment final as to the date of the judgment. Say the court in *Ditto v. State*, 30 Miss. 128: "Where the scire facias is not supported in a material respect by the judgment nisi, a judgment final, inconsistent with the judgment nisi, is erroneous, and, if to a party's prejudice, must be reversed." To the same point identically is *Bridges v. State*, 24 Miss. 154. Reversed and remanded.

(76 Miss. 710)

WESTBROOKS v. STATE.

(Supreme Court of Mississippi. April 10, 1899.)

INTOXICATING LIQUORS—CRIMINAL PROSECUTION—BILL OF PARTICULARS—EVIDENCE OF GOOD CHARACTER.

1. Since Ann. Code, § 705, authorizing the court to direct the giving of a bill of particulars where the pleading in any case is vague and general, applies only to civil actions, one accused of retailing liquors without a license is not entitled to a bill of particulars.

2. In a criminal prosecution, evidence of accused's general good character is admissible only when limited to the particular trait involved in the nature of the charge.

Appeal from circuit court, Pike county; W. P. Cassidy, Judge.

Anderson Westbrook was convicted of retailing intoxicating liquors without a license, and he appeals. Affirmed.

Chas. E. Williams and Will A. Parsons, for appellant. Wiley N. Nash, Atty. Gen., for the State.

TERRAL, J. The appellant was convicted of retailing, and appeals, and assigns error

thereon. Before the trial began, upon a proper affidavit made for that purpose, he moved the court for a bill of particulars of the charge, which the court overruled; and upon the trial he proposed to prove his general good character, and this evidence was rejected. A bill of particulars, even in civil cases, was unknown to the ancient common law, and its use in later times is said to have arisen under the common-law courts in actions of debt and assumpsit. 3 Enc. Pl. & Prac. 518. In criminal cases the common law required directness and particularity in the averments of the indictment; and there was no need, in general, for a note of the matters to be given in evidence to be furnished to the defendant, and there was no practice of that sort, except in special cases. However, in cases of barratry, where the charge is general, merely alleging the man to be a common barrator, without more, the practice, according to Brooke, was, before the trial, to furnish the defendant with a note of the evidence to be relied on; and the same rule prevailed in indictments for being a common scold; but of the offenses of which the charge may be so general as these, there are only a few set down in the books. 2 Hawk. P. C. 315. If being a common barrator or a common scold be crimes in this state (and our constitution does not require a more particular charge than anciently), doubtless a bill of particulars might be demanded. But, in general, all of the particulars required to be given are charged in the body of the indictment, and the practice of giving the bills of particulars has been unknown among us. Indictments for retailing precisely like this have been frequently before this court, and they have been uniformly held to be sufficient. We think that section 705, Ann. Code, does not apply to criminal cases, and that the action of the court in overruling the motion of the defendant to have himself furnished with a more particular description of the charge is correct.

2. Evidence of general good character is admissible in criminal cases; but the evidence relating to such general character should be confined to the particular trait involved in the nature of the charge against the defendant. The offer of the defendant was not so limited. 1 Greenl. Ev. § 54; 1 Whart. Cr. Law, § 636. Affirmed.

(76 Miss. 843)

BYERS v. TABB et al.

(Supreme Court of Mississippi. April 10, 1899.)

FOREIGN ASSIGNMENTS—VALIDITY—SITUS OF BOOK ACCOUNTS.

1. A wholesale dealer of another state sold goods on open account in the usual course of business to retailers in this state, the bills being payable at the seller's domicile, where also were kept the books containing the accounts. *Held*, that the situs of the accounts was at the seller's domicile, and they passed with his voluntary assignment for the benefit of creditors, made in that state.

2. A voluntary assignment for the benefit of creditors, made in another state by a person

domiciled there, will be upheld in this state, as to personal property situate there, though the laws of the foreign state provide for and authorize preferences which are unlawful in this state, where the record does not disclose the existence of any such preferences, and where there is nothing on the face of the assignment in conflict with the laws or public policy of this state.

Appeal from chancery court, Clay county; Baxter McFarland, Chancellor.

Suit by S. T. Tabb and others against John M. Byers, as assignee for the benefit of creditors of William H. Byers, and others. There was a decree for complainants, and defendant Byers appeals. Reversed.

Roane & McClellan, for appellant. Critz, Beckett & Kimbrough, for appellees.

WOODS, C. J. On the 31st day of March, 1898, William H. Byers, a wholesale dealer in millinery in the city of Louisville, state of Kentucky, executed a general assignment of all his property, real, personal, and mixed, wherever situated, to John M. Byers, as assignee for the benefit of all his creditors. The conveyance was duly signed and acknowledged by both assignor and assignee, and was filed and recorded on the same day in the office of the clerk of the proper court in said city of Louisville. The assignee immediately took possession of the assigned property, and proceeded to execute the trust. Subsequently, in April, 1898, the appellees filed their bill of complaint in the chancery court of Clay county, Miss., alleging an indebtedness to them, severally, in the amounts named in their bill, by William H. Byers, the assignor, and had writs of garnishment issued and served upon many persons, who were retail merchants in Mississippi, and who were indebted to said William H. Byers for merchandise bought by them from the wholesale millinery house, in Louisville, of said William H. Byers. The indebtedness of these various garnishees amounted, in the aggregate, to about \$8,000, and was evidenced by open account on the mercantile books of said William H. Byers. These accounts and the books containing them are, and have been since the execution of the assignment, in the possession of John M. Byers, the assignee, in Louisville, Ky. In September, 1898, the said John M. Byers, by leave of the chancery court of Clay county, Miss., filed his petition, asserting, as assignee, his claim to the several sums shown and admitted to be due by the respective garnishees, and praying that the same be paid into court, and turned over to him as assignee in said assignment. At the same time, William H. Byers, the assignor, filed his answer to the bill of complaint of Tabb and others, admitting his indebtedness to complainants, as set up in their bill, and admitting the indebtedness to him, prior to his assignment, of the garnishees, severally, in the sums named in the bill of Tabb and others; but he avers that on the 31st day of March, 1898, he made a deed of general as-

ignment to John M. Byers, as assignee, for the benefit of all his creditors, whereby he conveyed to said assignee all of his property and assets of every character wherever situated, whereby all right to and interest in the accounts against the garnishees named in complainants' bill passed to his said assignee, and became due to and collectible only by him, the assignee; and he, the assignor, had no interest in the same when complainants filed their bill. Tabb, Anna Goodwin, and Barbara Schmitt, three of the complainants to the bill in chancery in Clay county, are citizens of Louisville, Ky., and the remaining complainant, M. T. Allen, is a citizen of the state of Georgia; and all had knowledge of the assignment and its contents before filing their bill in chancery in Clay county. After filing said bill, and before the decree here appealed from was entered, all the complainants filed their claims with the proper authority in the court in Kentucky under whose direction and order the assigned estate is being administered and distributed, praying to be allowed to receive their ratable parts of the dividend there ready in that court for distribution. All their claims have been allowed by the Kentucky court, and Barbara Schmitt has received, by order of said court, \$2,000 on her claim; and as to the remainder of her claim, and all the other claims of the three other complainants, though allowed by that court, the court suspended any order for distribution, to await the result of the litigation in Mississippi.

By the assignment statutes of Kentucky, debts due by the assignor in the character of guardian, trustee of an express trust, etc., are made preferred debts; and, by those statutes, assignments shall not be invalidated by reason of any interest of the assignor, whether appearing on the face of the deed of assignment or otherwise, unless the assignor be solvent. Where is the situs of the accounts evidencing the several indebtednesses of the various garnishees? The accounts were made by retail merchants doing business in Mississippi in the purchase of goods from a wholesale merchant in Louisville. The open accounts appearing on the books of the wholesale merchant are, and have always been, kept in Louisville. That city is the domicile of the creditor, and the debts were payable there. The situs of the debts due by the garnishees was clearly in Louisville. Their owner has not dealt with them so as to locate them in Mississippi. It was said by this court, Cooper, C. J., delivering the opinion, in *Jahler v. Rascoe*, 62 Miss. 699: "It would be an unwarrantable construction to hold that debts due by residents of Mississippi to merchants conducting business in the states of Louisiana and Tennessee, contracted in the course of dealings with such merchants, were situated in this state, within the meaning of the statute. * * * The statute does not, in other cases than those in which the owner has so dealt with the property as to lo-

cate it here, abrogate the rule that choses in action have their situs at the domicile of the owner." The same general doctrine was held, also, in *Speed v. Kelly*, 59 Miss. 47. In this latter case the court held "that a debt due by a resident of this state to one domiciled in Louisiana, and having in his possession in that state the evidence of debt, was not, in the absence of any other evidence, personal property situated in this state." While these two cases went upon the proper construction of our statutes governing the administration and distribution of personal property of decedents, we are unable to perceive why the general principles announced in both are not equally applicable to cases involving the administration and distribution of personal property in an assignment proceeding. The assignment before us is valid in Kentucky. This is not questioned. Is it valid in Mississippi, and shall it be upheld here in so far as the rights of the assignee to the personal property in this state are affected? It will be well to remember here that the question is whether a voluntary assignment of personal property (choses in action in this instance), made in good faith, will be upheld in this state, though the conveyance was made in another state. This is not a case involving the consideration of the effect to be given an insolvent or bankrupt statute of a foreign state. The distinction between a voluntary conveyance by the owner and an involuntary one, or one made by operation of a statute, is universally recognized. The latter class of conveyances has no extraterritorial effect on property in a state other than that where made. As is well said in *Story, Conf. Laws*, § 411: "This makes a solid distinction between a voluntary conveyance by the owner, and an involuntary legal conveyance by mere authority of law. The former has no relation to place. The latter, on the contrary, has the strictest relation to place." The well-nigh universal rule is that a voluntary assignment which is valid where made will be upheld in another state where some of the assigned personal property is found, unless contrary to the positive law or public policy of the state where such property is found. There is nothing on the face of this deed of assignment in conflict with any statute of this state, or of our public policy. There are differences between the Mississippi and Kentucky assignment laws as to details in machinery in carrying into effect an assignment. But mere differences in administration will not produce conflict, necessarily.

It is argued, however, that this conveyance in the case in hand must be read as if it contained the provisions of the Kentucky statute which make trust debts due by the assignor preferred debts, and declare that the intent of the assignor, whether appearing on the face of the deed of assignment or otherwise, shall not invalidate the assignment, unless the assignor be solvent. Now, as we have said, this assignment is not only good

In Kentucky, but, on its face, it is good here; and it is the assignment itself which is to be upheld or destroyed by our courts, and not the Kentucky assignment laws. However, when we read into this conveyance the provisions of the Kentucky statute which we have referred to, the instrument itself will declare a preference for trust debts, if there be any such, and will declare that the conveyance shall not be invalidated if there be any fraudulent intent on the part of the assignor. Inasmuch as the record does not disclose the existence of any trust debts due by the assignor, the effect to be given the assignment will be exactly that which would have been given it if the Kentucky statute had not been read into the deed. And so, too, as there is no hint even of any intent on the part of the assignor, other than that of devoting his entire estate to the payment of his debts, the effect to be given the assignment in our courts will be exactly that which would have been given it if the provision of the Kentucky statute had not been read into it. It is thus apparent that looking at the deed alone, or looking at it with the inoperative and ineffectual provisions read into it, it is not a contravention of the law of public policy of this state. We are not to be understood as holding that the Kentucky assignment law is not essentially similar to ours on the same subject. We have not found it necessary to determine that question in this controversy. We are of opinion that the right to collect and have the sums due from the garnishees is in John M. Byers, the assignee.

The decree of the court below will be reversed, and the bill of complainants dismissed.

(77 Miss. 38)

NATIONS et al. v. LOVEJOY.

(Supreme Court of Mississippi. April 17, 1899.)

CIRCUIT COURTS—JURISDICTION—APPEAL FROM JUSTICE.

The circuit court of the Second judicial district has no appellate jurisdiction of a case brought before a justice whose district was partly in the Second circuit court district and partly in the First, where defendants were residents of the First district.

Appeal from circuit court, Yalobusha county; W. A. Belk, Special Judge.

Action by W. A. Lovejoy against Sam Nations and others. From a judgment for plaintiff, defendants appeal. Reversed.

Brewer & Wilson and Frank Johnston, for appellants. I. T. Blount, for appellee.

WOODS, C. J. This suit was begun by appellee against the appellants before a justice of the peace in justice district 2, in Yalobusha county, and judgment rendered in favor of appellants, from which judgment appellee took her appeal to the circuit court of the Second circuit and chancery court district of that county. From a judgment rendered against

them in the said circuit court of said Second judicial district of said county, appellants bring the present appeal to this court.

The appellants were properly sued before the justice of the peace in the Second justice of the peace district, as they were residents of said justice district. This justice's district was partly in the First circuit court and partly in the Second circuit court district. The appellants lived in that part of the district of the justice of the peace which was in the First circuit court district, but the appeal from the judgment of the justice of the peace was taken by appellee to the Second district circuit court. After the facts had been developed on trial in the circuit court of the Second district, the appellants moved to dismiss the appeal because of the want of jurisdiction in that court to entertain it, and the motion was overruled, and this action of the court is assigned for error in this court.

The question thus presented is not one of venue, but one of jurisdiction, and one of appellate jurisdiction. The circuit and chancery courts of the First and Second judicial districts are as distinct from each other as the circuit and chancery courts of separate and distinct counties. There is no appellate jurisdiction in the circuit court of one county from judgments of justices of the peace in another county. There is no such thing as appellate jurisdiction in a circuit court, unless conferred by statute, and there is no statute authorizing the circuit court of the First judicial district of Yalobusha county to take jurisdiction of appeals from judgments of a justice of the peace outside the limits of the First district. Every citizen is entitled to be sued in the district of the justice of the peace in which he resides (with a few exceptions specified in our statutes), and is entitled to be sued, also, in the courts of the county of his residence. Of course, one may consent to the transfer of a cause by change of venue from one court, having original jurisdiction of the subject-matter of the litigation, in one county, to another court, likewise having original jurisdiction of the subject-matter, in another county, and thereby confer jurisdiction of the person upon the latter court. But that is not the case made here. This was an appellate tribunal, having and determining an appeal in a cause over which the court clearly had no jurisdiction. The motion to dismiss the appeal should have been sustained. Reversed.

WESTERN ASSUR. CO. v. WHITE.

(Supreme Court of Mississippi. April 17, 1899.)

INSURANCE—AGENCY—PROOFS OF LOSS—WAIVER.

Insurer issuing a fire policy knew that its agent was a stockholder and cashier of a bank to which the loss clause was made payable as a creditor of the insured, and through its adjuster knew that the agent was responsible for insured not filing proofs of loss, and instead of

repudiating the agent's act the adjuster attempted to effect a settlement. *Held*, that there was a waiver of proofs of loss.

Appeal from circuit court, Lafayette county; Eugene Johnson, Judge.

Action by George A. White, to the use of the Bank of Oxford, against the Western Assurance Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Suit in the circuit court of Lafayette county by George White against the Western Assurance Company on an insurance policy issued by the defendant to recover \$1,085 and interest from November 30, 1894, for the use of the Bank of Oxford. The policy was on the steam engine, boiler, gin stands, etc., belonging to White, and was made payable to the Bank of Oxford as its interest might appear. It contained the three-quarter value clause. The principal defenses are that no proof of loss was made by White, as was required by the conditions of the policy, and that the property which was destroyed by fire on the 30th day of November, 1894, was not worth as much as the face of the policy. On the trial plaintiff proved that the policy had been issued, and the premiums paid, and that the policy was in force when the property was destroyed by fire. Ben Price was the agent of defendant at Oxford, Miss., and through him the policy was issued to White. He had been the agent there for several years, and had issued policies to White before. He was also cashier of the Bank of Oxford, and a stockholder therein. Price delivered the policy to White. The evidence shows that White notified Price of the loss, and asked him what was necessary for him to do. Price replied, "Nothing, until the adjuster comes." About 10 days afterwards, D. D. Boyd, who was the adjuster of the company, went to Oxford, and went to the scene of the fire, and investigated the loss, and returned to Oxford with White, and endeavored to effect a settlement, and agreed on the value of nearly all the items of loss, but they failed to agree as to other items, after going over them all. After White had failed to make a settlement with Boyd, he again went to Price, and asked him what was then necessary to do in order to collect the money, and Price said, "Wait 60 days, as the company had that time under the policy in which to make the settlement." White did nothing else until the 60 days expired, and made no attempt to comply with the conditions of the policy in regard to proof of loss, and a few days after the 60 days had expired instituted this suit to recover the money. After plaintiff had introduced his evidence, defendant made a motion to exclude it, because there was no proof of loss. This motion was overruled. Defendant then introduced evidence tending to show that the property insured could be replaced for much less than the sum demanded. The jury rendered a verdict for plaintiff for the \$1,085, with interest from the date of the loss till the day of the

trial, and a judgment was rendered in accordance therewith. From that judgment defendant appealed. Its contention is that, under the terms of the policy, the proof of loss was necessary; that what Boyd did was not a waiver; and that Price, because of his interest, and representing antagonistic interests to the company, could not waive proof of loss.

Stone & Sivley, for appellant. J. W. T. Falkner, for appellee.

WHITFIELD, J. The facts of this case differentiate it widely from the cases of Wildberger v. Insurance Co., 72 Miss. 343, 17 South. 282, and Greenwood Ice & Coal Co. v. Georgia Home Ins. Co., 72 Miss. 46, 17 South. 83. The wholesome doctrine of those cases will be rigidly applied whenever the facts of any other case fall within the principle of those cases. But in this case the appellant knew Price was a stockholder in, and the cashier of, the Bank of Oxford, that the loss clause was payable to the Bank of Oxford as its interest might appear, that it was so written in the face of the policy, that the property insured was the property of George White, and not of the Bank of Oxford, and through Boyd, its adjuster, all that had been done by Price; and Boyd, with full knowledge of all this, did not at once repudiate the whole transaction, but actually went on trying to effect a settlement, and did agree on the value of much of the property. We think, on the facts of this case, the right result was reached, and the judgment is affirmed.

(76 Miss. 504)

McGUIRE v. STATE.

(Supreme Court of Mississippi. April 10, 1899.)

CRIMINAL LAW—JURORS—INDICTMENT—CERTIFIED COPY—EVIDENCE—ARRAIGNMENT—PRESUMPTIONS—EX POST FACTO LAWS—LESSER PENALTY—NEW TRIAL.

1. It is proper for the court to exclude a juror who stated on his voir dire that he had an opinion of defendant's guilt which would require testimony to remove, and that he had doubts whether he could render an impartial verdict.

2. A defendant may be tried on a certified copy of the indictment, where it has been recorded, if the original has been lost.

3. The minutes of the court in a case are before the court when on hearing, without being put in evidence.

4. Where the record shows that defendant was arraigned on the same indictment, and pleaded not guilty at the first trial, he need not be again arraigned at a second trial of the same offense.

5. A record need not show that the indictment was read to the jury, since such fact will be presumed.

6. The infliction of a different, but not a greater, punishment for a crime does not make the statute *ex post facto* as applicable to crimes previously committed.

7. Life imprisonment is not a greater punishment than the death penalty, so as to make a statute changing the punishment for murder from death to life imprisonment, at the option of the jury, *ex post facto* as applicable to previous crimes.

8. Jurors cannot be heard to impeach their own verdict.

Appeal from circuit court, Marshall county; Z. M. Stephens, Judge.

John McGuire was convicted of murder, and he appeals. Reversed.

Mayes & Harris, D. M. Featherston, and W. A. McDonald, for appellants. Wiley N. Nash, Atty. Gen., for the State.

TERRAL, J. John McGuire, at the August term, 1898, of the circuit court of Marshall county, was tried and convicted of the murder of William Bayliss, and sentenced to be hanged. The killing occurred on the 26th day of February, 1869, and at the February term, 1898, of said Marshall county circuit court an indictment against the said McGuire for the murder of said Bayliss was found and returned into said court, and he was at that term in said court arraigned upon said indictment, and was put upon his trial for said crime; but, the jury failing to agree upon a verdict, a mistrial was had, and entered of record. The indictment against McGuire was recorded in the "Secret Record of Indictments," duly made by the clerk of said circuit court under section 1347, Code 1892, and at the August term, 1898, of said court, said indictment being lost, the said defendant was put upon his trial, over his objection, and was tried upon a certified copy of said indictment, pursuant to said section 1347, Id.

The sections of the act of April, 1872, material to this case are as follows (Laws 1872, pp. 88, 89):

"Sec. 5. Be it further enacted, that no person shall be incompetent as a juror because of conscientious scruples against capital punishment; but in cases heretofore deemed capital, the jury may adjudge the penalty to be death, or imprisonment for life in the penitentiary, and the court may, in all cases, cause the verdict to be amended in form."

"Sec. 8. Be it further enacted, that all prosecutions for criminal offences heretofore committed shall be commenced within two years after the commission thereof, and not after: provided, this section shall not apply to any cause in which the offender shall have fled from the state." The defendant pleaded not guilty, and under that plea sought to avail himself of the statute of limitations of two years, under section 8 of said act, above quoted, and which act he was well authorized to interpose against the prosecution as a perfect shield against it, unless the proviso to said section 8 excepted him out of the operation of the act. Upon the trial, the district attorney, supported by some uncertain evidence on that line, insisted that the defendant, before the passage of the act of April 5, 1872, had been indicted for said crime, and so said act had no application to the case (*Thompson v. State*, 54 Miss. 740); but that, if he was not supported in this contention, he yet insisted upon the case made that McGuire had fled from the state, and so the application of the statute of

limitations to the case became a vital point of inquiry. By the laws in force when the crime was committed (Code 1857, p. 614, art. 257) it was provided, "All indictments must be presented to the court by the foreman of the grand jury, in the presence of at least twelve of such jury;" and the evidence as to the finding of an indictment against McGuire in 1869 was so shadowy and uncertain that it could not support a verdict of the jury resting upon such contention as a material fact in the case, because at most it raised a mere probability of the fact of the return of the indictment into court, and did not preclude reasonable doubt on the subject.

The court gave for the state instruction No. 1, as follows: "(1) The court instructs the jury for the state that if you believe from the evidence, beyond a reasonable doubt, that a grand jury of Marshall county, in 1869, found an indictment against John McGuire for the killing of Wm. Bayliss, and since that date said indictment has been lost or destroyed, then the statute of limitations does not bar the prosecution, and you should not acquit him on that account;" and refused instruction No. 22 for the defendant, as follows: "(22) The court instructs the jury that an indictment which is not presented to the court by the grand jury is invalid, and the marking of an indictment by the clerk is the evidence that it was found by the grand jury, and an indictment not so presented to the court, and marked 'Filed' by the clerk, has not been found in any legal sense, and has no validity." The action of the court on these instructions is assigned for error.

Cook, being offered as a jurymen, stated on his voir dire that he had an opinion of the guilt of the defendant which it would require testimony to remove, and that he had doubts whether he could, if taken, render a fair and impartial verdict, and he was excluded by the court, and the defendant excepted.

The jury having convicted the defendant of murder, without fixing his punishment at imprisonment in the penitentiary for life, as under the instructions of the court they might have done, the defendant, on a day subsequent to his conviction, and on his motion for a new trial, offered Utley, one of the jurors, and proposed to prove by him that he thought, when rendering the verdict given in the case, that it would give to the defendant a sentence from one to five years in the penitentiary, and that he had no idea that he would have to be hanged; and the defendant also offered the testimony of seven others of the jury to prove their views of the matter coincided with those of Utley; and all this proffered evidence was excluded, and the action of the court therein excepted to.

The defendant, at the February term, 1898, of the court, was arraigned upon the indictment found against him at that term for the murder of Bayliss, and put upon his trial therefor, but a mistrial was had. At the ensuing August term, 1898, of the court, the indict-

ment was found to be lost, whereupon the defendant was then tried upon a copy of said indictment, duly certified from the record book of indictments kept under section 1347, Ann. Code, but without any new arraignment, and there is no certain evidence that the copy of the indictment upon which the defendant was tried was read to the jury, the defendant, or the court; and this omission and action are claimed to be erroneous and harmful.

Just before the verdict of guilty was returned into court, the jury informed the officer attending them that they desired further instructions as to their verdict. This wish was communicated to the judge and to the defendant's counsel, and the latter declined to have the jury state their difficulties, in order to their removal, whereupon the jury immediately returned their verdict.

The defendant objected to the reading of the minutes of the February term, 1898, of the court, showing, among other things, the arraignment of the defendant. He objected also to being tried on a copy of the indictment taken from the record of the indictments.

1. Juror Cook. The action of the court in excluding the juror Cook is, we think, in accord with the principles of law heretofore in use in the impanelment of jurors; at least it is justified by the last clause of section 2355, Ann. Code.

2. We see no reason for complaint by the defendant that he was tried upon a certified copy of the indictment. We know of no constitutional provision that forbids it. In change of venue cases it is provided that accused persons shall be tried on a certified copy of the indictment, and such practice has often been followed, without objection, and we are not advised that any valid objection could be made against it. The act requiring the recording of indictments would be useless unless it answered the purpose of supplying a lost indictment. The minutes of the court in any particular case are before the court when on hearing, and their being put in evidence was superfluous. The record showed that the defendant had been arraigned upon the indictment in this case, and had pleaded not guilty, and that rendered it unnecessary to arraign the defendant again. 2 Enc. Pl. & Prac. 771. The objection that the record of the proceedings does not show that the indictment was read to the jury cannot prevail. The record in no case is required to show such fact. Nevertheless it is always presumed that such is the case. The circuit court is a court of superior jurisdiction, requiring in capital cases that the defendant be represented by counsel, if he desires it; and one of the leading objects in the trial of a case is that the jury, as well as the court, may understand the question before it; and it is to be conclusively presumed, without express evidence to the contrary, that the judge saw to it that the jury were informed of the precise nature of the charge against the person whose life is committed to their hands.

3. Pardon. It is claimed that the act of April 5, 1872, operated as a statutory pardon of the defendant, because it authorized the jury to fix the punishment for murder at imprisonment for life in the penitentiary, instead of leaving it to the court to adjudge the death penalty unless such imprisonment be fixed by them, and contained no saving clause as to former offenses. Our state constitution forbids the enactment of *ex post facto* laws, and, if the act of 1872 falls within that category, the defendant is entitled to a discharge. *Ex post facto* laws are defined as follows: "(1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. (2) Every law that aggravates a crime, or makes it greater than it was when committed. (3) Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. (4) Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense in order to convict the offender. But I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the criminal law, but only those that create or aggravate the crime, or increase the punishment, or change the rules of evidence, for the purpose of conviction." Chase, J., in *Calder v. Bull*, 3 Dall. 386. If the act of 1872 is *ex post facto* as to the defendant, it is because the case falls within the second or third class enumerated in Judge Chase's opinion, and because the death penalty is less than imprisonment for life. It was in 1872, as it is now, a matter of common knowledge that many persons, when called upon to qualify themselves for jury service in capital cases, declared themselves opposed to capital punishment, and the fifth section of the act of 1872 was intended to obviate the scruples of those conscientiously opposed to the inflicting of the death penalty, some of whom believed that that penalty should not be inflicted in any case, nor could be rightly imposed by human authority; and it was unquestionably the opinion of the legislature that life imprisonment in the state penitentiary was a mitigation of the death penalty. Christian people have always regarded the infliction of death as the extreme penalty for crime, and such opinion necessarily results from the principles of their religion. There are courts which hold that any change in the mode of punishment makes the law *ex post facto*, but other authorities coincide with the opinion expressed by Judge Chase in *Calder v. Bull*, *ubi supra*, and hold that it is the infliction of a greater punishment that makes the law *ex post facto*, while the infliction of a different punishment, unless it also is a greater one, does not so operate. In passing the act of 1872, we are satisfied that the legislature considered life imprisonment a more merciful punishment than death, and we fully believe the general

sentiment of the Christian world approves the opinion.

4. Statute of Limitations. The evidence as to the finding of a bill of indictment against the defendant before the passage of the act of 1872 was too doubtful to be laid before the jury, and was wholly insufficient to prevent the operation of the bar of two years contained in section 8 of the act of 1872. Under the two years of limitation of the act of 1872, an indictment against the defendant was barred unless he was excepted from the operation of the last clause of section 8 of said act, which declares that, "This section shall not apply to any case in which the offender shall have fled from the state." The evidence of the finding of an indictment in this case in 1869 should have been disregarded as too uncertain for consideration, and the instruction of the court authorizing the jury to disregard the bar of the two years under the act of 1872 if an indictment had been found against the defendant before April 5, 1872, was error.

5. The court properly refused the evidence of the jury to impeach their verdict. They had not been satisfied with their understanding of the instructions given to them, and had made an ineffectual attempt to be enlightened on the subject, and had applied to the court for fuller instructions, but its being given to them was declined by the defendant's counsel. Their finding, however made, may not be impeached by their own evidence.

We give no opinion as to the operation of the statute of limitations under the act of 1872. Reversed, and remanded for a new trial.

(76 Miss. 890)

LOWENSTEIN et al. v. ABRAMSOHN.
(Supreme Court of Mississippi. April 10, 1899.)

ATTACHMENT—EQUITY—JURISDICTION—FRAUDULENT CONVEYANCES—EVIDENCE.

1. Equity has jurisdiction of a bill, by one receiving a stock of goods in extinguishment of a pre-existing debt, against a sheriff and attaching creditors, to subject the proceeds of the sale of the goods at an attachment sale to the satisfaction of said debt, and to enjoin the sheriff from paying the proceeds to the attaching creditors.

2. The fact that a stock of goods sold at an attachment sale for more than a debt for which they had been transferred before the sale does not show that the transfer was fraudulent, where the bid was for more than the goods were worth; the bidder being a local dealer, and unwilling to have the goods retailed by another at cost prices.

Appeal from chancery court, Coahoma county; A. H. Longino, Chancellor.

Bill by M. Abramsohn against B. Lowenstein & Bros. and others for a part of the proceeds of a sheriff's sale of a stock of goods seized under attachment. Decree for complainant, and defendants appeal. Affirmed.

Charles Brenner, a merchant doing business at Dublin, Miss., was indebted to M. Abramsohn, a merchant at Oxford, Miss., in the sum of \$2,793.51, evidenced by two promissory notes for \$1,481.66 and \$1,000, respectively, both past due, and bearing interest at

8 per cent., and both containing stipulations for the payment of attorney's fees which the holder might have to expend in their collection. On October 20, 1897, Abramsohn delivered these two notes to James Stone, an attorney at Oxford, Miss., for collection. Stone went to Dublin, and purchased for his client Brenner's entire stock of goods, store fixtures, and accounts due the store; the consideration being the extinguishment of the debts evidenced by the said promissory notes, which were then by the attorney marked "Paid," and delivered to Brenner, who at the same time delivered to the attorney the possession of the store, and the books evidencing the accounts transferred. Stone at once employed one Dancy to take charge of the property purchased, and Dancy placed over the door Abramsohn's sign, and took charge for the purpose of selling the goods out as Abramsohn's agent. On the 22d day of October, 1897, after Abramsohn had gone into possession, S. Seelig & Co. and eight other creditors of Charles Brenner levied successively nine attachment writs upon all of the property purchased by Abramsohn; the grounds of the attachments being that Charles Brenner had disposed of his property with the intent to defraud his creditors. Under these writs the sheriff seized the books of accounts, and took possession of the goods and store fixtures, and sold the goods and store fixtures at public auction on the 17th of November, 1897, at Dublin, when they were purchased by Allen & Co. at the price of \$3,800. Abramsohn attended the sale, and bid for the goods. There were a number of bidders until the price reached \$2,500. After that there were no bidders except Abramsohn and Allen & Co. Abramsohn's last bid was \$3,700. Dancy testified at the trial that before the sale he told Allen that he thought that, if Abramsohn bought the goods, they would be sold at cost; that Allen was in the mercantile business at Dublin, did not want to encounter competition of that kind, and determined to buy them; that the resolution of Allen to purchase, and the motive actuating him, came to the ears of Abramsohn, who concluded that he could make Allen pay full price for the goods. Dancy also testified that the stock of goods was worth about \$3,000 or \$3,500. The \$3,800 which the goods brought at the sale by the sheriff being in the hands of the sheriff under the nine levies so made by him, and no judgment having been rendered in any of the attachment suits, M. Abramsohn filed his bill in the chancery court of Coahoma county against the sheriff and all of the attaching creditors, wherein he released all claim to the account transferred to him, and all claim to the funds in the hands of the sheriff in excess of the debt owing to Abramsohn by Brenner, to wit, \$2,793.51, and prayed (1) that the sheriff be decreed to pay the \$2,793.51 to him; (2) for a temporary injunction restraining the attaching creditors from seeking to subject said \$2,793.51 to their respective demands,

and that the sheriff be restrained from paying them that sum out of the funds in his hands; and (3) that upon final hearing the defendants be perpetually enjoined. The greater number of the defendants demurred. Their demurrers were overruled, and they all answered jointly, denying all the equities of the bill. The case was heard on the pleadings and the proofs, and a decree was rendered granting the prayer of the bill. From this decree the attaching creditors appealed.

Butt & Butt, for appellants. Perkins & Winston and C. L. Sivley, for appellee.

WHITFIELD, J. The jurisdiction is abundantly sustained by *Bishop v. Rosenbaum*, 58 Miss. 84, and *Pollock v. Savings Inst.*, 61 Miss. 293.

On the merits, we rest our decision upon the distinct ground that the proof satisfactorily shows that the goods were not actually worth more than the debt due appellee. It is perfectly obvious from the testimony of Dancey that Allen's bid was not for the value of the goods alone, but also for what it would be worth to him to prevent the sale of this bankrupt stock in Dublin at or below cost. The highest bid really made for the goods, as such, was the sum of \$2,500. Allen had been told by Dancey that they would be sold, and Dancey had then told Abramsohn what he had told Allen; and Abramsohn, acting on this knowledge, was simply forcing Allen to bid all he could be made to bid,—not to get the goods, only, but to keep off this disastrous competition. That is the real situation,—one not foreseen, nor reasonably to be foreseen, by Abramsohn's agent, Stone, at the time of the purchase of the stock by him in extinguishment of Abramsohn's debt. We put our decision on this express ground, not sanctioning the doctrine of *ex post facto* purgation of fraud. A transaction stamped by the vitiating element of actual fraud at the time remains such, as to that particular transaction; always; and a doctrine that such a transaction can be purged of its fraud by matter *ex post facto*, and become itself—that particular transaction—honest, is abhorrent to any enlightened system of jurisprudence. It simply puts a premium upon fraud. But there was no actual fraud here, and Abramsohn's purpose was to get his just debt, and that was what in fact, at the time, he got. The surplus beyond that value,—the price of what it was worth to Allen to keep out this disastrous competition,—he is not entitled to, and does not claim. Affirmed.

(122 Ala. 580)

MORRIS v. EUFAULA NAT. BANK.¹

(Supreme Court of Alabama. Feb. 2, 1899.)

BILLS AND NOTES—DRAFTS—PAYMENT BY CHECK—AGENT FOR COLLECTION—PRESENTMENT—DISHONOR—TIME—RECOVERY—PLEADING.

1. An agent to collect a draft, to whom the acceptor gave a check for the amount in pay-

ment, as between himself and the acceptor has until the close of banking hours on the next secular day in which to present the check for payment; and hence, where the acceptor paid the check after the failure of the bank on which it was drawn before the expiration of such time, he cannot recover the amount from the agent.

2. Where a count in *assumpsit* is joined with one in case, the misjoinder is properly raised by demurrer to the entire pleading.

Appeal from circuit court, Barbour county.

Action by P. H. Morris against the Eufaula National Bank. From a judgment for defendant, plaintiff appeals. Affirmed.

The complaint was as follows: "The plaintiff claims of the defendant five hundred dollars as damages for that whereas, to wit, on March 30, 1891, the defendant had in its possession for collection a certain draft or bill of exchange drawn on plaintiff by the Mound City Distilling Company, and accepted by him, for the sum of four hundred and seventy and $\frac{22}{100}$ dollars, and which said draft or bill of exchange was due and payable on said March 30, 1891; and that on said day the said defendant presented said draft or bill of exchange to the plaintiff in the city of Eufaula, Alabama, about 10 o'clock in the forenoon of said day, for payment, and that said plaintiff then and there gave to said defendant a check on the John McNab Bank, a bank then doing a banking business in the city of Eufaula, Alabama, for said sum of four hundred and seventy and $\frac{22}{100}$ dollars, the amount due on said draft or bill of exchange. And plaintiff avers that he drew said check for said sum on the John McNab Bank, and delivered the same to the defendant in the city of Eufaula, Alabama, about 10 o'clock in the forenoon of said March 30, 1891, and that at the time said check was so drawn by plaintiff and delivered by him to the defendant, and during the remainder of said day, March 30, 1891, the said John McNab Bank kept open its banking house and carried on its banking business in the usual way, and paid all checks which were drawn on or against it during said day. And plaintiff further avers that at the time he drew said check and delivered it to the defendant as aforesaid he had on deposit to his credit in the said John McNab Bank, and subject to his check, the sum of two thousand dollars, and that the said defendant, by the exercise of reasonable diligence, could have presented said check to the said John McNab Bank during banking hours on said March 30, 1891; and that if defendant had so presented said check on said March 30, 1891, the same would have been paid in full by the said John McNab Bank, but said defendant, notwithstanding its contract in the premises, and in disregard of its duty arising out of its contract with plaintiff, failed to present said check to the said John McNab Bank on said March 30, 1891. And plaintiff further avers that after said March 30, 1891, and on March 31, 1891, the said John McNab Bank suspended payment, and failed, and never after its said failure carried on any business, and by reason

¹ Rehearing denied April 14, 1899.

of the premises the said plaintiff was compelled by said defendant, on March 31, 1891, to take up said check so given by him to it as aforesaid, and pay said defendant in money the said sum of four hundred and seventy and $\frac{22}{100}$ dollars on March 31, 1891, and by reason thereof plaintiff was damaged as aforesaid; wherefore he brings this suit." To this complaint the defendant demurred upon the following grounds: (1) That it was not the duty of defendant to present the check mentioned in said complaint until the day after it received said check from plaintiff. (2) That it was not defendant's duty to present the check mentioned in said complaint on the same day the same was received. (3) The said complaint shows that the bank upon which the check mentioned in the same was drawn closed its doors on the same day said check was drawn, and never afterwards opened them for business. (4) Said complaint fails to aver that plaintiff suffered any damage by defendant's failure to present said check on the day it was received. This demurrer was overruled, and thereupon the defendant filed the general issue and five special pleas. The plaintiff's demurrers to the third and fourth pleas were sustained, and it is unnecessary to set out said pleas. The second and fifth pleas were as follows: "No. 2. That the defendant, doing business in Eufaula, Alabama, on March 30, 1891, having for collection the draft mentioned and described in the complaint, presented the same to the plaintiff in Eufaula, Alabama, on said day; that the plaintiff gave his check for the amount of said draft upon the John McNab Bank, doing business in Eufaula, Alabama, and defendant held said check until next day, to wit, March 31, 1891; that on said last-named day the said John McNab Bank did not open its doors for business, and has been suspended ever since; that the defendant paid the amount of said draft above described to its owner, and demanded of plaintiff reimbursement of same by reason of his check, and defendant insisted upon it, whereupon plaintiff said that he would consult his lawyer about the matter, and take his advice; that on or about April 21, 1891, the plaintiff, having been advised that he was liable for the same, agreed to pay to the defendant the amount of said check, and, in execution of said agreement, gave to defendant his note for the amount, with interest, payable on October 1, 1891, and on or about the day the same fell due, on October 1, 1891, he paid it to defendant; and that plaintiff, having paid, adjusted, and settled this claim with full knowledge of all the facts, cannot now maintain this suit." "No. 5. The defendant, for further answer to the complaint in said cause, saith that the cause of action therein alleged is barred by the statute of limitations of one year." To the second plea the plaintiff demurred upon the following grounds: "That the matters and things set up in said plea are in no wise an answer to the complaint filed in said cause. The action in this case, as stated in said com-

plaint, is for the failure of the defendant to present a check as stated in said complaint, and said plea sets up matters and things in reference to the action of the plaintiff and defendant about the adjustment and payment of the amount advanced by the defendant to the Mound City Distilling Company, the owners of the draft or bill of exchange which defendant had for collection, and which the plaintiff was trying to pay, and said plea does not set up any fact which excuses or tends to excuse the defendant for its failure to present said check to the John McNab Bank, as it had contracted with the plaintiff to present and collect within a reasonable time." To the fifth plea, the plaintiff demurred upon the following grounds: "(1) The complaint filed in said cause shows that this is an action upon a simple contract, and is not barred by the statute of limitations of one year. (2) The complaint filed in said cause shows that this is an action for the breach of a contract which was made between the plaintiff and defendant on March 30, 1891, and is not barred by the statute of limitations of one year. (3) The complaint filed in said cause shows that this is an action for an injury to the rights of plaintiff arising from a contract entered into between plaintiff and defendant on March 30, 1891, and which said contract was broken by the defendant, and that said action is not barred by the statute of limitations of one year." Each of these demurrers was overruled, and the plaintiff duly excepted. After the remandment of the cause by this court on the former appeal, the plaintiff amended his complaint by filing an additional count. The substance of this count, for the purposes of this appeal, is sufficiently stated in the opinion. To the added count the defendant demurred upon the ground that there was a misjoinder of causes of action. This demurrer was sustained, and, the plaintiff declining to plead further, there was a verdict and judgment for the defendant. The plaintiff appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

G. L. Comer, for appellant. S. H. Dent, Jr., for appellee.

PER CURIAM. A draft had been drawn by the Mound City Distilling Company on the plaintiff, Morris, and duly accepted by him. It was due on March 30, 1891, and was held by the defendant, the Eufaula National Bank, for collection. The latter made due presentment of it to the drawee and acceptor thereof for payment on March 30th, and received from him a bank check drawn by him for the amount due on the accepted draft on the John McNab Bank, another banking institution then doing business at Eufaula, Ala., where the payee thereof was located. The check dated March 30th was payable to the Eufaula National Bank, and was delivered about 10 o'clock in the forenoon. The John McNab Bank continued to pay checks drawn on it

and presented during the remainder of the day of March 30th, and, having then closed its doors, did not thereafter resume business operations. The plaintiff had funds on deposit with the drawee sufficient to meet the check, which would have been paid if presented within banking hours on the day it was delivered to defendant. On March 31st, the John McNab Bank being then closed, the plaintiff took up his check, and paid defendant the amount called for therein, \$470.22. The first amended count, from which the above facts appear, states that the plaintiff "was compelled" by the defendant to take up the check, and we therefore assume that it was taken up and the amount paid on the insistence of the defendant that it should be done. The plaintiff afterwards brought his action against the defendant, wherein he claims damages on account of the failure of the defendant to present the check on March 30th. A check is payable on presentation and demand. To charge the drawer, the holder is required to present it within a reasonable time, and after the lapse of a reasonable time from its delivery by the drawer the holder retains it at his peril. *Savings Co. v. Weakley*, 108 Ala. 458, 15 South. 854; *Watt v. Gans* (Ala.) 21 South. 1011. As between the holder and drawer of the check, however, presentment may be made at any time, and delay in presentment does not discharge the liability of the drawer unless loss to him has resulted. *Carroll v. Sweet*, 128 N. Y. 19, 27 N. E. 763; 2 Daniel, Neg. Inst. § 1587; *Savings Co. v. Weakley*, supra. Without questioning these general principles, it was held on the former appeal in this case (106 Ala. 383, 18 South. 11) that the amended complaint showed a cause of action. The conclusion of the court was reached upon a distinction, therein pointed out, as being established by the authorities cited in the opinion. In illustrating the proposition announced by him (2 Morse, Banks, § 421), quoted in our former opinion, that learned author was not as lucid as he usually is, but the proposition itself is clear. He thus states the same doctrine in section 240: "But when a check is taken, instead of money, by one acting for others, a delay of presentment for a day, or for any time beyond that within which, with proper and reasonable diligence, it can be presented, is at the peril of the party retaining the check and postponing presentment, as between him and the persons in interest whom he represents. And where loss occurs because such a check is not presented on the day of its reception, the agent is liable." The same doctrine is thus stated by Mr. Daniel: "The allowance of a day to present the check does not extend to an agent who receives one for a debt of his principal. He must present it instantaneously." 2 Daniel, Neg. Inst. § 1590. The authority cited by each of these text writers is *Smith v. Miller*, 43 N. Y. 171; Mr. Daniel citing, in addition, *Farwell v. Curtis*, 7 Biss. 165, Fed. Cas. No. 4,690, and *First Nat. Bank of Meadville v. Fourth*

Nat. Bank of New York, 16 Hun, 332. As the case of *Smith v. Miller*, 43 N. Y. 171, 52 N. Y. 546, is cited as sustaining the conclusion of the court in this case on the former appeal, it is proper to make a fuller statement of it than we would otherwise feel called on to do. The plaintiffs in that case brought an action to recover the unpaid balance of the price of a bill of goods sold by the plaintiffs to the defendants. The defendants set up a defense of payment by a draft for \$2,968.69 drawn by them on James K. Place & Co., of New York, to the order of plaintiffs, who resided and did business in New York, the defendants residing at Buffalo. The plaintiffs received the draft by mail on the morning of November 19th, and immediately indorsed it, and at about half past 1 in the afternoon of the same day presented it for payment at the counting house of James K. Place & Co., the drawees, who were merchants in New York in good standing. In payment of the draft James K. Place & Co. gave their check on the Manufacturers' National Bank of New York City, to the order of plaintiffs, for the full amount. At the time plaintiffs received the check of James K. Place & Co. the latter had funds in the Manufacturers' Bank to meet the check, which would have been paid had it been presented on that day. The check was deposited during the same afternoon in the Citizens' Bank for collection, and was not presented for payment at the Manufacturers' National Bank till 12 o'clock the next day, on the morning of which James K. Place & Co. had failed, and on that account payment of the check was refused. The action therefore was between parties to the original draft, and was not between the parties to the check which James K. Place & Co. had given to plaintiffs. The court, in its opinion, says: "When a check is taken, instead of money, by one acting for others, as was done by the plaintiffs, a delay of presentment for a day, or for any time beyond that within which, with proper and reasonable diligence, it can be presented, is at the peril of the party thus retaining the check and postponing presentment, as between him and the persons in interest whom he represents." 43 N. Y. 176. In *First Nat. Bank of Meadville v. Fourth Nat. Bank of New York*, 16 Hun, 332, 77 N. Y. 320, it appeared that the Meadville Bank had forwarded to the Fourth National Bank a sight draft drawn by another bank in Meadville on certain bankers in New York. On receipt of the draft, the Fourth National Bank presented it to the drawees for payment, who gave their check on another New York bank for the amount, and the draft was delivered to them. The Fourth National Bank did not present this check for payment on that day, but sent it through a clearing house, and it was presented the next day for payment, but payment was refused, the drawers of the check having failed on that day. The Fourth National Bank thereupon returned the check to the drawers, received back the draft, made

formal demand of payment and caused the draft to be protested for nonpayment, and on the next day due notice of protest was served by mail upon plaintiffs and upon the drawer of the draft. The action was brought by the Meadville Bank against the Fourth National Bank to recover damages resulting from alleged negligence on the part of defendant in the performance of its duty, as agent for plaintiff. It was held that it was the duty of defendant to have presented the check for payment as soon as, with reasonable diligence, it could, and for any damages arising from the delay in presentation it was liable. This case, it will be observed, was between the drawer or owner of the draft and its agent for collecting the same. The question presented in *Farwell v. Curtis*, 7 Biss. 165, Fed. Cas. No. 4,690, so far as it bears on the point under discussion, was of the same general nature as that in *Smith v. Miller*, which was there cited and approved. If the Mound City Distilling Company were suing the Eufaula National Bank for accepting the check of the drawee of the draft, and thereby causing loss to it, the cases referred to would be in point, but that is not the case presented by the record before us. And that the court in *Smith v. Miller* did not intend that its language or decision should be construed to apply to the relative rights of the parties to the check itself drawn by James K. Place & Co. is apparent from its language just preceding that above quoted, the court saying: "But a check is payable instantly, and, as between the drawer and drawee, the latter has, in analogy to the rules applicable to inland bills of exchange, until the day after the receipt of a check to present it for payment, when drawn on a bank in the same place where given and received. But," continues the court, "the duty of the plaintiffs is not determined by that rule of commercial law. That rule has respect only to the contract and liability of parties to the instrument." And we may say further that in *Railroad Co. v. Collins*, 3 Lans. 29, 57 N. Y. 641, the question decided in *Smith v. Miller* is clearly pointed out. There the defendant had given the plaintiff a check on a local bank for the amount of freight bills on May 4th. The bank on which it was drawn failed on the 5th, and the check was not presented or paid. The action was for the amount of the freight bill, for which the check had been given. The court held that there was no laches in not presenting the check before the bank closed, as the plaintiff had the whole of the next day after receiving it (i. e. of the 5th) in which to present it; and, referring to *Smith v. Miller*, distinguished it in the particular above pointed out, namely, that that case was not disposed of upon the rules of law regulating the rights and duties, respectively, of the drawer and drawee of a check, but upon the rules applicable to one who takes a check for collection, acting for one not a party to it. The distinction, therefore, to be

drawn from the foregoing authorities is this: That, as between the drawer or owner of the draft on the one hand and the party charged with the duty of collecting it on the other hand, the question of their relative rights is to be determined by the rules of law applicable to principal and agent; and that, as between the drawer and the payee of a check given under the circumstances and for the purpose shown in this case, the question of their respective rights and liabilities is to be ascertained and fixed by the principles of the commercial law. The defendant here, in collecting the draft, was the agent of the drawer thereof, and in no proper sense can it be said to have been the agent of the plaintiff. 1 *Morse, Banks*, § 214; *Dodge v. Trust Co.*, 93 U. S. 385; *Anderson v. Gill*, 79 Md. 312, 29 Atl. 527. There are numerous cases, besides those already adverted to, some of which are referred to hereafter, where the action was upon the check itself, or upon the original indebtedness, and the defense was interposed of payment, by reason of laches in the presentation of the check for payment, which resulted in a loss or damage to the drawer; and such laches and consequent damage we have held may be shown under a plea of payment. *Watt v. Gans* (Ala.) 21 South. 1011. Manifestly, the drawer's case is not made any stronger by the mere fact that he is plaintiff than it would, under the same circumstances, be if he were defendant, and pleading that he was discharged by the payee's or holder's delay in presenting the check. It would, indeed, be an anomaly to decide that the defendant had a reasonable time within which to present the check for payment, in order to charge the drawer, and, under the same state of facts, to hold that the defendant was guilty of negligence in not presenting it before the expiration of such reasonable time.

Under the facts stated in the count of the complaint under consideration, the only obligation, so far as concerned the plaintiff, which rested upon the defendant, was to use due diligence to make presentment and demand of payment of the check within the reasonable time allowed by the rules of the commercial law, and, upon its being dishonored, to give due notice to the drawer. 1 *Morse, Banks*, § 218. What, then, is the reasonable time which the defendant had within which to discharge the obligation, under the facts of this case? We consider it thoroughly settled that the reasonable time allowed the holder for presenting a check, when he receives it in the same place where the bank on which it is drawn is located, is till the close of banking hours on the next secular day; and if, in the meantime, the bank fails, the loss will fall on the drawer. *Daniel, Neg. Inst.* § 1590; 1 *Morse, Banks*, §§ 240, 421; *Rand. Com. Paper*, § 1103; *Bank v. Spicer*, 6 Wend. 443; *Wear v. Lee*, 87 Mo. 358; *Bickford v. Bank*, 42 Ill. 238; *Simpson v. Insurance Co.*, 44 Cal. 139; *Loux v. Fox*, 171 Pa. St. 68, 33 Atl. 190; *Anderson v. Gill*, 79 Md.

312, 29 Atl. 527; *Holmes v. Roe*, 62 Mich. 199, 28 N. W. 864; *Smith v. Miller*, 43 N. Y. 171; *O'Brien v. Smith*, 1 Black, 99. We recognized and approved this rule in *Savings Co. v. Weakley*, supra. In *Bank v. Nelson*, 105 Ala. 180, 16 South. 707, this court held that checks were included in the word "bills" as used in section 1761 of the Code of this state, relating to instruments governed by the commercial law. In that case, Judge Haralson, speaking for the court, says: "We fail to see why checks, as well as other commercial instruments, do not require the protection of the statute. They are as well known, and from the necessities of the case enter as largely into the commercial transactions of the country, as other species of commercial instruments; and, after all we have said and attempted on the subject of negotiable instruments for these many years, to relegate them to take their chances as commercial bastards, and make their own way in the commercial world, deprived of the protection which is accorded to other negotiable instruments, it seems would be against reason, authority, and the interest of the country." Nothing is shown by the count we have discussed which calls for any modification of the well-settled rule above announced. The acceptance of the check by the defendant was only a payment of the draft sub modo, and could become operative as a payment in fact only when the check was paid (*Smith v. Miller*, supra); and, the drawee bank being closed on March 31st, the defendant could on that day have tendered back to the drawer his check, and made formal demand for the payment of the accepted draft (*First Nat. Bank of Meadville v. Fourth Nat. Bank of New York*, 77 N. Y. 320). Whether, therefore, his payment on March 31st be treated as a payment of his check or of the acceptance, the result is the same as to him, as he was, by reason of having accepted the draft, liable thereon as the principal debtor. 3 Am. & Eng. Enc. Law (2d Ed.) 470; *Ticknor v. Bank*, 3 Ala. 135. His liability was not discharged, and under the views we have expressed the defendant was not liable to him in damages. It follows that the demurrer to the first count should have been sustained, and that the former opinion in this case (106 Ala. 383, 18 South. 11) must be overruled.

After the case returned to the circuit court, the plaintiff was allowed to amend his complaint by filing an additional count, which averred substantially the same facts that appear in the original complaint, except that he averred that at the time he delivered his check to defendant the latter "contracted with plaintiff to present the same within a reasonable time to said John McNab Bank for payment," and "that defendant violated its contract with plaintiff in that it did not present said check for payment to the John McNab Bank within a reasonable time on said March 30, 1891." Without stopping to determine whether the meaning of the averments is that a contract was made whereby the defendant

agreed to present the check on March 30th, the day of its receipt, we are satisfied the court's ruling is free from error on this branch of the case. As we construe the original complaint, it counted on the want of due diligence or negligence of the defendant in presenting the check, and was therefore in case. The new count claiming damages by reason of the alleged violation of the contract therein set out was in assumpsit. But it is not allowable to join a count in case with one in assumpsit. By the introduction of the additional count the complaint was made to contain a misjoinder of counts, and the defect was properly taken advantage of by the demurrer to the entire complaint as amended. *Wilkinson v. Moseley*, 30 Ala. 562. The plaintiff having declined to plead further, judgment was rendered against him, and the judgment of the circuit court is affirmed.

The foregoing opinion was prepared by former Chief Justice BRICKELL, and is adopted by the court.

(118 Ala. 488)

COREY v. WADSWORTH et al.

(Supreme Court of Alabama. Jan. 31, 1899.)

INSOLVENT CORPORATIONS—RIGHT TO PREFER OFFICERS—TRUST-FUND DOCTRINE—FRAUDULENT CONVEYANCES.

1. The assets of an insolvent corporation do not constitute a trust fund in the hands of its officers as trustees for the payment of its debts.

2. A transfer of property by an insolvent corporation to one of its officers in payment of a bona fide debt is valid; and this, though the officer so preferred participated in and controlled the directors' meeting at which the transfer was authorized.

3. Where a creditor of an insolvent corporation is also, in a less amount, its debtor, the corporation can prefer him over its other creditors only to the extent of the balance due.

4. A director of an insolvent corporation paid its notes to the amount of \$6,000, which he had guaranteed, and, to indemnify him, the company transferred to him property exceeding that sum in value. He testified that the company owed him \$8,000, in addition to the \$6,000, and that the transfer was in payment of both debts, but this claim was not made until other creditors had brought suit to set aside the transfer as fraudulent, and he was unable to state the amount of the debt accurately. The company's books disclosed no indebtedness to him, but showed him indebted to the company. In making the transfer, the property was estimated at less than its real value, and most of it had been purchased by the company under the direction of its president, who was the transferee's relative, for the purpose of so transferring it. *Held*, that the transfer was fraudulent as against creditors.

Appeal from chancery court, Morgan county; William H. Simpson, Chancellor.

Creditors' bill by W. W. Wadsworth against Lorenzo Corey and another to have set aside and annulled as fraudulent and void certain transfers of its property by the Decatur Building Supply Company to the defendant Lorenzo Corey, and to compel the said Corey to account for the value of the assets of the Decatur Building Supply Company..so trans-

ferred to him and appropriated by him. The material facts, as averred in the bill and answer and disclosed by the evidence, are as follows: Prior to 1887, the Decatur Building Supply Company was incorporated under the general laws of Alabama, Decatur being the place of its business habitation. Wadsworth, the complainant, had, at various times, between the latter part of the year 1887 and May 19, 1888, sold and shipped to the Decatur Building Supply Company lumber and shingles. In payment of the lumber and shingles, the supply company gave to Wadsworth several drafts, which were not paid, the aggregate sum of the said several drafts amounting to \$1,400, all of which were past due when the bill in this case was filed, in January, 1891. In February, 1888, Lorenzo Corey, one of the defendants, became a stockholder in the Decatur Building Supply Company, and thereafter he became a member of the board of directors and president of said company, which position he held at the time of the occurrence of the matters and transactions now complained of. On May 15, 1888, the said Lorenzo Corey, together with other officers and stockholders of the Decatur Building Supply Company, entered into an agreement with the Exchange Bank of Decatur, by which they bound themselves, as sureties or grantors of the said Decatur Building Supply Company, for the payment to the bank of such indebtedness as said company might incur, not exceeding \$6,000. By the end of June, 1888, the bank had loaned to the building supply company the sum of \$6,000, and took its notes therefor. These notes were subsequently paid by Corey. One Hoy, the brother-in-law of Corey, was the vice president and general manager of the Decatur Building Supply Company. From the 19th to the 23d of July, 1888, said building supply company, through its directors and officers, sold a large part of its stock in trade, consisting of doors, sash, blinds, etc., to Corey, in consideration or in payment of a debt of \$6,000, and in alleged payment of their indebtedness which Corey claimed said company owed him. At the time of the transfer of this property to Corey, the Decatur Building Supply Company was insolvent, and within three or four days after the consummation of the transfer to Corey, on, to wit, July 28, 1888, the Decatur Building Supply Company, acting through said Corey as its president, assigned all of its remaining assets to the trustee for the benefit of its general creditors. The total indebtedness of these general creditors amounted to more than \$22,000, and they received not more than 15 per cent. thereof from the property and assets of the corporation conveyed in the deed of assignment. It was further shown by the evidence that, while the Decatur Building Supply Company was in an insolvent condition, Corey procured it to order a lot of sash, doors, and blinds, although they were charged to the company, and that at various times he received goods

from the company without being charged therefor. The bill was amended so as to make it a bill in behalf of the complainant and all other creditors of the building supply company who might come in and make themselves parties complainant and assume their proportionate share of the costs. Under this amendment, several creditors of the supply company were made parties complainant. The other facts of the case necessary to a full understanding of the decision on the present appeal are sufficiently set forth in the opinion. On the final submission of the cause, on the pleadings and proof, the chancellor rendered a decree granting the relief prayed for, and ordering said conveyance to the defendant Corey to be set aside and annulled, because fraudulent and void as to the creditors of the Decatur Building Supply Company. From this decree the present appeal is taken, and the rendition thereof is assigned as error. Affirmed.

Harris & Eyster and Speake & Russell, for appellant. E. W. Godbey, for appellees.

McCLELLAN, C. J. One of the main questions in this case is whether an insolvent and failing corporation can make a valid transfer of property to one of its directors in payment of a debt owing from the corporation to him, thus preferring him to other creditors in the payment of its debts, or, perhaps, more accurately, whether directors of such corporation can prefer themselves in the payment of corporate debts. The writer not only has very affirmative views favorable to the validity of such a transfer on abstract principles, but he is further quite convinced that the point has been to all intents and purposes so decided by this court. We are, of course, aware that many courts have held the contrary view, and some of the text writers have strongly condemned the doctrine we believe to be absolutely sound; some of them, indeed, resorting largely to invective and epithet in denunciation of the idea that a corporation may pay a just debt to an honest creditor, though he be a director, in preference to the just debts of other honest creditors, who are strangers to the corporation. We have no epithets to apply to such courts and writers, nor to the rule they declare. Many of them are able expounders of the law, and all of them are doubtless actuated only by a purpose to ascertain and expound the true principle in this connection. And they may be right, and we wrong; but we do not think so, and we shall endeavor to give the reasons for the faith that is in us.

We are utterly unable to conceive, upon any just and sound principle or consideration, the least shadow of difference or distinction between the debt of a director and the debt of a stranger against a corporation, upon which could be predicated one rule in respect of a preference by the corporation in the payment of the former, and another rule in respect of such preference in the payment of the latter.

Take the case we have here, assuming, for the discussion of the point immediately under consideration, that the transaction involves no actual fraud. The corporation is a going concern, and its managers do not contemplate its failure. But it is in debt, and needs money to continue its business and to pay its maturing obligations. It borrows the money from a director, directly or through a pledge of his credit. At the same time it incurs debts to strangers for supplies necessary in its business. The money borrowed from the director is used for corporate purposes. It is paid out to other creditors, or is applied to liquidate corporate expenses. So, also, the supplies constituting the consideration of the debts to strangers are applied to the authorized uses of the corporation, and inure to its advantage. There is nothing covinous in the creation of either class of debts. Neither the advancing director nor the supplying stranger has any intention or expectation of receiving any undue or illegal benefit from the transaction he thus has with the corporation. It may well be that the director, being a stockholder, anticipates that the aid he gives the corporation in his individual capacity will redound to his advantage ultimately in the increased value of, or in dividends upon, his stock. But, as all debts must be paid before the stockholder can be benefited by such a transaction, the intention and expectation of the advancing director involves and presupposes the payment of all corporate indebtedness. It follows obviously that, in lending his money or credit to the corporation, the director can have no purpose or intent inimical to existing or future creditors, but, to the contrary, the primary effect of the aid he thus gives the company is of affirmative benefit to its creditors. The stranger creditor, to the contrary, does expect a direct profit to himself by the transaction in which he becomes its creditor. If he lends it money, he expects and contracts for interest, and even this remuneration does not inure to the director who pledges his credit. If he sells his wares to it, he expects and contracts for a profit upon them. Of course, all this is perfectly legitimate. But it shows that, so far as the expectation of benefit goes, the director who pledges his credit, as did the respondent here, stands in a less selfish attitude towards the corporation and its creditors than does the stranger who sells property to it on credit. And, at least, we may say that the director creditor and the stranger creditor—the respondent and the complainant in this case—stand, in the creation of their debts, equally untainted of wrong done or intended; and, regarded from the point of view of the inception of their claims, are equally, and to like extent, entitled to the favorable consideration of the courts and the just protection of the law.

It is equally clear that the corporation itself and its other creditors are, to say the least, as much benefited by the money it borrows on the individual credit of the director as by

the wares it purchases on time from the stranger. As we have seen, both the money so borrowed and the property so purchased become assets of the corporation, enable it to prosecute its business, to pay its creditors, and to meet its expenses. There is, in other words, nothing in the uses to which the money borrowed and the property purchased are applied, or intended to be applied, which differentiates the attitude and rights, before the courts and the law, of the director who pledges his credit, from the attitude and rights of the stranger creditor. In the effects and results of their respective transactions, as well as in the purposes and intents which actuated each to the thing he did, is found no scintilla of evil, and nothing of wrong or injury, to the corporation or its creditors, which would entitle the one to more consideration than the other, which would accord to one rights denied to the other, or which would admit of a preference in the payment of the debt of the one, and condemn as fraudulent a preference in the payment of the debt of the other.

A step further in unfolding this question and case: The expectations of the officers and managers of the corporation, entertained at the time of borrowing the money on the faith of the director, as to keeping the corporation a going concern and continuing indefinitely to carry on its business, are disappointed. They find that, notwithstanding the personal efforts of the director in pledging his credit to raise money for the business and creditors of the concern, the corporation cannot keep its head above water, but must discontinue its business, cease to be a going concern, and apply its assets to the payment of its liabilities. Among these liabilities they find the debt due its director for money borrowed, and a debt due a stranger for property purchased. The assets are sufficient to pay one in full and a percentage only on the other. The debts were equally just and bona fide in their inception. The corporation and its creditors have been equally benefited by each of the transactions by which these debts, respectively, were incurred. Neither is tainted by any infirmative circumstance whatever. There is no more abstract justice in paying the stranger in full to the exclusion of the director than in paying the director in full to the exclusion of the stranger. If one may be so paid, so may the other, upon every conceivable consideration of justice and right. That the stranger creditor may be so paid to the exclusion of the director creditor nobody denies. Indeed, there is a sort of alacrity and joyousness in many of the authorities so holding, as if the director creditor had been guilty of some enormous wrong or crime in advancing his money to the corporation for the primary benefit of its stranger creditors without reward or the hope thereof, and he, and his claim for simple reimbursement, were unclean and unrighteous things before the law. That the director creditor may be so paid is strenuously denied by many authorities, sometimes

with an acerbity of statement and a bitterness of denunciation which happily are rarely found in juridical writings. And why may the director creditor not be so preferred and paid? Confessedly, his debt is a just one. Confessedly, the corporation, its business, and its creditors are benefited by the consideration of it as fully as by the consideration of the debt due the stranger creditor. Confessedly, under a general assignment by the corporation, he would be entitled to share upon the same footing as the stranger creditor. Confessedly, indeed, in every contingency, and under all circumstances and conditions, the director creditor and his claim stand upon the same footing, and have the same rights, as the stranger creditor and his claim, except only that, as is insisted, the corporation may prefer and pay the latter in full, while the preference and payment in full of the former is fraudulent and void. There is, we are firmly of the opinion, no reason whatever for this distinction, and we believe it can be so demonstrated.

Let us first examine the reasons which are advanced by the judges and writers who hold to that view. Nearly all of the adjudged cases which hold that an insolvent and failing corporation cannot convey property to its officers and directors in payment of their debts, in preference to the debts of stranger creditors, rest their conclusions entirely upon the ground that the assets of such corporation constitute a trust fund in the hands of its officers and managers as trustees for the payment of its debts, and that such trustees cannot pay themselves in preference to other creditors. We content ourselves upon this point by saying that this "trust-fund doctrine" has been utterly repudiated in this state in a thoroughly considered case, and by an opinion prepared with considerable care and research, in which all the judges of this court concurred. *Jewelry Co. v. Voller*, 106 Ala. 205, 17 South. 525, 28 Lawy. Rep. Ann. 707, and 54 Am. St. Rep. 81. But, leaving the trust-fund doctrine out of the case, it is sought to rest the conclusion that the transfer to a director involved in this case is fraudulent upon other grounds, being the same to which a text writer or two and perhaps some courts have referred a like conclusion. And what are they?

In the first place, the notion is advanced that such a transfer involves the reservation of a benefit to somebody,—whether to the corporation, or to the director creditor, or to the other creditors, is not made at all clear in the statement of the general proposition, and, when a more concrete statement is ventured upon, the identity of the person or entity receiving an undue benefit becomes more and more uncertain. And we do not hesitate to maintain that no benefit is, in such transaction, reserved, or in any way inures, to anybody beyond what the law clearly and fully contemplates, allows, and approves. What is a benefit reserved which will vitiate the transfer of property by an insolvent and failing debtor in the payment

of a debt? Is it not, in the nature of things, an undue benefit? Is it not essentially and necessarily the securing of some advantage beyond and in addition to the satisfaction of the debt sought to be paid? Can there be any such thing as the reservation of a benefit when the whole effect of the transaction is the payment of a just and honest debt by the transfer to the creditor of property precisely equal in value to the amount of the debt? By such transaction there are benefits, of course, inuring to each party, but not such as the law condemns, or as afford any ground for complaint on the part of other creditors. The debtor is benefited by the liquidation of his liability, and the creditor is benefited by receiving the money which he is entitled to receive. But these are not undue or vitiating benefits. They contravene no principle of law or rule of moral action, but, to the contrary, mark the accomplishment of the ends of the law in the premises, in a manner not inconsistent with abstract justice nor with any tenet of sound morals. It is of no sort of consequence what the relations aliunde of the debtor and creditor are, personally or in estate or by contract. They may stand to each other as father to son, or brother to brother, or husband to wife, or principal to agent, or vice versa, and even as partners, but for a consideration to be hereafter adverted to. Whatever else and cumulative may be the relations of the parties, if one owes the other a just debt he may, whether solvent or insolvent, pay that debt by the transfer of commensurate property, without impeachment upon any legal or moral ground. The suggestion that a director or stockholder creditor receives a benefit in addition to the payment of his debt, in that thereby the corporation is relieved of the liability, and his holdings of stock are enhanced in value, is palpably and obviously without the least shadow of merit. The stock can have no value to the prejudice of any creditor. All creditors must be paid before any of the assets of the company can go to its stockholders. An insolvent and failing corporation has not, and can never have, anything to go to its shareholders; and the payment of one or more debts, to the exclusion of others, cannot possibly result in giving a value to its stock, and thereby collaterally benefiting the director creditor whose debt is paid. And if it could be conceived that an insolvent and failing corporation could pay its debts and have assets over to form a basis of stock value, who would there be to complain of the benefit thus accruing to its officers and stockholders whose debts had been paid along with others? It is only creditors who can complain of undue benefits secured to the debtor or other creditors in the transfer of property in preferential payment of debts; and, in the impossible case suggested, there would be no creditors, and hence nobody to be injured or prejudiced, and hence no wrong or injury done or suffered. One just and honest debt, it seems necessary to remark, is as just and honest as any other

just and honest debt, and may be paid in the same way, under the same conditions. The whole end of the law is that all the property of an insolvent debtor shall be applied to his debts. The debtor may be a father, son, brother, husband, wife, principal, agent, corporation, or individual. Whatever the outside relations are, the law requires only that his assets shall go to his creditors, and does not require that they shall go to them ratably, but only that for each dollar in value of such assets a dollar of honest indebtedness shall be paid, wholly irrespective of whether the debt so paid is due to one creditor of many or to all of the many. We draw a line. Upon one side of it is the insolvent debtor and his insufficient property. On the other are ranged his creditors and their claims. The law is simply and merely that that property must pass to the other side of that line, to somebody on the other side, and to the payment, in whole or part, as the case may be, of some, to the exclusion of other, claims on that side, or of all of them ratably. The property must go to the indebtedness. It must reduce the aggregate of the claims of the several creditors considered as one gross sum, and though it thus reduce the gross indebtedness only by satisfying in full a particular item entering into the aggregate, by paying one claim in full and nothing on the others, the law is satisfied; its ends have been met; its purposes effectuated; no undue benefit has been reserved; no undue advantage has been taken; and it lies in no man's mouth to complain.

But it is said that "the officers of an insolvent corporation are in a position to know the real condition of the corporation, an advantage not attainable by creditors generally," and for this reason preferences in the payment of their debts should not be allowed. Has it ever been suggested before that better knowledge of a debtor's pecuniary condition by a particular creditor was any ground for declaring fraudulent and setting aside a preferential transfer to such creditor? Was such a doctrine ever ruled by any court? To the contrary, has it not been, over and over again, held by this court that, so long as all the creditor receives is the fair equivalent of his honest debt, his knowledge of his debtor's insolvency, and even his perfect consciousness that the effect of the transfer to him will necessarily be to leave other creditors unpaid and without hope of payment, are matters wholly apart from the issue,—wholly irrelevant and inconsequent? Knowledge on the part of the creditor, however accurate and exclusive, of the debtor's precarious situation, and of the injurious effects of a proposed transfer of property to such creditor, whether such knowledge be incident to the relations existing between the parties or not, is absolutely without a scintilla of influence upon a transfer of property, at a fair valuation, to pay an honest and adequate debt. Given the transfer at such a valuation in payment of such a debt, the law concerns itself in no degree

whatever with the creditor's knowledge or information, or even with his purposes and intent. For whatever he knows or intends, he has taken only that which he is entitled to take under the law, and hence, in the eyes of the law, he has done no wrong.

Again, it is contended that the officers and managers of an insolvent and failing corporation must be held to the same line of duties, and subjected to the same incapacities and liabilities, as partners or mere members of an association of individuals. There is, in our opinion, no law or reason in this position. The fundamental, and in the present connection all-important, difference between the managers of an insolvent and failing corporation, on the one hand, and partners and members of associations, on the other, lies in the fact that the corporate managers are not liable, in any sense, for the debts of the corporation, and partners and members of associations are individually liable to the fullest extent for all the debts of their partnership or association. The stranger creditor of a partnership or association is entitled, as against the members thereof, to take and apply to his debt, not only all the property of the partnership or association, but also all the property of each of its members, to the entire exclusion of their claims as individuals against the partnership debtor. And, indeed, there is a vitiating infirmity in a debtor and creditor transaction between a partnership and a partner from its very inception, so far as other creditors are interested; for if it could be conceived that a partner advancing money to his firm stands upon the same footing as other creditors, abstractly speaking, the loan going, as it would, to reduce partnership liabilities, would operate to cut down the advancing partner's ultimate individual liability, and, on the assumption that he would be entitled to have the loan refunded to him, the effect would be to reduce his liabilities as an individual partner by a transaction in which he in fact has paid or parted with nothing. Of course, this cannot be allowed; and this view of such a transaction is but another way of reaching the inevitable conclusion that the partner in such case is not a creditor of his firm, in any sense, against the claims of outside creditors. The fact manifestly is that the contribution of money or property to a partnership by a partner beyond his share under the partnership articles is, especially when the firm is insolvent, in the nature, and has the effect, of a payment by such partner on his individual liability for the partnership debts, and is essentially not the creation of a debt from the firm to him, except as between the other partners and himself; and this is so, of course, as to voluntary associations and their members.

Now, as to corporations and their officers and stockholders: No officer or stockholder of a corporation is at all, or in any case, liable for any debt of the corporation. Nobody, we suppose, will question this proposition. If an

officer or stockholder lends his money to the corporation, it does not go in reduction of his individual liability, because he is under no such liability. It is not in the nature of the payment of a debt to the creditors of the corporation, because he owes them no debt. Neither he nor the corporation is benefited or injured either by the loan or its repayment, except to the extent there might be benefit or detriment to the parties if the loan were made by a stranger; and, confessedly, the loan creates a debt from the corporation to the advancing officer or stockholder, not only as between the corporation and him, but also as between him and stranger creditors of the company. And this, whether the corporation be solvent or insolvent; in a prosperous condition or in failing circumstances. He may sue and recover his debt in full, whatever the effect of such recovery on the claims of other creditors. If the corporation assigns or is being wound up, he, like every other creditor, is entitled to share in its assets. The corporation may pay him as it may pay any other creditor, though the effect be to disable it to pay other creditors in full, since his is an honest and just debt, and the whole end of the law is the application of corporate assets, either ratably or preferentially, to the payment of honest and just debts. And the *quo modo* is immaterial. The payment may be made in money or by the transfer of property. So long as the honest creditor gets no more, either in money or property, than his just debt, no undue benefit is reserved to the corporation or inures to the officer creditor, and no detriment, in legal contemplation, results to other creditors; no wrong has been done to anybody; nobody has been unduly advantaged; and the transaction is lawful, honest, and valid.

The suggestion that a transfer by directors to one of their number of property in payment of a debt is invalid, as being the act of the party accepting the transfer, has no merit, dissociated from the exploded trust-fund doctrine. On that doctrine the directors become trustees, and on the principle that a trustee cannot transfer the trust estate to himself as an individual is rested the further proposition that directors of an insolvent corporation cannot, being trustees, transfer its property to themselves in payment of debts which the corporation owes them. But with the elimination of the main proposition, that such directors are trustees, falls the dependent proposition that they cannot prefer themselves in the payment of debts. With the trust-fund doctrine out of the way, the separate corporate entity continues to exist for all purposes wholly unaffected by the fact of insolvency, and its functions must continue to be performed. These functions are performed by the directors for and in the name of the corporation, and their official acts are not their individual acts at all, but the acts of the corporation; and, not being trustees for creditors, their acts, when assailed by

creditors, are not subject to the rule that, if a trustee contracts with himself in reference to the trust estate, his acts are void, at the election of, or as against, the cestui que trust. There being in such case no trustee, and no relation of trustee and cestui que trust between the directors of the corporation and its creditors, the matter stands thus: A corporation, without assets to pay all its debts, owes its directors and it owes strangers. The debts of the two classes of creditors are equally honest and just, and stand upon the same footing, in law and in equity. The corporation has an undoubted right to pay some creditors to the exclusion of others. Any creditor has the undoubted right to accept a preference. The corporation has the same right to pay its directors as it has to pay strangers. The directors have the same right to preferential payment as do strangers. To the exercise of this undoubted right to make preferences, it is essential that the corporation must act. It can only act through the directors. If the directors cannot act to the end of preferring their own just debts,—having the undoubted right to such preference,—the preference cannot be made, and the undoubted right of the corporation to make it, and of the directors to accept it, is denied and defeated. The ends of the law, that the assets of the corporation shall be applied to such of its debts as the corporation prefers, are defeated. And for what? Upon what ground? Not that the directors are under any incapacity to prefer themselves which can be referred to any principle of law. Not that they are trustees; for they are not trustees for the creditors. Not that they are agents of other creditors; for they are not such agents. Not that they occupy any other fiduciary relation to other creditors; for being only the agents of the corporation, and, in that capacity only, the trustees for stockholders alone, they bear and can bear to the creditors, who have to do with the corporation as an entity, and not with the shareholders at all, only the relation of the agent of a debtor to his creditor,—a relation which is obviously as devoid of every attribute of a fiduciary character as the direct relation of debtor and creditor. Upon what ground, then, we repeat, is rested the idea that directors cannot prefer themselves? Getting away from the trust-fund doctrine, it is based upon the bald assertion that the director in such case is acting both for the corporation and himself in contracting in his representative capacity with himself as an individual; and this, it is said, the law will not allow. That is the sole ground put forward. It cannot for a moment be sustained upon principle or well-considered authority. The results claimed do not follow. The contract of a director, with himself as an individual, and the sale of corporate property by directors to themselves as individuals, is not void, even as against the corporation itself or the stockholders. Upon all reason and authority, it is

perfectly valid, if not disaffirmed by the corporation itself or the stockholders. And the election belongs exclusively to the corporation and stockholders. If they do not exercise it, the transaction must stand. Strangers, of course, cannot question it, for they are wholly without interest in the premises. General creditors cannot question it, since no right of theirs has been violated by it. They cannot hold the directors to account as fiduciaries, as there are no fiduciary relations between them. As creditors, their only right is to have the corporate assets applied to just corporate debts, and this right is not impinged upon, but, to the contrary, fully conserved, by the payment of the just debts of the directors. They have no lien upon corporate assets. They have no rights of ownership in corporate property. They cannot claim their debts should be paid in full, to the total or partial exclusion of other equally honest and just debts. The property not being impressed with a trust in their favor, and standing, as they do, in no superior right to director creditors, they, the right of preference being recognized, have no shadow of right to insist upon even a pro rata application of the assets to all indebtedness. Their only right is to insist that all the assets shall be applied preferentially, or otherwise, to the indebtedness; and this right is absolutely subserved, as we have seen, by the payment of director creditors to the exclusion of stranger creditors. They have no right to insist upon the equal payment of all debts pro rata. The right of preference, which every debtor confessedly has, necessarily involves favoritism,—the right of choice of one creditor, and of any one creditor, to the exclusion of others. It is utterly inconsistent with all notions of equality, and, as a natural person may prefer his relatives and his friends to the exclusion of strangers, so an artificial person may prefer its friends and those occupying official relations to it to the exclusion of strangers. There is, the writer thinks, no semblance of sound principle or well-considered authority for a different conclusion. It seems to him that those courts which have taken a different view have been largely moved thereto by a consideration of the danger of fraudulent claims being brought forward by directors, and of the facility afforded directors by their positions to establish such claims, rather than by any just consideration of any recognized principle of law or equity obtaining in the premises. They have allowed themselves to be driven to the denial of a right altogether because of a practical difficulty in mere matter of evidence. They deny an undoubted right to the directors, because, forsooth, the persons asserting the right have opportunities for deceiving the courts as to the existence of the facts upon which it rests. They deny the right, though proved beyond all peradventure in the particular case, because in other cases it may be supported by fraud and perjury. The same considerations

are as applicable to other relations, and the courts might, with equal force and propriety, strike down all conveyances and transfers in payment of debts between parent and child, brother and brother, husband and wife, and the like, because those relations afford opportunities for simulation and fraud. Yet nobody pretends that such transfers in preferential payment of honest debts are under the ban of the law, as being constructively fraudulent. And no more upon reason and principle and well-considered authority can like transactions by directors be avoided on the ground that such officers have opportunities for fraud and simulation, which have, however, not been utilized in the particular case. It is not for the courts to be governed by such considerations. They are to ascertain the facts in each case, and to apply the law thereto, and the law is not to be changed in its application in a given case by the fact that to apply it as it exists might be to admit of difficulties of proof in another case. If the danger of administering the law as it is is sufficiently great and imminent to require a change of the law, that is a matter for the legislature, and not for the courts. It is a question of legislative policy, and not of existing law.

We have considered this matter on principle at some length, because of its importance, and because it has been not a little mooted in this state. For the same reasons, we will now, at some length, refer to authorities sustaining the view we have declared. The first case to which we will invite attention, as well because of the ability of the court deciding it as because it is among older ones, is that of *Buell v. Buckingham*, 16 Iowa, 284. The opinion is by John F. Dillon, a judge and law writer of national reputation for ability and learning. *Buckingham & Co.* were general creditors of a corporation. Buell was also a creditor, a director thereof, and its president. Buell participated with the other two directors, the presence of all three being necessary to a quorum, in a sale and transfer of the corporate property to himself in payment of the debt the corporation owed him. The transaction was assailed by *Buckingham & Co.* on the same grounds that are advanced by the complainant in the case at bar. Assuming Buell's participation as president and director in the sale to himself as an individual, Judge Dillon proceeds: "This makes it necessary to discuss the nature of the relations which Buell and the defendants, respectively, sustained to the corporation. In one respect, their relations were common and identical. They were both creditors. Their equities, in this respect, were equal and the same. Being an officer in the corporation did not deprive Buell of the right to enter into competition with other creditors, and run a race of vigilance with them, availing himself in the contest of his superior knowledge and of the advantages of his position to obtain security for, or payment of, his debt. He has an ad-

vantage, it is true, but it is one which results from his position, and which is known to every person who deals with, and extends credit to, a corporation. This is one of the causes which has operated to bring corporate companies into discredit, and may constitute a good legislative reason for giving priority to outside creditors. But the legislature must furnish the remedy. That the act of Buell was not legally or constructively fraudulent, in consequence of his being an officer or member of the corporation, see *Whitwell v. Warner*, 20 Vt. 425, 444; *Ang. & A. Corp.* § 390; *Gordon v. Preston*, 1 Watts, 386; *Sargent v. Webster*, 13 Metc. (Mass.) 497; *Banking Co. v. Claghorn*, 1 Speer, Eq. 562. But, in addition to being a creditor, Buell sustained to the company the relation of a stockholder and director. Such companies are essentially partnerships, except in form. 'The directors are the trustees or managing partners, and the stockholders are the cestui que trustent, and have a joint interest in all of the property and effects of the corporation.' Per Walworth, Ch., in *Robinson v. Smith*, 3 Paige, 222, 232; *Cunningham v. Pell*, 5 Paige, 607; *Slee v. Bloom*, 19 Johns. 479; *Hoyt v. Thompson*, 5 N. Y. 320. The corporation is an artificial person, owning its property and necessarily acting by its agents, and these agents are the directors. After much reflection, it seems to me that the correct view of Buell's position is this: He is a trustee, and the beneficiaries are the corporation, or, in other words, the stockholders; or, what is in essence the same, he is an agent, and the stockholders the principal. If this is the relation, then the rules of law applicable to purchasers by agents and trustees apply to the purchase in question. There is a manifest impropriety in allowing the same person to act as the agent of the seller and to become himself the buyer. There may be, in all such cases, a conflict between duty and interest. Acting for himself, Buell's interest would be to obtain payment. Acting for the best interests of the corporation, his disinterested and unbiased convictions of duty might be to advise against a sale of the entire property to one creditor or against any sale at all. It is in view of these considerations that 'the wise policy of the law hath put the sting of a disability into the temptation, as a defensive weapon against the strength of the danger which lies in the situation.' Even these principles would not, in my judgment, apply to the case, if there had been a quorum without Buell. Now, the purchase of property by an agent or trustee, or by any person acting in a fiduciary capacity, is not void ab origine and absolutely. It is voidable only. It is made subject to the right of the principal or beneficiary, in a reasonable time, to say that he is not satisfied with it. It is valid in equity as well as law, unless the parties interested repudiate it or complain of it, and these may set it aside without showing either fraud or injury. *Bank of Old Dominion v. Dubuque & P. R. Co.*, 8 Iowa, 277; *Davoue v. Fan-*

ning, 2 Johns. Ch. 252; *Bostwick v. Atkins*, 3 N. Y. 53, 60; 1 Pars. Cont. 75, 76, and cases in note; 1 White & T. Lead. Cas. Eq. 167; *MacGregor v. Gardner*, 14 Iowa, 326, 335. As the principal or parties interested may confirm the sale, a mere stranger cannot make the objection that the trustee was the purchaser or that the sale was irregular. The remedy belongs only 'to persons who had an interest in the property before the sale, and no other person can apply to set aside the sale.' *Hawley v. Cramer*, 4 Cow. 717, 744; *Edmondson v. Welsh*, 27 Ala. 578; *Foster v. Goree*, 5 Ala. 428; *Hannah v. Carrington*, 18 Ark. 85; *Herbert v. Hanrick*, 16 Ala. 581; *Greenleaf v. Queen*, 1 Pet. 138; *Hillegass v. Hillegass*, 5 Pa. St. 97; *Wightman v. Doe*, 24 Miss. 675. Adopting this as the true view, it follows that Buell's participation in the sale and purchase of the property did not make the same void. The utmost effect it could have would be to make the sale voidable at the instance of any person having an interest in the property sold. But the defendants being at that time general creditors, and having no interest in, or lien upon, the property, and there being no actual fraud, are not entitled to avoid the sale, simply on the ground that Buell was one of the three directors necessary to constitute a quorum. This, in my judgment, is the correct view to be taken of the case. But adjudged cases go further (and it is possible some of them go too far), and sustain the purchase of Buell on broader grounds. I will refer briefly to some of them. Thus, it is held that if three persons are appointed a committee 'to finish and repair a school house' (*Geer v. School Dist.*, 6 Vt. 76), or to superintend the building of a church, they may 'as effectually bind the society by a contract concluded with one of their own number as with a stranger.' These cases were confirmed in *Rogers v. Society*, 19 Vt. 187, where the court say 'there is perhaps some incongruity in thus allowing a person to act in a double capacity as an agent for a corporation contracting with himself. But, whether a majority or the whole act, the party contracted with, as well as any other, may participate in the bargain. Partiality so gross as to amount to fraud will, when sustained, defeat the contract.' In these cases the court held the objection not good, even when made by the corporation. The case of *Hayward v. Society*, 21 Pick. 270, shows that where the trustees are creditors of the society, and therefore interested, they may, nevertheless, vote that the treasurer execute a note to them for the amount, and it is valid."

In *Bank v. Whittle*, 78 Va. 787, like questions arose, and were decided in the same way, the court, by Lewis, P. J., saying: "There is no proof of actual fraud in the transactions involved, but the appellees insist that the assets of an insolvent corporation are a trust fund for the payment of its debts; that the directors are trustees for the cred-

itors, whose duty it is to apply the assets ratably for the benefit of the general creditors; and that, therefore, they can make no lawful preferences in favor of themselves, or in favor of those creditors for whose claims they are individually responsible. That the directors of a corporation are bound to act in discharge of their duties with prudence, vigilance, and fidelity, and to apply its assets, in the event of insolvency, for the benefit of the creditors in preference to the claims of stockholders or other persons, is a proposition which is not, and cannot be, disputed. But that they are technically trustees for the creditors, and bound to apply the assets ratably among the general creditors, is a proposition which has never been judicially affirmed in this state, and is in conflict with the great weight of authority elsewhere. Much stress is laid by the appellees on the case of *Sawyer v. Hoag*, 17 Wall. 610. In that case the well-established principle was asserted that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors, which cannot be withdrawn from their reach by any act or device on the part of the directors. But no such doctrine as is here contended for was there laid down. On the contrary, the court recognized a distinction between the capital stock of a corporation and its ordinary assets, with which, it was said, the directors may deal as they choose. It is not only settled that the directors may make preferences between creditors, but such preferences may be made in their own favor when they themselves are creditors of the corporation. Of course, in such cases, they must act with the utmost good faith, and the transactions, to be upheld, must be free from the taint of fraud or suspicion. This was distinctly held in the well-considered case of *Buell v. Buckingham*, 16 Iowa, 284. There the controversy was between a judgment creditor of an insolvent corporation and one of its directors. An execution in favor of the former was levied on certain property which the latter claimed by purchase in discharge of a debt due him by the company. The property was sold and conveyed to him pursuant to an order made by the directors, at a meeting at which he was present and voted, his presence being necessary to make a quorum for business. The transaction was assailed by the judgment creditor as illegal and void, but it was held to be valid. In *Gordon v. Preston*, 1 Watts, 385, a mortgage by a corporation was held good which was assailed by creditors, on the ground, among others, that it was in favor of the president and treasurer of the company, and who were present at the meeting of the directors when the mortgage was authorized and executed. Chief Justice Gibson delivered the opinion of the court. He said: "That a director may sustain the relation of debtor or creditor in regard to the corporation, and in the latter receive a security, is a proposition which re-

quires not the aid of an argument, and here the existence of a meritorious debt is not disputed." In *Ashhurst's Appeal*, 60 Pa. St. 290, Judge Strong, for the court, said: "There must be many things which directors can do for their individual benefit which are binding upon a corporation of which they are directors. If they have advanced money, I cannot doubt they may pay themselves with corporate funds. If they have become liable as sureties for the corporation, they may provide for their indemnity. And though, ordinarily, the law frowns upon contracts made by them in their representative character with themselves as private persons, such contracts are not necessarily void; they are carefully watched, and their fairness must be shown."

The case of *Banking Co. v. Claghorn*, decided by the court of appeals of South Carolina as far back as 1844, is to the same effect. There it was insisted by general creditors that a mortgage executed to directors of a corporation to indemnify them against liability as indorsers on the company's paper was constructively fraudulent, on the ground that in the execution of the mortgage the directors contracted with themselves. The validity of the transfer by the directors to themselves was sustained, the court saying: "There is, upon a superficial view, something very startling in this, if the facts be true, and they probably are as to some, perhaps all, of the indorsers; but the alarm will cease when we take into consideration the motives and influences which operate upon men to lend their credit to assist individuals or corporations to pursue their enterprises. The directors of a corporation ought to be, and generally are, better informed as to its liabilities and resources than any one else, and if they, having the means, refuse to aid them in their operations, by the loan of money or credit, no one else will be found to do it; and I need not add, what is known to all having any experience, that an overweening confidence in their capacity to manage the affairs of a corporation, and a mistaken view of the state of its finances, have often involved the stockholders, and especially the directors, in distress and ruin. No man likes to give up an enterprise in which he has embarked, until he is satisfied that it cannot succeed, and this feeling is strengthened by the numbers that are embarked in it. Few are willing to recede, while there are any to persevere. Now, there is nothing, either in law or equity, which forbids a member, or even a director, of a corporation, from contracting with it, and, like any other individual, he has a right to prescribe his own terms, which the corporation is at liberty to accept or reject, and, when the contract is concluded, he stands in the same relation to the other creditors of the corporation as any other individual would under the same circumstances. When the question of priority arises, it must depend on the bona fides of the transaction, fraud or no fraud. If by greater diligence, and without

fraud, he has fairly gained an advantage over the other creditors, he is entitled to retain it; and I cannot, from the evidence in this case, detect the slightest ground of suspicion that there was any fraud on the part of the indorsers in obtaining the mortgage to secure the debt of the steam company." 1 Speer, Eq. 545, 562.

The supreme court of Vermont committed itself many years ago to the same doctrine. Speaking to the questions we have before us here, for that court, that eminent jurist and commentator, Isaac F. Redfield, used the following language: "But it does not occur to us that there is any just ground for charging the defendants, with the exception of Cummings, perhaps, with any actual or constructive fraud. As to constructive fraud, it is not competent, certainly, to predicate this of the mere fact of a stockholder's availing himself of his superior advantages to obtain security for debts due to himself, to the exclusion of other debtors. The stockholder and a stranger, who are both creditors of a corporation, no doubt stand in very unequal positions. But it is an inequality which the law allows, and which is understood by those who contract with corporations, and one which will always tend, more or less, to bring in doubt the credit of such bodies. But it is a subject with which this court have nothing to do. Some modification of the law upon this subject has been attempted, I believe, to what purpose time must determine. We are content to leave that subject as it is. And while we would, no doubt, guard the exercise of such a privilege, in the stockholders of a corporation, with some degree of severity, we must not forget that all just rights are entitled to a fair consideration in a court of justice. We should not, then, watch the exercise of a right with so much strictness as to declare its mere existence to be a constructive fraud." *Whitwell v. Warner*, 20 Vt. 425, 444.

The supreme court of Connecticut unequivocally declares the same doctrines. In the case of *Smith v. Skeary*, 47 Conn. 47, 53, 54, the following is the opinion of the court on the questions now before us: "The plaintiff Hotchkiss, and Smith, the intestate of the other plaintiff, were stockholders and directors of the Star Tool Company, a joint-stock corporation. They were creditors to the corporation to an amount exceeding \$6,000, which was justly due and unsecured. On the 15th day of December, 1876, pursuant to a vote of the board of directors, there was transferred to them from the corporation, in payment of their claim, personal property, including that embraced in the present suit, of the value of about \$6,000. The corporation was in fact insolvent, although it was supposed by the parties at the time that it would be able to pay all its debts and liabilities. The transaction was in entire good faith, with no intention to defraud creditors, and there was no fraud unless the same arises as matter of law from the facts found. We are unable to discover

any principle of law which renders the transaction fraudulent. The corporation had a right, and it was its duty, to pay this debt. These creditors had a perfect right to receive pay in money or goods, and the fact that they were stockholders and directors did not modify or abridge that right, so long as there was no actual fraudulent intent. The fact, if it be a fact, that it operated to prefer these creditors, is not sufficient at common law to stamp it as fraudulent; for the common law favored the vigilant, and a creditor might lawfully obtain a preference. It does not become fraudulent under our insolvent laws, because no proceedings in insolvency were instituted in due time, so that the case cannot be brought within the operation of those laws. The consideration was good and adequate, so that there is no badge of fraud in that respect."

In a later Iowa case the principles declared by *Dillon in Buell v. Buckingham*, supra, were again announced and reaffirmed, the court saying: "May a director enforce such a debt? We understand that he may become a creditor of the corporation, may advance it money, or sell it property, and obligations of the corporation executed therefor may be enforced by him. In this regard he occupies no different position from that of any other creditor; and if the debt he holds was contracted in good faith, and there is an absence of fraud on his part, he may take security or payment, though the corporation be insolvent, and he may thereby acquire priority in the payment of his claim. Counsel for defendants admit this proposition, with an exception in the case of the insolvency of the corporation. They insist that the directors of an insolvent corporation cannot take from it security, by mortgage or other conveyance creating a lien upon its property, even though given in good faith, and without fraud in the transaction. We are not prepared to admit this proposition. A creditor may accept payment or security from an insolvent debtor free from any claim of other creditors. A corporation may make payment of its debts, or give its property in security therefor, just as a natural person may do. If, therefore, a director holds the indebtedness of an insolvent corporation, he may take payment or security in a good-faith and honest transaction. No reason can be given why a director who holds a valid debt against his corporation may not, though it be insolvent, in a fair and honest way, take its property in security. If the property, money, or other consideration of the debt was fairly used for the benefit of the corporation, was added to its assets, or used in its business, it would be unreasonable to hold that the director is deprived of rights and remedies held by other creditors. It is not shown, in the answer of defendants, that there was any bad faith or dishonest practices on the part of the creditors for whom plaintiff is trustee in becoming creditors of the plow company and taking security from it. It is true that the courts will scan with care, and even with sus-

picion, such transactions, and demand that they be accompanied by the utmost good faith." *Garrett v. Plow Co.*, 70 Iowa, 697, 701, 29 N. W. 398.

And in a yet later case the same court uses the following language: "Counsel for the appellant contends that the 'organization of the company by the stockholders of the old corporation was for the purpose of transferring the property of the old organization in fraud of creditors.' It is not alleged in the petition that such sale and conveyance were made with the intent and for the purpose of defrauding creditors, but that what was done amounted to an unlawful preference. In other words, we understand the claim to be that what was done amounts to a legal fraud, as distinguished from an actual fraudulent intent. If wrong in this, we find, from the evidence, that the defendants did not intend to defraud any one. Such was not their purpose, but they honestly believed they had the legal right to procure the mortgage, and thus secure themselves, although other creditors of the corporation were not secured or paid; and whether they had this right is the important question in this case. The evidence satisfies us that the Marshall County Company was indebted to the mortgagees in the sum of \$10,000 at the time the mortgage was executed, and that such indebtedness was contracted in good faith. The mortgagees, it is true, were officers and stockholders of the corporation; but, notwithstanding this fact, they had the right to procure the corporation to execute the mortgage, although other creditors of the corporation are unable to obtain payment of their indebtedness. Corporations can make contracts and transfer property, possessing the same powers in such respects as private individuals. Code, § 1664. Such is the rule in the absence of a statute, and therefore it has the right to prefer one creditor to another. 2 Mor. Priv. Corp. § 802. The fact that the preference is exercised in favor of directors or shareholders of the corporation is immaterial, although the director or shareholder may have voted for the proposition, and the security given was to secure an indebtedness to himself. *Buell v. Buckingham*, 16 Iowa, 284; *Garrett v. Plow Co.*, 70 Iowa, 697, 29 N. W. 395. It is insisted that this case is distinguished from those cited, because of the fact that all of the officers, directors, and shareholders voted in favor of the creation of the indebtedness and the execution of the mortgage. We do not believe this can or should make any difference. The material question is one of right and power, and, if this exists, it is immaterial whether this power is exercised by all or a part of the persons in whom the power is vested." *Warfield v. Canning Co.*, 72 Iowa, 666, 669, 34 N. W. 468.

The supreme court of Missouri fully supports all the views we have set forth in this opinion. Among the many cases decided by that court upholding the right of director creditors of an insolvent corporation to pay

themselves by a transfer of corporate property, we refer specially to two among, if not, the latest. The opinion of the court in the case of *Schufeldt v. Smith*, 131 Mo. 280, 286, et seq., 31 S. W. 1040, is as follows: "Most of the questions involved in this record have, in some recent cases in this court, been given careful and exhaustive consideration. The investigations given the subject have been more labored and thorough on account of apparent want of harmony in some of the previous decisions of this court, as well as on account of the diversity of opinion in other jurisdictions. The conclusion reached by each of the divisions, which received the concurrence of all the members, may be briefly given, in the language of the syllabi prepared by the judge who wrote one of the opinions, as follows: 'A corporation in falling circumstances may * * * prefer one creditor to another in discharging its obligations, if such preference is made in good faith, while the property of the company remains in its possession, unaffected by liens or by process of law. * * * Mere insolvency of a corporation does not, of itself, transform its assets into a trust fund for the equal benefit of all its creditors.' *Alberger v. Bank*, 123 Mo. 313, 27 S. W. 657; *Slavens v. Drug Co.*, 128 Mo. 341, 30 S. W. 1025; *Waggoner-Gates Milling Co. v. Ziegler-Zaliss Commission Co.*, 128 Mo. 473, 31 S. W. 28. It would seem to follow logically, from these decisions, that a preference may be made to a director for a debt directly due him from the corporation, unless it would be defeated by his own act in voting himself the preference. But it is insisted with much earnestness, and argued with great ability, that the directors had no power to bind the corporation to an agreement made with themselves, and in which they had a personal interest, and that, therefore, the resolution of the board of directors authorizing preferences to be given the members thereof over other creditors, and the deed of trust executed in pursuance thereof, were absolutely void. This contention must rest upon one of two theories,—either that the directors of a corporation are trustees for its creditors, and its assets constitute a trust fund which they must apply ratably towards the satisfaction of all the debts, or that such a transaction is, upon its face, constructively fraudulent. As has been seen, the so-called 'trust-fund theory,' as applied to a corporation while dominion over its property is retained, is not recognized in this state as being sound. Nothing additional need be said on that subject. The board of directors are undoubtedly trustees for the corporation and stockholders, and, when acting for them, are bound to exercise the utmost good faith. Any attempt, in dealing with its property or affairs, to secure themselves personal advantages over other stockholders, should, at least, be subject to the most rigorous scrutiny. *Hill v. Mining Co.*, 119 Mo. 9, 24 S. W. 223, and cases cited. But it cannot be said, as a correct proposition of

law, that officers of a corporation cannot themselves, and in their own names, contract with it. To so hold would virtually deny to corporations the credit upon which so much of the business of the country is transacted, and which is so essential to success. If the stockholders and officers of corporations are not permitted to advance money to them, or to indorse for them, without subjecting themselves to such disadvantages, they would be deprived of their most valuable source of credit. A corporation naturally looks to those interested in its affairs for accommodations. If directors can lend the corporation money, or indorse for it, they should certainly have the same right to collect the debts or secure themselves as is accorded to other creditors. The cases cited abundantly show that a corporation, so long as it has control of its property, though insolvent, may, when acting honestly, prefer one creditor to another. A mortgage, then, giving such preference, is not constructively fraudulent. Neither the corporation nor the other stockholders are injured by the preference given. To defeat them, actual fraud should be shown. The honest debts all stand, and should stand, on equal footing. All the creditors should have equal rights to enter in the race of diligence. The fact that the race may be unequal should not deprive the winner of his reward. An individual debtor can prefer his family, his neighbors, and his friends. If the preferred debt is honest, the preference cannot be impeached, though the wife of the debtor secure the advantage. *Hart v. Leete*, 104 Mo. 338, 15 S. W. 976; *Riley v. Vaughan*, 116 Mo. 176, 22 S. W. 707. No reason can be seen why a corporation may not also prefer its friends. There is no more equity in allowing an individual debtor to prefer his creditor wife or children than in allowing a corporation to prefer its stockholders and officers. To permit equities to control would defeat all preferences. While the owner of property retains the power of its disposal, he may apply it to the payment of any honest debt, is the rule upon which the right to make preferences among creditors rests. The rule should apply as well to corporations as to individuals, and any change should be made by the legislature, and not by the courts. If the debt is an honest one, and the corporation had the power to contract it, it has the right to pay or secure it, and no fraud can be imputed to it from the fact that it is paid or secured in preference to another. 'It may be conceded,' said Judge Taft in a recent case, 'that the trust relation justifies and requires courts of equity to subject preferences by an insolvent corporation of its own directors to the closest scrutiny, and places the burden upon the preferred director of showing, beyond question, that he had a bona fide debt against the corporation; but we do not see why, if a corporation may prefer one creditor over others, it may not prefer a director who is a bona fide creditor. Preferences are not based on any equitable principle. They go

by favor, and, as an individual may prefer among his creditors his friends and relatives, so a corporation may prefer its friends.' *Brown v. Furniture Co.*, 7 C. O. A. 231, 58 Fed., loc. cit. 292. See, also, *Worthen v. Griffith* (Ark.) 28 S. W. 286, and cases cited."

And in the yet later case of *Butler v. Mining Co.*, 139 Mo. 467, 41 S. W. 234, the following propositions, as shown by the headnotes, were laid down: "(1) The transfer by an insolvent corporation of its property to its directors, who are bona fide creditors because of money previously advanced by them to the company, is valid as against general creditors. (2) The law does not limit the power of a corporation to transfer its property by fair dealing, in the interest of its stockholders, so long as the corporation, undissolved, holds the title thereto, and the possession thereof; nor is it true that, as soon as a condition of insolvency is approached, its property is impressed with a trust for the general good. (3) A corporation can transfer its property to its directors to pay money advanced to it by them in the same way that it can use that property to pay the president or other officer for services performed by him in managing the business. (4) The trial court committed error in holding that land honestly transferred by a corporation to its directors in liquidation of subsisting debts was impressed with a lien or trust in behalf of a third party, who had obtained a judgment against the company after such transfer. (5) The directors of a corporation, when bona fide creditors, stand on a footing equally as good as its general creditors; and, if such corporation has in good faith transferred its entire property to such directors in payment of an honest debt, a general creditor, whose claim was not a lien at the time of the transfer, has no remedy."

In New Jersey, also, it is the established law that a sale, at a fair valuation, by the directors, of the property of an insolvent corporation, to themselves, in payment of just debts due them, is valid as against stranger creditors, whose debts in consequence go unpaid. *Wilkinson v. Bauerle*, 41 N. J. Eq. 685, 643-645, 7 Atl. 514.

The supreme court of Arkansas, speaking by Riddick, J., after utterly repudiating, as we have done, the idea that the assets of an insolvent corporation constitute a trust fund for its creditors, proceeds to discuss the right of such corporation to prefer its directors in the payment of debts, as follows: "But it is contended that the funds of an insolvent corporation are in the hands of the directors, to be disbursed on their unbiased and impartial judgment, and that, when personal interest or individual gain is an element subserved through their preference, it should be set aside, as being in contravention of sound equitable principles. To support this contention, counsel cite, among other cases, the well-considered case of *Mallory v. Mallory-Wheeler Co.* (Conn.) 23 Atl. 708, 38 Am. & Eng. Corp. Cas. 120. In that case the directors of a cor-

poration undertook to use their official position for their own benefit, and to increase their salary, to the injury of the interests of the corporation. The familiar rule that no one acting in a fiduciary capacity shall be permitted to make use of that relation for his own benefit, at the expense of the interests of his principal, was invoked by the corporation and applied by the court. There can be no doubt that the rule was properly applied in that case, for the directors are agents, and, to a certain extent, trustees, of the corporation. They will not be allowed to enter into engagements in which they have a personal interest conflicting with the interests of their principal, whose interests they are bound to protect. The rule is of wide application, and applies, as was held in that case, to agents, partners, guardians, executors, and to trustees generally, as well as to the directors and managing officers of corporations. If personal engagements hostile to the interest of their principals are entered into by persons holding such fiduciary relations, they are not, in law, absolutely void, but voidable, at the election of their principals. We do not see how that rule can apply in this case, for the party complaining here is not the corporation, but certain creditors of the corporation. The directors of a corporation are neither trustees nor agents of the creditors, and they do not occupy a fiduciary relation towards them, and therefore the rule does not apply. Although there are expressions in many of the cases cited by counsel that seem to support the contention that, even when an insolvent corporation may make preferences, the directors of such corporation must be free from personal bias in disbursing its assets and making such preferences, yet we do not believe that such a rule has any sound reason to rest upon. The very fact that preferences are made shows always that the party making them is biased more or less towards the person in whose favor they are made. As long as preferences are allowed to be made by insolvent debtors, they will be dictated more or less by the personal bias of the person making them. The individual debtor, when insolvent and forced to make an assignment, generally prefers his friends, and often members of his own family. The home creditor and neighbor is preferred at the expense of the nonresident one, perhaps equally deserving. So, when this dry-goods company came to make an assignment, it is not strange that, in making preferences, it should favor the home creditors. The contention that the estate of an insolvent debtor should be disbursed by some one acting without bias or personal interest would apply almost as well to the case of an assignment by an insolvent individual or partnership as to that of a corporation, and, if adopted, would result in forbidding all preferences in assignments by insolvent debtors,—a result that might be productive of much good, but it is one that the courts must leave to the wisdom of the legislature to accomplish; for, to quote

the language of Judge Caldwell in *Gould v. Railway Co.*, the right to make preferences 'is too firmly imbedded in our system of jurisprudence to be overthrown by judicial decision, and it can no more be overthrown by the courts in its application to corporations than to individuals.' *Gould v. Railway Co.*, 52 Fed. 684. That was a case that arose in this state, and was controlled by the laws of this state, and, after an examination of the authorities, the court held that an insolvent corporation of this state may prefer its creditors, whether they be officers of the corporation or strangers. 'The doctrine established by the best-considered cases, and by the supreme court of the United States,' says Judge Caldwell, in his opinion in that case, 'is that the mere fact that creditors of a corporation are directors and stockholders does not prevent their taking security to themselves as individuals to secure a bona fide loan of money previously made to such corporation, and used by it in conducting its legitimate business.' " *Worthen v. Griffith*, 59 Ark. 562, 578, 28 S. W. 291.

The same position has been taken by the circuit court of appeals of the Sixth circuit. In *Brown v. Furniture Co.*, 7 C. C. A. 225, 58 Fed. 286, the court, by Taft, circuit judge, say: "We now come to the question whether the fact that Harry and W. J. Long, directors, were interested as guarantors and indorsers upon most of the notes secured by the mortgages, and were directors and stockholders in the corporation, and as such voted to give the mortgages, renders the mortgages invalid. Several cases have been cited, some of them decisions of circuit courts of the United States, in which it has been held that, while it is lawful for a corporation to prefer creditors, it is not equitable or permissible for directors of a corporation to prefer themselves, even if they are bona fide creditors, because they are trustees. It may be conceded that the trust relation justifies and requires courts of equity to subject preferences by an insolvent corporation of its own directors to the closest scrutiny, and places the burden upon the preferred director of showing, beyond question, that he had a bona fide debt against the corporation; but we do not see why, if a corporation may prefer one creditor over others, it may not prefer a director who is a bona fide creditor. Preferences are not based on any equitable principle. They go by favor, and as an individual may prefer, among his creditors, his friends and relatives, so a corporation may prefer its friends."

The supreme court of Michigan is fully committed to the same doctrine. In *Bank of Montreal v. J. E. Potts Salt & Lumber Co.*, 90 Mich. 345, 350, 51 N. W. 513, opinion by Montgomery, J., it is said: "Nor is it the law of this state that, as soon as a corporation becomes insolvent, the directors of the corporation become trustees for all the creditors alike, in such sense as to prevent their giving valid security by way of preference to

one of the stockholders or directors. We are aware that the decisions in the various states are not uniform as to the question, and that a number of very eminent text writers have deprecated a state of the law which admits of such preferences. But, to adopt the language of Dillon, J., in *Buell v. Buckingham*, 16 Iowa, 284, this condition of the law 'may constitute a good legislative reason for giving priority to outside creditors, but the legislature must furnish the remedy.' In the case referred to, it was held that being an officer of the corporation did not deprive Buell of the right to enter into competition with the other creditors, and run a race of diligence with them. The rule in this state has, we think, been established since the case of *Town v. Bank*, 2 Doug. (Mich.) 530, that a corporation may, in the absence of legislative restriction, deal with its property precisely as an individual may, and may prefer one creditor over another; and hence that the assets do not become a trust fund, for pro rata distribution among all its creditors. * * *

This is the substance of the rule stated in both *Town v. Bank* and *Turnbull v. Lumber Co.* (Mich.) 21 N. W. 375. And in the later case of *Kendall v. Bishop*, 76 Mich. 634, 43 N. W. 645, a mortgage had been given to secure the directors of the corporation and to secure paper upon which they were indorsers. The question under consideration was fully discussed in the briefs of counsel, and it was said by Mr. Justice Campbell: 'There seems to be no reason why one honest creditor should be on a worse footing than another, and we do not find in our law any such distinction.' See, also, *Lucas v. Friant* (Mich.) 69 N. W. 735.

The supreme court of Mississippi, in effect, indorses the doctrine that director creditors of an insolvent corporation may prefer themselves in payment of their claims by a transfer of corporate property. *Sells v. Commission Co.*, 72 Miss. 590, 17 N. W. 236.

In *Gould v. Railway Co.*, 52 Fed. 680, 684, it is said by Caldwell, J., after repudiating the trust-fund doctrine: "It is next contended that the deed of trust is void because it was executed to secure debts due to persons who were directors of the corporation, and large holders of its stock and mortgage bonds. The money was actually advanced by the directors in good faith, for the benefit of the company, and was used by the company for legitimate corporate purposes. It was not loaned or advanced for the purpose of obtaining any advantage over the corporation or its other stockholders or creditors, but to conserve and protect the best interests of all persons interested in the property. It is obvious that the directors who made these advances did not do so from choice, or because they esteemed it a safe or profitable investment in itself. They made the advances because the corporation stood in pressing need of the money, and its failure to get it was likely to result injuriously to all its creditors and stock-

holders. The inducement to make the loan was to protect and give value to their own large interests as creditors and stockholders of the corporation; but all other creditors and stockholders, in proportion to their interests, were equally protected and benefited by the loan. Upon these facts, the deed of trust executed by the direction of the stockholders and board of directors to secure the advances previously made by these four directors to the company is a valid security. The advances constituted a valid debt against the corporation, which it was legally liable to pay, and could have been compelled to pay by suit. Where a corporation is legally liable to pay a debt, it may undoubtedly give a security for its payment. The use of its property to pay or secure a bona fide debt is not an unlawful use or diversion of its property, no matter what official relation the creditor sustains to the corporation. The corporation is under the same obligation to pay a bona fide debt due to one of its directors and stockholders that it is to pay a debt due to a stranger, and a security given for a debt due to a director and stockholder is as valid as a security given to any other creditor. The doctrine established by the best-considered cases and by the decisions of the supreme court of the United States is that the mere fact that creditors of a corporation are directors and stockholders does not prevent their taking security to themselves as individuals to secure a bona fide loan of money previously made to such corporation, and used by it in conducting its legitimate corporate business. Among the states maintaining this doctrine may be mentioned Vermont, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Virginia, Illinois, Minnesota, and Iowa. And to the same effect, see *Duncomb v. Railroad Co.*, 84 N. Y. 190, 88 N. Y. 1; *Harts v. Brown*, 77 Ill. 226; *Reichwald v. Hotel Co.*, 106 Ill. 439; *Stratton v. Allen*, 16 N. J. Eq. 229; *Wilkinson v. Bauerle*, 41 N. J. Eq. 635, 7 Atl. 514; *Bank v. Whittle*, 78 Va. 737; *Ashhurst's Appeal*, 60 Pa. St. 314; *Whitwell v. Warner*, 20 Vt. 425; *Gordon v. Preston*, 1 Watts, 386; *Sargent v. Webster*, 13 Metc. (Mass.) 497; *Kitchen v. Railway Co.*, 69 Mo. 224; *Oil Co. v. Marbury*, 91 U. S. 587. An exhaustive and luminous discussion of this question is found in the opinion of the supreme court of Minnesota, delivered by Judge Mitchell, in the case of *Hospes v. Car Co.*, 50 N. W. 1117. The reasoning of the learned judge who delivered the opinion of the court in that case makes it extremely clear that an insolvent corporation may prefer its creditors, whether they be officers of the corporation or strangers, and that there is no foundation for the doctrine that the insolvency of a corporation has the effect to convert its assets into a 'trust fund,' in the technical sense of that term, and its officers into mere trustees, charged with the duty of distributing its assets ratably among its creditors."

The view we have been elaborating is ful-

ly supported, also, by the English courts. It is there held that the assets of an insolvent corporation are not a trust fund for creditors; that its directors are not trustees for creditors; and that, of consequence, stranger creditors cannot avoid the disposition of its assets by directors in the preferential payment of their own just claims. In *Re Wincham Shipbuilding, Boiler & Salt Co.*, 9 Ch. Div. 322, the facts were that assets of the corporation were used by the directors in paying a corporate debt for which they were personally liable. The transaction was attacked by stranger creditors on the ground that the directors were trustees for them, and as such could not thus contract for their own benefit, to the detriment of the complainants. Vice Chancellor Bacon agreed with them, and granted relief, but, on appeal, the learned Jessel, M. R., reversed the decree, and sustained the transaction, saying: "The vice chancellor decided the question on this ground: that the directors were trustees of all their powers. So, no doubt, they were. But it is further said that they exercised their powers in breach of trust and for their own benefit, and therefore that the act which they did was nugatory. But it appears to me that the question is, for whom were they trustees? It does not appear that the vice chancellor considered this point; but it makes all the difference whether they were trustees for the persons who were injured by what had been done in this case, namely, the other creditors of the company. It has always been held that the directors are trustees for the shareholders; that is, for the company. They are the managing partners of the company, and if they abuse their powers, which they hold in trust for the company, to the damage of the company, for their own benefit, they are liable to make good the breach of trust to their cestuis que trustent, like any other trustees. But directors are not trustees for the creditors of the company. The creditors have certain rights against a company and its members, but they have no greater rights against the directors than against any other members of the company. * * * That being so, there was nothing to impose a duty on the directors not to pay a debt of the company, for which they were themselves liable, in priority to other debts, unless section 164 of the act of 1862 applied, which it certainly does not in the present case. The payment to the bank was not a fraudulent preference. It was made in the ordinary course of business. It was a good payment, and could not be recovered back. Therefore the directors, although they derived a collateral advantage to themselves, did not injure their cestuis que trustent. The payment was not any breach of duty to the only persons for whom they were trustees."

The reasoning of these authorities cannot, in our opinion, be answered. Certainly, the naked assertions of some courts that the law is otherwise is not even a pretense of refutation. Surely, also, such logic is not met by

invective. And the conclusions which they reach, the principles which they establish, are not only logical, and the legitimate and necessary consequence of the most familiar and elementary doctrines of the law, long recognized, but they are also, in the highest degree, just and right.

The application of these principles to the case at bar leads to this result: The transfer of property by the Decatur Building Supply Company to Corey, in payment of debts the company owed him, or to indemnify him against liability as indorser for the company, is not rendered fraudulent and void by the facts that the corporation was insolvent, and that he was a stockholder, director, and president of the corporation, and as such participated in the transaction by which his claims were thus preferred to those of complainant and other stranger creditors. The case of *Corey v. Wadsworth*, 99 Ala. 68, 11 South. 350, was directly, and the cases of *Gibson v. Furniture Co.*, 96 Ala. 357, 11 South. 365, and *Goodyear Rubber Co. v. George D. Scott Co.*, 96 Ala. 439, 11 South. 370, were, in effect, overruled by the subsequent case of *Jewelry Co. v. Volfer*, 106 Ala. 205, 17 South. 525, which has been several times reaffirmed by this court. *Barrett v. Pollak Co.*, 108 Ala. 390, 18 South. 615; *Pollak Co. v. Muscogee Mfg. Co.*, 108 Ala. 467, 18 South. 611. The later case of *Mary Lee Coal & Ry. Co. v. Knox*, 110 Ala. 632, 19 South. 67, is irreconcilable with the three cases last above named, and with the foregoing opinion in the case at bar. On the point under consideration, it must be overruled.

But, as we shall presently see, the sale to, and purchase by, Corey of the property of the corporation, was covinous and vicious, wholly apart from the consideration of his personal and official relations to the company. The decree of the chancellor was, however, based equally upon those relations and upon actual fraud, and the foregoing will stand as the opinion of the court upon one of the two grounds on which his conclusion was rested, and also as supplying the reasons for our conclusion in the case of *Anderson v. Bank* (which we now hand down) 25 South. 523.

Now, as to the other question in the present case, namely, whether the respondent Corey was under an honest liability for, or held an honest debt against, the Decatur Building Supply Company, commensurate in amount with the value of the property he took from the company in case of his liability or in payment of his debt, one or both, we reach the conclusion, the onus being on him, that he has failed to show, with that clearness and fullness which the law requires, that he received from the corporation, in payment of honest debts due from the corporation to himself, or to others for which he was bound as surety or guarantor, property which, reckoned at its fair value, was only sufficient to reimburse him or to save him harmless. In reaching this conclusion, we concede the integrity of the bank's

claim of \$6,000 against the supply company, as to which he was guarantor or surety. But it is clear, upon the whole evidence, that he received property of considerably greater value than \$6,000; so that, all other questions out of the way, the transaction could not be allowed to stand. He seems to have appreciated this, and insists that the company owed him directly about \$800, which constituted in part the consideration for the property he received. We do not find that the company owed him this \$800. In the first place, he was very laggard in bringing forward this claim at all; so much so, indeed, that it has earmarks of afterthought. Then, his testimony as to the precise amount of the claim and the manner of its accrual is quite unsatisfactory. He, indeed, makes no pretense of an accurate statement in either respect, but in his testimony constantly refers to the books of the company, to the effect that they correctly set forth the amount, and upon what account the corporation incurred the debt, etc. When the books, thus vouched for by him, are looked to, they not only do not show that the company owed him this or any other sum; but to the contrary, when taken in connection with his own evidence, they affirmatively show that he was, at the time of the transfer of this property to him, heavily indebted to the company himself. We suppose it will not be controverted that a creditor who is also, in less amount, the debtor of an insolvent, cannot take property in payment, except to the amount of his claim, as reduced by deducting therefrom his indebtedness to the insolvent. As applied here, this rule would have allowed Corey to take property of the value of \$6,000, for which he was bound to the bank, less the amount he individually and directly owed the insolvent corporation. That he took largely more than this there can be no doubt. It is true that he testifies, in a general way, that the property was worth less than the amount of his just claims against the company, and that it sold for less. But these conclusions of his are manifestly based upon the unfounded assumption that the company owed him about \$800, independently of the bank matter, and they take no account of the fact, as we find it to be, that, instead of the supply company owing him that sum, he was indebted to it for himself, and on account of Hoy, two or three or more thousands of dollars. Then, too, it is shown very satisfactorily that a great deal of the property he received was not estimated at its real value. For instance, he took several car loads of material,—sash, blinds, doors, lumber, etc.,—as it came into the company's possession about the time of the sale to him, at 10 per cent. off the cost at the factory, the supply company paying the transportation charges. And when, added to all these considerations, attention is had to the fact, which is inferable from the evidence and which the chancellor found, that the goods received by him were to a large extent ordered by the supply company

at his instance, his brother-in-law being general manager and he president of the company, from complainants in this case, for the purpose of applying them to his alleged claims against the insolvent corporation, we are driven to the conclusion that the whole transaction was tainted with actual fraud, and that the effect of it was not to pay a bona fide debt with property of equal value, but to give a large bonus to Corey over and beyond the amount of his just claims against the corporation; and upon this view the decree of the chancery court must be affirmed. Affirmed.

NOTE. The following opinion was written by Hon. THOMAS W. COLEMAN, at the time a justice of this court. At his suggestion, the case was passed over to the present court. The opinion has been again read and considered in consultation, and, though it has never been adopted or concurred in by any of the judges, it is printed here at Judge COLEMAN'S request:

The present bill is purely and simply a creditors' bill, seeking to subject the assets of the insolvent corporation, which, according to the averments of the bill, were sold and transferred to Lorenzo Corey, in fraud of creditors. That complainants were creditors of the Decatur Building Supply Company, a corporation, at the time of the sale and transfer of the assets to Corey, is not controverted. That Corey was a stockholder, a director, and president of the corporation at the time of the transfer to him, and that Hoy, the general manager, was his brother-in-law, are admitted facts. A few days prior to the 26th of July, 1888, the president, general manager, and other officers discussed the pecuniary condition of the corporation, and the necessity of making a general assignment for the benefit of its creditors, and this course was then agreed upon. Corey employed and paid attorneys to prepare the deed for a general assignment, and the assignment was executed on July 26, 1888. At the time of the execution of the general assignment, its indebtedness was \$26,000, and general creditors, other than those who were officers of the corporation, realized only 15 per cent. of their demands from the property assigned. There is no contention that the assignee failed to discharge his duty, or that less than their value was realized from the assets conveyed to the assignee. That on and from the 19th of July, to and including a part of the 26th of July, 1888, many thousands of dollars' worth of its available assets (salable property) and some choses in action were sold and transferred and delivered to Lorenzo Corey, and by him appropriated to his own use, are facts averred in the bill and fully sustained by the proof. The complainants base their right to relief upon two propositions: First, that if, in point of fact, Corey was bound for certain debts of the corporation as a guarantor, and that if Corey was a creditor of the insolvent corporation, being a stockholder, director, and its president, and exercising a controlling influence, the law will not permit him to indemnify himself against liability as a guarantor, and to prefer himself as a creditor to all the other creditors, by the purchase of the assets of the corporation in payment of his demands and liability, he at the time knowing its insolvent condition, and that it must necessarily cease to do business in a few days; second, that the demands claimed by Corey to be due him were not bona fide, and that the transaction of the purchase of the assets was a scheme concocted at the instance of Corey, to protect him and other officers of the corporation, who were co-guarantors, and to wreck the corporation for his own benefit,

and that in the transaction actual fraud existed, and that, under either aspect, Corey should be held a trustee in invitum, and made to account for the assets thus appropriated. The defense relied upon is that Corey was liable as a guarantor to the Exchange Bank of Decatur for a debt of the Decatur Building Supply Company, the debtor and defendant corporation, for \$6,000, and that the corporation was indebted to him individually in large sums of money, advanced and loaned by him; and that he paid by checks on the Exchange Bank, payable to the Decatur Building Supply Company, \$6,000, with the understanding and agreement that it was to be applied to, and in payment of, the debt of the corporation due the bank, for which he and other officers were bound as guarantors, and that the remainder of the property purchased by him was in satisfaction of bona fide debts due him from the building supply company, and that the transaction was free from fraud. It was proven that Corey was also a stockholder and director in the Exchange Bank of Decatur; otherwise, it does not appear that the Exchange Bank had any knowledge of the understanding as to the means provided for the payment of this debt. A further statement of the facts can be found in the report of the case in 99 Ala. 63, 11 South. 350.

The pleadings and evidence show that Lorenzo Corey, a stockholder, director, and president of the building supply company, a corporation, with a knowledge that it was insolvent, upon the eve of, and in contemplation of, a general assignment, appropriated, under the form of a purchase, largely more than half of its available assets to the payment of a debt for which he and other officers were personally bound as guarantors, and in payment of debts claimed to be due him individually; thereby securing such an advantage and preference over other creditors, so that he sustained but little, if any, loss, while the other creditors did not realize more than 15 per cent. of their claims. The question is, can the purchase by a director and president be sustained in a court of equity against the claims of the other creditors? Under well-settled principles, such a transaction, the debts being bona fide, would not necessarily be fraudulent and void, if made between individuals, although the debtor might have been hopelessly insolvent at the time, provided the assets were sold for a fair price and the debtor received no benefit from the transaction. Can the same rule be applied in favor of officers in control of corporations, after the corporations have become insolvent, and ceased to do business, without doing violence to well-established rules, necessary to prevent undue advantage and injustice?

The direct question was settled by this court, after full discussion, in the case of *Gibson v. Furniture Co.*, 96 Ala. 367, 11 South. 365, in which the court used this language: "The corporation, however, became insolvent, and he [Gibson], being a director, could not purchase its stock in trade, and close its operations, and thereby make himself a preferred creditor."

In the case of *Goodyear Rubber Co. v. George D. Scott Co.*, 96 Ala. 439, 11 South. 370, this court declared that an insolvent corporation could prefer some of its creditors, but that a director or member of the governing board of an insolvent corporation was without authority to make himself a preferred creditor. In this case Scott was a guarantor or indorser of the insolvent corporation.

The direct question was again presented by demurrer to the bill in the case at bar on a former appeal (99 Ala. 63, 11 South. 350), and, after thorough consideration, the conclusion was reached by the court, as then constituted, that a director or governing member of the board of an insolvent corporation was not authorized to prefer himself to general creditors. True, the learned chief justice who wrote the

opinion contended that the trust-fund doctrine was the "sounder rule,"—a doctrine which has not been accepted by this court, and upon which the equitable principle, that a director or governing member of the board cannot prefer himself to other creditors, does not depend. In the subsequent case of *Mary Lee Coal & Railway Co.*, 110 Ala. 632, 19 South. 67,—a case held under consultation for a long time, and reconsidered pending an application for a rehearing,—we used the following language: "The rule that a director of an insolvent corporation cannot prefer himself, directly or indirectly, over other creditors, is but the application of a very familiar principle to the directors and stockholders of a corporation. No insolvent person who is a debtor is permitted to dispose of his property by which a benefit is reserved to himself, to the prejudice of his creditors. * * * In one sense, corporations are entities; but corporations and the stockholders are not separate and distinct entities for all purposes and in all respects. A corporation is a collective body, composed of different persons. *Railroad Co. v. Nicholas*, 98 Ala. 124, 12 South. 723; *Mor. Priv. Corp. § 227*. Whatever is of benefit to the corporation, as a collective body, is a benefit to the stockholders or persons of which it is composed. Corporations are controlled by, and act through, a board of directors or stockholders. When, therefore, an insolvent corporation, acting by its governing body, which, by reason of their relations to the corporation, may know its condition, and have advantages superior to other creditors, sells or transfers its assets, or any portion of them, on such terms or conditions as to place the property beyond the reach of its creditors, and thereby protect the members or any of them from loss, and yet secure a benefit to those who effect the sale and transfer, whether consummated directly or through another corporation of which they are the owners and beneficiaries, such sale or transfer is in violation of the rule which prevails as to persons, and is void as to such persons making the sale and who are thus benefited. The rule is as much a necessity to prevent fraud, injustice, and undue advantage on the part of the directors and stockholders of corporations as to similar transactions between individuals. A person cannot be a debtor to, and creditor of, himself, but by reason of the fact that the same persons may be the directors and stockholders of separate corporations, one of which may become the debtor of the other; and thus, though not in name and form, in fact, stockholders often sustain the relation of debtor and creditor to themselves. In arriving at the bona fides of transactions and motives of parties thus situated, for the prevention of fraud and undue advantage and the administration of justice, courts should not regard corporations as separate, distinct entities from the owners and stockholders, and sanction as valid transactions which, if done by individuals under the same circumstances, would be set aside and annulled. We would not apply, however, to corporations, whether solvent or insolvent, which have not been dissolved or ceased to do business as going concerns, a different rule than that applied to individuals acting as such in this respect, and disable them from paying some creditors at the expense of others, under any and all circumstances. *Goodyear Rubber Co. v. George D. Scott Co.*, 96 Ala. 439, 11 South. 370."

These decisions declare the law to be that the mere insolvency of a corporation does not convert its assets into a trust fund for its creditors, but by reason of the nature of a corporation, and the relation its governing officers bear to it, any disposition of its property, after insolvency, by its officers, by which they are preferred, or a benefit is reserved to themselves, over the other creditors, will be set aside as fraudulent and void, at the instance of creditors. This is the conclusion reached by the

great weight of authority. All the courts holding to this view do not proceed upon the same grounds. It is the logical conclusion from the trust-fund doctrine, and the courts maintaining that rule, for the most part, declare their conclusion from it. Other courts, which do not accept the trust-fund doctrine, as this court has done, reach the same conclusion, upon other grounds. *Beach v. Miller*, 130 Ill. 162, 22 N. E. 464, and 17 Am. St. Rep. 291, and extended notes; *Sweeny v. Refining Co.*, 30 W. Va. 443, 4 S. E. 431, and 8 Am. St. Rep. 88; *Lagrange Butter Tub Co. v. National Bank of Commerce*, 122 Mo. 154, 26 S. W. 710, and 43 Am. St. Rep. 558; *Rouse v. Bank*, 46 Ohio St. 493, 22 N. E. 293, and 15 Am. St. Rep. 644, and note; *Bank v. Knowles*, 67 Wis. 373, 28 N. W. 225; *Haywood v. Lumber Co.*, 64 Wis. 639, 26 N. W. 184; *Ballin v. Bank*, 89 Wis. 278, 61 N. W. 1118, and 46 Am. St. Rep. 834, reviewing the Wisconsin cases.

These authorities refer to many others. It is true that other courts hold to a different view, and declare that an insolvent corporation may prefer any creditor, even a director or president, to other creditors. *Garrett v. Plow Co.*, 70 Iowa, 697, 29 N. W. 395, 59 Am. Rep. 461, and notes; *Worthen v. Griffith*, 59 Ark. 562, 28 S. W. 286, and 43 Am. St. Rep. 50, and notes. The principle upon which these latter cases proceed is that a corporation is a legal unit, in every respect, as much so as an individual, and that the same rules of law must be applied to both alike. The argument, we are of opinion, proceeds from a false premise. A corporation is composed of several persons, and not of one person. It cannot act by itself, but only by agents. When the corporation increases in wealth, the enhancement redounds to the benefit of those who compose it. When it loses money, it is their loss. The persons who compose it are affected with the same infirmities of human nature, after the incorporation, as before. In all business transactions, done in the name of the corporation, those engaged in accomplishing these business transactions, as its managing and governing officers, are subject to the same selfish influences which would operate upon them acting in their individual names, for their personal interest. These officers are in a position to know the real condition of a corporation, an advantage not attainable by creditors generally. The maxim that the law favors the diligent can have no just application to parties having such advantages. When an insolvent debtor prefers one creditor to another, it is of no pecuniary advantage to the debtor, and even in such cases, if he secures a benefit to himself, the preference will be set aside. If this be sound law and good morals, certainly, when an insolvent corporation sells to those who make up and constitute the corporation, the same legal and moral rule is violated. Why is it that a partnership is prohibited from preferring one of its own members to the other creditors, and the same principle is not applicable to corporations dealing with its own members and officers? When a person is solvent, having no creditors, he can dispose of his property to whom and on such terms as he sees proper, and reserve to himself any benefit he may desire, but, when he is insolvent, a different rule arises. On account of the limited liability of corporations, the rule should, at least, be as strictly enforced against its beneficiaries as against persons. There is but one sound and practical way of dealing with insolvent corporations, so as to prevent an unfair and unjust advantage by its officers and for protection of the creditors in their just rights, and that is "to treat the officers and stockholders as the proprietors"; or, as Morawetz says, always keep in mind that a corporation is an association of persons, and to apply the same rules to them as are applied to partnerships and individuals, so far as to prohibit them from acquiring the assets in preference to its general

creditors. Mr. Thompson, in his comprehensive work on Corporations, has collected and cited a great many authorities which treat of the rights of creditors to the assets of insolvent corporations, and in section 1569 declares the trust-fund doctrine to be "nothing more than a rule which the law applies to every other debtor." He says: "In considering the power of corporations with reference to their capital and shares, it is necessary to note a fundamental distinction between the English and American cases. In 1824 the fertile brain of Mr. Justice Story invented the doctrine that the capital stock of a corporation is a trust fund for the payment of its creditors, and that the creditors have an equitable lien or charge upon it superior to that of the stockholders. This has become the settled doctrine of American courts. If this doctrine means anything more than that the creditors of a corporation must be paid before its property can be distributed among its shareholders, then there would be no difference in this respect between the English and American decisions; for this is the rule which obtains in the winding up of partnerships. The partnership creditors must be paid before the individual partners can divide the social assets among themselves. And, indeed, treating the shareholders as proprietors,—and this is the only practical judicial conception of their status,—this rule is nothing more than that which the law applies to every other debtor. He cannot keep and enjoy his property, leaving his debts unpaid." A great many authorities are cited to this text. Upon the doctrine that an insolvent corporation can prefer its own directors, he uses the following language (5 *Thomp. Corp.* § 6496): "The writer wishes to weigh his words carefully, and not to speak disrespectfully of the judicial courts; but he feels that he does not characterize this doctrine in the language which it deserves, unless he calls it an infamous doctrine, which is not supported by any underlying principles of justice. It gives added weight to calamity which the public suffer through the fact of nearly every form of industry passing into the hands of limited liability corporations. The infamy is intensified where the directors are allowed to appropriate the property of the corporation in payment of debts due from the corporation to themselves, leaving its other creditors hopelessly without remedy." *Id.* § 6498: "It is to be regretted that some of the American courts have carried the right of an insolvent corporation to prefer creditors to the extent of holding that it may not only prefer creditors who are its own shareholders, but may prefer such as are its own directors. This infamous doctrine has been pushed to the extent of allowing the directors and shareholders of a corporation to prefer themselves, at the expense of its creditors at large, although the director or shareholder may have voted for the proposition. A conception which proceeds upon a similar level is that the fact that the directors had falsely represented to the public, by means of the letter heads on which they conducted the business correspondence of their company, that it had a certain capital, does not estop them from preferring themselves before the general creditors of the company, whom they have thus deceived in giving credit to it. It cannot escape attention that this doctrine offers a new inducement to the incorporation of every species of business, because it gives the members of corporations an advantage over their creditors which the members of a partnership do not possess. A partnership cannot distribute its assets to its partners in preference to its creditors, but, under this miserable doctrine, if it becomes incorporated, it can do so." *Id.* § 6499: "It would not be profitable to quote the mouthings of judges upon this question, but it is strange that judges can be found so destitute of a sense of justice as to announce the following proposition: 'There is nothing, either in law or equity,

which forbids a member, or even a director, of a corporation, from contracting with it, and, like any other individual, he has a right to prescribe his own terms, which the corporation are at liberty to accept or reject; and, when the contract is concluded, he stands in the same relation to the other creditors of the corporation as any other individual would under the same circumstances. When the question of priority arises, it must depend on the bona fides of the transaction,—fraud or no fraud. If, by greater diligence and without fraud, he has fairly gained an advantage over the other creditors, he is entitled to retain it. Undoubtedly, the directors have a right to contract with the corporation while it is a going concern, provided they do it fairly; but, in general, they are the only ones whose knowledge of the internal affairs of the corporation will enable them to predict, in any state of circumstances, whether it can continue a going concern, or must suspend and go into liquidation; and to say that when they avail themselves of this knowledge, as against outside creditors, who have, and from the nature of the case can generally have, no such knowledge, they are merely exercising 'greater diligence, and without fraud,' is a strange perversion of language, and one which exhibits a low sense of justice. The principle under consideration does not, of course, apply to the case where directors have advanced money to the corporation in good faith, while it is a solvent and going concern, to prosecute its ordinary business, and the corporation, while still a solvent and going concern, repays this advance. Nor does the principle have any necessary connection with a case where, a corporation being in difficulties, some of its directors come to its rescue, and advance money, and take a mortgage to secure their present advances, and thereby help the corporation out of its difficulties, and put it upon its feet, so that it becomes prosperous, after which other of its members, who failed or refused to aid it in its difficulties, came forward, and, in a suit brought in its name, endeavor to make the directors, who have purchased its property under their mortgage at a foreclosure, account for the profit which they have realized."

In the case of *Sutton Mfg. Co. v. Hutchinson*, 11 C. C. A. 320, 63 Fed. 496, Harlan, J., considered the question at great length, reviewing many of the decisions of the supreme court of the United States, and drew the distinction between the rights and duties of the managing officers of an insolvent corporation and an individual who was not able to pay his debts. He uses the following language: "A corporation is not required, by any duty it owes to creditors, to suspend operations the moment it becomes financially embarrassed, or because it may be doubtful whether the objects of its creation can be attained by further effort upon its part. It is in the line of right and of duty when attempting, in good faith, by the exercise of its lawful powers, and by the use of all legitimate means, to preserve its active existence, and thereby accomplish the objects for which it was created. In such a crisis in its affairs, and to those ends, it may accept financial assistance from one of its directors, and by a mortgage upon its property secure the payment of money then loaned or advanced by him, or in that mode protect him against liability then incurred in its behalf by him. Of course, in cases of that kind, a court of equity will closely scrutinize the transaction, and, in a contest between general creditors and a director or managing officer who takes a mortgage upon its property, will hold the latter to clear proof that the mortgage was executed in good faith, and was not a device to enable him to obtain an advantage for himself over those interested in the distribution of the mortgagor's property. *Richardson's Ex'r v. Green*, 133 U. S. 30, 43, 10 Sup. Ct. 280; *Oil Co. v. Marbury*, 91 U. S. 587, 588. Entirely different considerations come in-

to view when an insolvent corporation, having no expectation of continuing its business, and recognizing its financial embarrassments as too serious to be overcome, mortgages its property to secure a debt previously incurred by one of its directors, or, in a general assignment of all its property, gives him a preference. To a general assignment by a private corporation for the full benefit of all its creditors, including directors, no objection could be made, because it recognizes the equal right of creditors to participate in the distribution of the common fund. Such an assignment, Lord Ellenborough said in *Pickstock v. Lyster*, 3 Maule & S. 371, 375, is to be referred to an act of duty rather than of fraud, and is an act by the assignor that arises out of a discharge of the moral duties attached to his character of debtor to make the fund available for the whole body of creditors. The contention of the defendants is that, in disposing of their respective properties, an individual and a corporation were recognized at common law as having equal rights; and as the former may, in the absence of a statute forbidding it, transfer the whole or part of his property with the intention or with the effect of giving a preference to some of his creditors, to the exclusion of others, so an insolvent corporation, when financially embarrassed and not intending to continue its business, may make a preference among its creditors, whoever they may be, and whatever their relation to the corporation or to the property transferred. If this be a sound rule, it would follow that directors, being also creditors, of an insolvent corporation, which has abandoned the objects of its creation and ceased an active existence, may distribute among themselves its entire assets, if the reasonable value thereof does not exceed their aggregate demands. We cannot accept this view. In our judgment, when a corporation becomes insolvent, and intends not to prosecute its business, or does not expect to make further effort to accomplish the objects of its creation, its managing officers or directors come under a duty to distribute its property or its proceeds ratably among all creditors, having regard, of course, to valid liens or charges previously placed upon it. Their duty is 'to act up to the end or design' for which the corporation was created (1 Bl. Comm. 480), and, when they can no longer do so, their function is to hold or distribute the property in their hands for the equal benefit of those entitled to it. Because of the existence of this duty in respect to a common fund in their hands to be administered, the law will not permit them, although creditors, to obtain any peculiar advantage for themselves to the prejudice of other creditors. This rule is imperatively demanded by the principle that one who has the possession and control of property for the benefit of others—and, surely, an insolvent corporation, which has ceased to do business, holds its property for the benefit of creditors—may not dispose of it for its own special advantage, to the injury of any of those for whom it is held. That principle pervades the entire law regulating the conduct of those who hold fiduciary relations to others, and, instead of being relaxed, should be rigidly enforced, in cases of breach of duty or trust by corporate managers seeking to enrich themselves at the expense of those who have an interest equally with themselves in the property committed by law to their control. It would be difficult to overstate the mischievous results of a contrary rule, as applied to those intrusted with the management of corporate property."

The latest decision bearing on the question, to which our attention has been called, is that of *Sanford Fork & Tool Co. v. Howe, Brown & Co.*, 157 U. S. 312, 15 Sup. Ct. 621, the opinion delivered by Mr. Justice Brewer. In this opinion it is declared that "a corporation acting in good faith, and without any purpose of defrauding its creditors, but with the sole object of continuing a business which promises to be

successful, may give a mortgage to directors who have lent their credit to it, in order to induce a continuance of that credit, and to obtain renewals of maturing paper, at a time when the corporation, although it may not then in fact be possessed of assets equal at cash prices to its indebtedness, is in fact a going concern, and is intending and is expecting to continue its business." The circumstances under which a corporation, not in fact possessed of assets equal, at cash prices, to its indebtedness, may execute a mortgage of indemnity in favor of its directors, is stated with great care and precision, as if the court intended carefully to guard against committing itself to the conclusion under different circumstances. The case of Sutton Mfg. Co., supra, is cited in the opinion, without an intimation of disapproval of any of its statements. It is impossible to read the opinion of Mr. Justice Brewer, supra, without being impressed with the conclusion that the court would not uphold a mortgage to indemnify directors of an insolvent corporation made with a knowledge of its insolvency, having no intention to continue its business or aid it, but in anticipation of its speedy termination as a going concern, the effect of which transaction merely secured a preference over other creditors. On page 319, 157 U. S., and page 624, 15 Sup. Ct., Mr. Brewer says: "Carrying on business after the giving of an indemnifying mortgage, with a knowledge of insolvency, with the expectation of soon winding up the affairs of the corporation, and only for the sake of giving an appearance of good faith, leaves the transaction precisely as though the mortgage was executed at the moment of distribution and with the view of a personal preference."

The illustration that a line drawn, with the insolvent debtor and his insufficient property on one side, and the creditors and their claims on the other side, and that the passing of the property to somebody on the other side, is what the law demands, is misleading and fallacious. The fundamental difference is overlooked. In the case of the insolvent corporation, on one side of the line stands the director, having the power to dispose of the insufficient property, and on the other side of the line this same director is ranged with the other creditors with his claim. The grantor and the grantee are one and the same person. No amount of argument or assertion can ever satisfy an impartial judgment that the general creditors stand upon equal footing with a creditor who has the power to dispose of the assets subject to debts. Under such conditions, to apply the rule that the law favors the diligent perpetrates a travesty on justice. We do not believe in any case has it ever been contended that it is right to permit a grantor to convey directly to himself, to the injury of creditors of the conveyed assets. The only escape from such an obnoxious rule is to take refuge behind the doctrine that a corporation is in law, and must be regarded for all purposes as, a single individual. With this circumstance out of the way, there is nothing left to support the doctrine that a controlling officer of an insolvent corporation may prefer himself to all other creditors.

In the case of Railroad Co. v. Nicholas, 98 Ala. 92, 12 South. 723, one of the principal questions settled involved this question. The case was one of unusual importance, discussed orally, and at great length by written argument, by eminent counsel, and, after thorough discussion and great deliberation, this court unanimously approved the declaration that, for many purposes, a corporation was not in reality a person or thing distinct from its constituent parts. It required no statute to authorize stockholders, as such, to resort to courts of equity for protection against the corporation of which they were constituent parts, and yet an individual cannot maintain an action against himself. Many individuals are wealthy by rea-

son of their stock in corporations. The debt of the corporation, and the appropriation of its assets to the payment of its debt, lessens the individual wealth of the owner of its stock. Whatever affects the interest of the corporation affects the pecuniary values of the stockholder in his individual capacity. The fact that by law the property of an individual partner may be subjected to the payment of partnership debts, and the liability of a stockholder for the debts of the corporation is limited to his corporate interest, emphasizes the fact that the debt of the corporation is his individual debt, to the extent of his corporate interest. It is noticeable that so many of the authorities which announce the conclusion that the directors of an insolvent corporation may prefer themselves to other creditors seemingly admit that the contrary rule is the sounder and more just, but hold that it requires legislation to authorize the courts to so hold. This conclusion proceeds solely from the premise that courts cannot distinguish between the members associated as a corporation under a corporate name and with corporate privileges and the corporation as a unity,—a holding contrary to everyday practice in the courts in other matters, and contrary to obvious facts and many adjudications.

Independent of these considerations, there stands the undisputed fact that the directors of an insolvent corporation, whose skill and supposed integrity have induced the credit and confidence of the business public, without warning of its tottering condition and approaching dissolution,—a condition known to the directors, and by them kept concealed from the confiding public,—conscious that the creditors, if perchance they should come to a knowledge of its condition, will be forced to the slow process of suit, can, by a simple transaction of purchase from the corporation, which they alone can execute, secure all its assets in satisfaction of their claims and demands. Of course, being the governing board, they know exactly how far to trust the electrified corpse, and when to act for their own security. No others can know. They are not deceived. It is in their power, and theirs alone, to see that they are fully paid. They run no risk in giving credit. When the creditors complain, they must be content with the reply that the "law favors the diligent"; that "our credit and money have kept the concern apparently alive for the past. True, you were deceived, and we were not, but that is your misfortune. We are in control of the assets, and will pay ourselves."

This court, in four decisions cited above, has deliberately condemned such a transaction as unjust and fraudulent. Justice and fair dealing must be against it. The great weight of authority is against it. We cite from brief of counsel a few decisions which have been verified, out of the many which might be cited: "The allowance of preferences was termed a 'pernicious doctrine,' in *Conover v. Hull*, 10 Wash. 673, 39 Pac. 166, and 45 Am. St. Rep. 810, 'at variance with the whole theory of the law.' 2 Mor. Priv. Corp. § 808. 'The law does not intend or allow such an appropriation.' *Sicardi v. Oil Co.*, 24 Atl. 163, 149 Pa. St. 148. 'Weight of authority and reason was against the validity of such preferences.' *Howe, Brown & Co. v. Sanford Fork & Tool Co.*, 44 Fed. 231. 'It is a doctrine which is at variance with the whole theory of the law covering the rights of creditors of insolvent corporations.' *Rouse v. Bank*, 46 Ohio St. 493, 22 N. E. 293, and 5 Lawy. Rep. Ann. 378, 383. " * * * Entitled to take precedence among the many reckless absurdities, etc. *Wait Insol. Corp.* § 162. 'Great weight of authority denies the right.' Editorial note, *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.* (Tex. Sup.) 22 Lawy. Rep. Ann. 807 (s. c. 24 S. W. 16). 'Could not be rightfully done.' *Sutton Mfg. Co. v. Hutchinson*, 11 C. C. A. 321, 63 Fed. 496. The invalidity of such preferences has been said to be 'well settled.'

Bonney v. Tilley, 109 Cal. 346, 42 Pac. 439. This is said to be 'in line with the great weight of modern authority.' Tillson v. Downing (Neb.) 63 N. W. 837. 'The conservative and preservative tendency of the courts * * * has been to establish and maintain the doctrine' of invalidity. Northwestern Mut. Life Ins. Co. v. Cotton Exchange Real-Estate Co., 70 Fed. 155. 'A careful perusal of what is said by the leading text writers on the subject, and a laborious examination of the cases to which they refer, has convinced us that the decided weight of American authority is as indicated.' Lowry Banking Co. v. Empire Lumber Co., 17 S. E. 968, 91 Ga. 624. * * * The rule which prohibits directors, when a corporation is insolvent and about to go into liquidation, from preferring debts due to themselves,' etc. Adams v. Milling Co., 35 Fed. 433. 'The modern authorities, almost without exception, utter the same strong condemnatory language.' Corey v. Wadsworth, 99 Ala. 68, 11 South. 350. 'That appellants came within the prohibition of this rule is beyond controversy.' Roseboom v. Whittaker, 23 N. E. 339, 132 Ill. 81 (directly in point). 'This principle was applied to the taking of a mortgage by the directors on the property of the corporation to secure their liability as sureties on the note of the corporation.' Haywood v. Lumber Co., 64 Wis. 639, 26 N. W. 184. 'It seems to be well settled that the directors of an insolvent corporation * * * cannot secure to themselves any preference.' * * * Bonney v. Tilley, 42 Pac. 439, 109 Cal. 346. 'It appears to be well settled by authority.' W. P. Noble Mercantile Co. v. Mt. Pleasant Equitable Co-operative Inst. (Utah) 42 Pac. 869. In speaking of cases holding to the same effect, it was said in Tillson v. Downing (Neb.) 63 N. W. 837: 'We think both these cases are in line with the great weight of modern authority.' This is said in 1 Beach Priv. Corp. 241, to be a 'general rule.' 'The only just and equitable rule.' Editorial note, Conover v. Hull, 45 Am. St. Rep. 835 (s. c. 10 Wash. 673, 39 Pac. 166). 'A general rule.' 17 Am. & Eng. Enc. Law, 122. 'The above case is clearly in accord with the weight of authority.' Editorial note to Corey v. Wadsworth, 23 Lawy. Rep. Ann. 618 (s. c. 11 South. 350); Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co., 86 Tex. 143, 24 S. W. 16, and 22 Lawy. Rep. Ann. 802; Rouse v. Bank, 46 Ohio St. 493, 22 N. E. 293."

No satisfactory argument has been adduced to show that this court should depart from its settled doctrine, and certainly none which has not been met and successfully controverted in one or more of the decisions cited.

The fifteenth paragraph of the amended answer avers that "Corey is the owner and possessor of a large indebtedness of the building supply company, which was existing at the time of the assignment; and that the same has been assigned and transferred to him, and that it amounts to about \$5,000, besides \$1,500 mentioned in the original answer, and he claims to be a creditor," etc. The prayer is that the answer be taken as a cross bill, and that he be allowed to share in the distribution. To the cross bill the complainant demurred, and, among others, assigned substantially, as a ground of demurrer, that the claims set up in the cross bill were not described with sufficient definiteness to enable the complainant to tell whether the claims were by account or note, nor from whom nor when obtained. The demurrer to the cross bill was well taken, and properly sustained.

The evidence of the respondent that the corporation was indebted to him, other than the debt due the Exchange Bank, is not clear nor satisfactory. He testified, in a general way, that the property purchased by him was in payment of advances and loans made by him, but when these advances were made, in what amounts, and how evidenced, is not stated,

though he was interrogated thereto. The most that could be obtained from him, as to the price of the goods, was that he did not remember, but that the books of the company would show. The account taken from the books, and the testimony of Poley, who kept the books in part, and was an officer, does not sustain Corey. We are satisfied that the decree of the chancery court has done the appellant no injury, and that there is no error of which he can complain.

(123 Ala. 275)

ANDERSON et al. v. BULLOCK COUNTY BANK et al.

(Supreme Court of Alabama. Feb. 1, 1899.)

CORPORATIONS—BONDS—MORTGAGES—VALIDITY—RIGHTS OF CREDITORS—PURCHASE BY PRESIDENT—PREFERENCE—CLAIMS OF OFFICERS—APPEAL—AFFIRMANCE.

1. A creditor of a corporation cannot attack the validity of a mortgage given by it to secure money borrowed, because notice to the stockholders of a meeting, at which the holders of the larger part in value of the stock consented to the mortgage, was not given, as required by Code 1896, § 1256, subd. 7 (Code 1896, § 1664).

2. The fact that the president of a corporation, with the consent of the board of directors and stockholders, purchased corporate bonds of the value of \$18,000 for \$16,500, does not render the bonds invalid as usurious or fraudulent, as against a creditor whose claim was contracted nearly six years after.

3. The president of a corporation, holding its past-due, valid bonds, agreed to procure the issue of new bonds, and to exchange the latter for other property. At a meeting of stockholders, a resolution, favored by the president, was adopted, authorizing the issue of new bonds to retire the old ones, and the execution of a mortgage to secure same. The new bonds, signed by the president, purported to be a series of a larger amount than authorized, and the mortgage also purported to secure such larger amount. *Held*, that the bonds and mortgage were not invalid as against subsequent creditors.

4. A corporation becoming insolvent, and its property being wasted for want of care by the officers, the holders of its valid bonds, secured by mortgage, obtained a decree of foreclosure, which provided that the property should not be sold for less than the amount of the bonds. The decree did not adjudge an indebtedness, or ascertain its amount. *Held*, that subsequent creditors could not have such decree set aside and a sale made at their instance, where it did not appear that the property would not sell for as much under the foreclosure decree.

5. An insolvent corporation may transfer its property in payment of bona fide debts due its officers, though thereby preferring such claims to those of other creditors.

6. Where a bill should have been dismissed for want of equity, and the appeal is by complainant, who merely assigns as error the decree sustaining a demurrer on special grounds, which were well taken, the decree will be affirmed.

Appeal from chancery court, Bullock county; Jere N. Williams, Chancellor.

Bill by F. Anderson and others against the Bullock County Bank and others. From a decree sustaining a demurrer to the bill, complainants appeal. Affirmed.

The averments of the bill show the following facts:

Complainants in the court below are simple contract creditors, who have not reduced their

claims to judgment, of the Bullock County Manufacturing Company, a corporation organized under the general laws of Alabama for the purpose of manufacturing cotton-seed oil, cotton-seed cake, etc. The corporation was organized in May, 1889, with an authorized capital stock of 250 shares, of the face value of \$100 each. At the time of its organization there were 219 shares subscribed and paid in, and the number was never increased. S. J. Foster, who was its president and a director, owned 120 shares of said stock, and controlled 12 additional shares, belonging to S. J. Foster, Jr. On November 7, 1889, a resolution was adopted authorizing the issuance of \$20,000 of 8 per cent. interest bearing coupon bonds, to run five years, in denominations of \$500 each, and also a mortgage on the plant to secure the same. These bonds were issued, and the mortgage executed, in pursuance of said resolution, and were to mature on November 7, 1894. At the time of their issuance, the corporation owed \$4,000 of notes, accounts, and bills. It is alleged that, on this account, the issuance of said bonds increased the indebtedness of the corporation beyond its capital stock, and was illegal. It is alleged that said mortgage was not authorized by the consent of the holders of the larger part in value of the capital stock of said corporation, expressed at a meeting of the stockholders, etc. A copy of the resolution authorizing the issuance of said bonds and the execution of said mortgage is attached as an exhibit to the bill, and shows that 193 shares (a large majority of the shares of stock) were present and represented at said meeting. It is alleged that S. J. Foster, by previous agreement with the directors, purchased \$18,000 of said bonds, and paid \$16,500 therefor, and that this was all of said bonds that were ever sold; and that this purchase was an abuse by said Foster of his position as a director, and was contrary to the constitution and statute laws of the state, and was a usurious transaction. And from the time of the issuance of said bonds until the 3d day of June, 1895, said Foster managed the affairs of said corporation, continued to own the bonds and stock referred to, except \$1,000 of said bonds, which in the interim were retired, and regularly collected the interest on said bonds, so that when they matured there were \$17,000 in value thereof outstanding. During the period of time herein recited, the Bullock County Bank was acting as trustee for the bondholders of the corporation under the mortgage. One J. A. Paulk owned a large share of the capital stock of said bank, and knew the interest owned in and held by said Foster in the corporation. In the spring of 1895, and prior to June 3, 1895, there was an agreement made between said Paulk and said Foster whereby said Paulk was to exchange or transfer his stock in the Bullock County Bank for said Foster's interest in the corporation, both stock and bonds; and, said bonds being

at the time past due, it was a part of said agreement that the corporation should issue new bonds, of like kind and amount, to run for 10 years, for the purpose of canceling and retiring said old bonds. The new issue of bonds was made; the old bonds were canceled and retired, said Foster taking said new bonds in lieu of said old bonds; and a new mortgage, a copy of which is attached to the bill as an exhibit, was executed to the Bullock County Bank, as trustee, to secure said new bonds, said mortgage covering the plant of said corporation. There was attached to the bill, as an exhibit, a copy of the resolution authorizing the issuance of said new bonds and the execution of said mortgage. At the meeting adopting said resolution a large majority, to wit, 166 shares, were represented, and the same was adopted by a unanimous vote of all present and represented. The trade between said Foster and Paulk was consummated by the transfer to Paulk of 120 shares of the capital stock and said entire issue of new bonds. At a meeting of the stockholders, J. A. Paulk, J. L. Paulk (his son), and J. L. Roberts were elected directors,—J. A. Paulk, president; and J. L. Paulk, secretary and treasurer,—and they continued in office until June, 1896, when they were re-elected; and W. M. Pitts was also elected as an additional director at said meeting. It is alleged that said Paulk was indebted to L. Bernheimer and L. Sessions, and that they each held portions of his bank stock as collateral security for the debts due them; and that it was understood in said deal that said Bernheimer and Sessions should surrender said bank stock to said Foster, and that they should receive, in exchange therefor, bonds of the corporation, which were to be sold by said Foster to said Paulk; that said Paulk did transfer and assign to said Bernheimer \$13,000 in value of said bonds, and to said Sessions \$2,000 in value thereof; that the debts due by Paulk to Bernheimer and Sessions each contained usurious interest, and that they knew that said bonds were issued to retire the old bonds, knew their history, and all about the affairs of the corporation,—how it had been managed, and the relation that Foster and Paulk bore to it. In paragraph 10 of the bill it is alleged that, in preparing said bonds, and mortgage given to secure the same, in consummation of the trade between said Foster and Paulk, the officers and directors exceeded their authority, in that the said bonds were made negotiable instruments, and the said mortgage provides for the earlier maturity of said bonds than 10 years in case default in the payment of taxes and interest on said bonds is made by said corporation; and further, that the officers of said corporation exceeded their authority in the issuance of said bonds and the execution of said mortgage. In paragraph 11 it is alleged that in 1896 a fire occurred in the buildings containing the machinery covered by said mortgage, and in-

jured and destroyed a large portion thereof. and new machinery was put in said building, and the machinery so purchased comprises part of the outfit and property of the corporation which the holders of the bonds are seeking to sell under said mortgage, which complainants are unable at this time to specify. In paragraphs 12 and 13 it is alleged that, about February 15, 1897, the officers and directors ceased to look after the affairs of the corporation; that the corporation was insolvent, and owed \$10,000 in addition to its bonded debt; that J. L. Paulk and W. M. Pitts were engaged in a mercantile business, under the firm name of Pitts & Paulk; that said corporation was indebted to Pitts & Paulk in the sum of about \$2,000; that it was indebted to W. M. Pitts in about the sum of \$2,500; that it was indebted to L. Bernheimer in about the sum of \$3,000; and that J. A. Paulk, its president, was indebted to Pitts & Paulk in about the sum of \$2,000, and was also largely indebted to said Bernheimer on his individual account; that, a short time prior to the time when the corporation ceased to do business, it had on hand a large quantity of cotton-seed meal, hulls, and cake, which was substantially all of its property over and above the property covered by the mortgage; that the said officers of the corporation, with the intent to prefer the payment of the debts due to themselves, and the debts due to Pitts & Paulk and to the said Bernheimer, sold a portion of the said product, and paid the salaries due to themselves with the proceeds, and turned over to Pitts & Paulk, W. M. Pitts, and L. Bernheimer a large portion of the said product in payment of the claims due them, and also permitted Pitts & Paulk, W. M. Pitts, and Bernheimer to knowingly appropriate the proceeds of said product to the payment of the debts due to themselves, with the intent to prefer the said debts over and above the claims of other creditors; that J. A. Paulk diverted a large portion of said output to the payment of private debts, including his taxes due the state, and also the county of Bullock; that Bernheimer, of the assets of said corporation received by him, failed and refused to apply any part thereof to the payment of the past-due coupons of the bonds of said corporation in his hands, but insisted on the payment of the amount due him on such coupons, and threatened to apply to the trustee for the bondholders, under the stipulations of the mortgage given to secure the bonds, to foreclose the same unless such coupons and all taxes which were unpaid should be at once liquidated, knowing that he had received assets which he should have applied to the payment of said coupons, and the taxes for 1896, then past due and unpaid; and the president neglected and refused to require said Bernheimer to apply the assets in his hands to the payment of the past-due coupons held by him; that the directors and certain stockholders, on February 23, 1897,

got together, and adopted a resolution authorizing the bondholders to sell the plant at public auction, and this was done, at the instigation of L. Bernheimer; that, a short time after said meeting, J. L. Pitts, who was a brother-in-law of J. A. Paulk, and a creditor of his to the amount of about \$2,000, voluntarily, and without any request from Bernheimer or any officer of the corporation, went to the Bullock County Bank, where the unpaid coupons of Bernheimer were sent for collection, and paid the same, and said bank then transferred said coupons to him; that, a short time after these coupons were turned over to him, he, Bernheimer, and said L. Sessions, representing themselves to be the holders of all the bonds, in writing, made an application to the Bullock County Bank, as trustee, to foreclose the mortgage referred to; that J. L. Pitts owned no bonds, and only held the coupons acquired by him as herein stated; and that all the coupons held by Sessions had been paid to him; that the said trustee then filed a bill in the chancery court of Bullock county to foreclose said mortgage, and it is alleged that J. L. Pitts either employed or agreed to pay all counsel engaged in said suit on the side of the complainant; that the only party defendant to said bill was the Bullock County Manufacturing Company, which was brought into court by service of citation on J. A. Paulk, as its president; that no defense was made to said suit; that a decree pro confesso was taken against the defendant; that said suit was a collusive effort, on the part of the parties thereto and the officers of the corporation, to prefer any claim or debt held by J. L. Pitts against said corporation and the said J. A. Paulk, and also to enforce the payment of the said bonds before they were rightfully due; that, although the taxes were due, neither the trustee, the bondholders, nor J. L. Pitts made any offer or attempt to pay the same; that, although a decree is still in force, yet, by written agreement, signed by said corporation, and all the officers in direct cause, the said defendant corporation consented for a final decree to be rendered in said cause in vacation; that said agreement was attached to the bill as an exhibit; that said cause was submitted to final decree in vacation, and decree rendered in vacation, a copy of which is attached to the bill as an exhibit; that said decree ordered the sale of said plant, and the same is now advertised for sale by the register; that said suit, from its institution to its final decree, is a collusive effort to hinder, delay, and defeat the general creditors of said corporation.

The Bullock County Bank, the Bullock County Manufacturing Company, J. L. Pitts, J. A. Paulk, J. L. Paulk, W. M. Pitts, Dr. L. Sessions, and L. Bernheimer are made parties defendant to the bill. The bill prays that a receiver be appointed to take charge of the property of the corporation pending this litigation. It further prays: (1) To declare the

bill filed by Bullock County Bank against the Bullock County Manufacturing Company to be collusive and fraudulent, and begun for the purpose of hindering, etc., and to dismiss the same out of court. (2) To declare said bonds to be null and void, and order them to be delivered up and canceled, or, in the alternative, to declare that they are not a prior claim or lien to the debts of the general creditors. (3) To declare the mortgage null and void, and cause same to be canceled, and that J. L. Pitts has no claim against the corporation for money paid out by him for past-due coupons, or, in the alternative, that he is only a simple creditor for said amount. (4) That the amount of the property wrongfully appropriated by W. M. Pitts, Pitts & Paulk, J. A. Paulk, J. L. Paulk, and L. Bernheimer be ascertained, and that they be required to bring the proceeds into court, and be held as trustees of all such property, and made to account for the same; and that all the property of the corporation be sold, and the proceeds be brought into court for distribution, and be subjected to the payment of the debts due appellants, as well as other creditors; also, that the decree rendered in the foreclosure suit be declared null and void, and the bill in said cause be dismissed. The Bullock County Manufacturing Company, J. A. Paulk, J. L. Paulk, J. L. Pitts, and W. M. Pitts separately and severally demurred to the bill, upon the following, among other, grounds: (1) Because the bill of complaint shows that it is an effort by simple contract creditors of a private corporation to have declared void the bonds of said corporation, on the ground of alleged noncompliance with the statutory requirements for the issuance of bonds by such corporation. (2) Because the said bill shows that it is an effort by simple contract creditors of a private corporation to have declared void a mortgage on the property of a private corporation, on the ground of alleged noncompliance with the statutory requirements for the execution of such mortgages by such corporations. (3) Because said bill seeks to declare void the bonds and mortgage of the Bullock County Manufacturing Company on the ground of irregularities in the issuance of said bonds and the execution of said mortgage, and it shows that none of these complainants are stockholders of said corporation. (4) Said bill is multifarious, in that it complains of acts done by different parties, who are made defendants to said bill, which said acts have no connection with each other, and which said parties are not shown to be in privity with each. (5) Said bill is multifarious, because it brings in parties as defendants to matters with which they are not connected, and the relief sought is not the same against all the defendants. (6) Said bill is multifarious, because these defendants are each brought in by the bill to defend on various matters, with a large portion of which the bill shows that each defendant did not have any knowledge, participation, or connection. (7) Said bill is multifarious in this:

that it seeks to hold these defendants Pitts & Paulk, W. M. Pitts, and L. Bernheimer liable for proceeds of the product of said Bullock County Manufacturing Company, alleged to have been misappropriated by them, and said L. Sessions, L. Bernheimer, and J. L. Pitts liable for the alleged noncompliance of said manufacturing company with the statutory requirements in the issuance of said bonds and the execution of said mortgage, and the said J. A. Paulk and the said J. L. Paulk liable for the proceeds of said manufacturing company alleged to have been wrongfully appropriated by them, when it is not shown that said parties are in privity with each other, and when said different acts have no connection with each other. (8) Said bill is multifarious in that it seeks relief against W. M. Pitts, Pitts & Paulk, and L. Bernheimer for the alleged misappropriation by them of the proceeds of the product of the Bullock County Manufacturing Company, and also seeks to have the mortgage on the plant and machinery of said corporation set aside on the ground of noncompliance with the statutory requirements for the authorization and execution of mortgages by private corporations. (9) There is a misjoinder of parties defendant to said bill, in that the defendants charged therein with a misappropriation of the proceeds of the product of said defendant corporation are joined with its bondholders, who are charged with acts going to make said bonds mature before they were rightfully due. (10) The bill does not state any facts which show that these defendants, or either of them, in the decree of foreclosure, were guilty of a collusive effort to prefer any claim or debt held by J. L. Pitts against said corporation and the said J. A. Paulk. (11) They demur to all that portion of paragraph 2 $\frac{1}{2}$ of said bill, commencing on line 29, page 5, at the words, "that the making of said mortgage," to the end of said paragraph, on the grounds (a) that the same are not clear and orderly statements of facts, but are conclusions of the pleader; (b) because the same are irrelevant, prolix, and frivolous; (c) because the facts complained of cannot be taken advantage of by simple contract creditors, which the complainants are shown to be by said bill; (d) because simple contract creditors cannot be heard to complain of irregularities or noncompliance with statutory requirements by private corporations in the issuance of their bonds and the execution of their mortgage. (12) They demur to all that part of paragraph 3 of said bill commencing at the words, "And complainants further aver," on line 21, page 6, to the end of said paragraph, because the same are not clear and orderly statements of facts, but are conclusions of the pleader; (b) because the same are irrelevant, prolix, and frivolous. (13) They demur to the allegations in paragraph 3 of said bill that said S. J. Foster took \$18,000 of said bonds for \$16,500, (a) because these complainants are shown by the bill to be simple contract creditors, and do not show that they were injured

thereby; (b) because said facts give the complainants no equity, or ground for the relief prayed against these defendants, or either of them; (c) and because usury is a defense personal to the borrower or his personal representatives, and cannot be set up by creditors of a borrower who had no connection with said transaction; (d) and because the amount of usury is not set forth distinctly and correctly, nor the terms and nature of the usurious agreement, nor the amount of the payments; (e) and because the purchase of the bonds of a corporation at less than their face value is permitted by law, and is not a usurious transaction; (f) because the consideration of bonds cannot be impeached by a stranger, not standing precisely in the situation of the original parties, and identified in equity by privity of title with them. (14) They demur to the tenth paragraph of said bill, because the same are not clear and orderly statements of facts, but are conclusions of the pleader; (b) because no facts are stated in said paragraph which give the complainants any equity, or entitle them to any relief prayed against these defendants, or either of them; (c) because no facts are stated showing that the officers of said corporation exceeded their authority in the issuance of said bonds and the execution of said mortgage; (d) because the facts stated in said paragraph are irrelevant and immaterial; (e) because simple contract creditors have no right to complain of the alleged excess of authority by said officers; (f) because these complainants are shown to be neither stockholders nor bondholders of said corporation, nor parties having any connection with said transaction whatever. (15) They demur to the eleventh paragraph of said bill on the grounds that Exhibit A, attached to said bill, shows that all the property now in the possession of said corporation is covered by said mortgage; (b) because if any new machinery, not covered by said mortgage, is sought to be sold under said mortgage, these complainants had a full and adequate remedy at law to enforce their rights upon the same; (c) because the allegations contained in said bill are immaterial and irrelevant. (16) They demur to the allegation that said L. Bernheimer did not apply any of the assets of said corporation which came into his hands to the payment of its taxes, because this fact gives to these complainants no equity or ground for relief. (17) There is a nonjoinder of parties defendant in said bill, in that it is alleged in said bill that bonds of said Bullock County Manufacturing Company are outstanding to the amount of \$17,000, and that the defendant L. Bernheimer holds \$13,000 thereof, and the defendant L. Sessions holds \$2,000 thereof; and it is also alleged therein that defendant J. L. Pitts owns none of said bonds, and the said bill seeks to have declared void the whole of the bonds of said corporation now outstanding; and the person or persons, party or parties, who own the remaining \$2,000 in face value of said bonds, are not made parties

defendant to said bill, and it is not averred that they are unknown. (18) There is a nonjoinder of parties defendant to said bill, because said bill seeks to declare void the bonds and mortgage of the defendant Bullock County Manufacturing Company, and it is not shown by said bill to what party or parties four of the bonds of said corporation secured by said mortgage belong, nor are the party or parties holding said bonds made parties defendant to this bill. (19) There is a nonjoinder of parties defendant to this bill, in that the party or parties who hold or own four of the bonds of said corporation sought to be declared void are not brought in to defend against said bill, and it is nowhere averred in said bill that the owner or owners of said bonds are unknown. (20) Because it is not alleged in said bill who owns the \$2,000 of bonds unaccounted for therein, or that the coupons thereon had been paid, or that the owner or owners thereof participated or colluded in any acts, or committed any acts, for the purpose of, or with the intent, or which had the effect of, making said bonds mature before they were rightfully due. The Bullock County Bank demurred to the bill, upon the following, among other, grounds: (1) The bill does not state any facts which show that this defendant in the decree of foreclosure was guilty of a collusive effort to prefer any claim or debt held by J. L. Pitts against said corporation and the said J. A. Paulk. (2) The bill does not state any facts which show that this defendant was guilty of collusive effort to enforce the payment of said bonds before they were rightfully due. (3) The bill does not show that this defendant is violating its fiduciary duties by misusing, misapplying, or wasting the said property, the subject-matter of this suit. Upon the submission of the cause upon the demurrers, the chancellor sustained these grounds of demurrer which are above set out, and overruled the other grounds of demurrer. From the decree sustaining said grounds of demurrer, the complainants appeal, and assign the rendition thereof as error.

J. D. Norman, for appellants. Ernest L. Blue, Thos. G. & Chas. P. Jones, D. S. Bethune, and Holloway & Holloway, for appellees.

McCLELLAN, C. J. Appellants, as simple contract creditors of the Bullock County Manufacturing Company, a private corporation, filed their bill for the purpose of having canceled and annulled mortgages executed to secure the bonds of said corporation, and to hold certain of its officers, president, secretary, and a director, individually responsible for assets of the corporation alleged to have been appropriated by them to debts due them individually, and also one of the bondholders, for the proceeds of assets applied to the payment of the individual debt of the president of said corporation, and also a debt due him from the corporation. Neither of the debts

due complainants accrued prior to the year 1896. The first 11 paragraphs of the bill deal principally with the bonds and mortgages executed by the corporation. The respondent debtor corporation was incorporated on the 7th of November, 1889, with an authorized capital stock of \$25,000, of which \$21,800 was paid up, and no more of the stock, it seems, was ever subscribed for or issued. On the same date, by resolution of a majority of the stockholders, authority was given to issue 40 bonds, each of the face value of \$500, aggregating \$20,000, to mature and become due in five years. Only 36 of the bonds were issued, all of which were taken by S. J. Foster, the president of the corporation, he paying in cash therefor the sum of \$16,500. It is averred in the bill that the bonds were worth their face value, and it is charged that the statutory requirements as to notice for the issuing of bonds and making a mortgage were not complied with. The pleader concludes, from this statement of facts, with the averment that the bonds and mortgage were usurious and void.

It has been often decided that subdivision 7, § 1256, Code 1896 (section 1664, Code 1886), was intended for the protection of the stockholders, and, if there was no complaint on their part, the failure to observe its provisions was not available to creditors. *Nelson v. Hubbard*, 96 Ala. 238, 11 South. 428; *Barrett v. Pollak*, 108 Ala. 390, 18 South. 615; *Iron Co. v. McKeever*, 112 Ala. 134, 20 South. 84. The mere fact that the president of the corporation, with the consent of the board and stockholders, purchased bonds of the corporation of the value of \$18,000 for \$16,500, alone, furnished no ground of complaint to creditors whose debts were not contracted for nearly six years afterwards, either on the ground of usury or fraud. From all that is said in the bill, our conclusion is that, so far as complainants are concerned, the issue of the bonds referred to, and the execution of the mortgage to secure them, were done in good faith and are valid. The bill then proceeds to set out a transaction, or "deal," between the said S. J. Foster and one J. A. Paulk, which occurred in the year 1895. It avers that the said Foster owned the stock originally issued to him, and \$17,000 of said bonds (\$1,000 of the \$18,000 having been retired); that J. A. Paulk owned a large quantity of the stock of the Bullock County Bank, a private corporation, and that they agreed to exchange the one for the other,—that is, that S. J. Foster would transfer his bonds and stock of the Bullock County Manufacturing Company to J. A. Paulk, and in exchange therefor the said Paulk would transfer his bank stock to said Foster. As the bonds were past due, it was agreed that Foster should procure the issue of new bonds, to run for 10 years. At the time of the agreement between Foster and Paulk, the bill avers that Paulk was indebted largely to one Bernheimer and to one Sessions, to secure which he had deposited with them,

as collateral, a large part of the bank stock owned by him; and, in order to carry out his agreement with Foster, it was agreed and understood that the said Bernheimer and the said Sessions should release the bank stock thus held as collateral, and receive from J. A. Paulk the new bonds of the Bullock County Manufacturing Company, when transferred to him by Foster, in lieu of the bank stock. At a meeting of the stockholders of the Bullock County Manufacturing Company, held on the 22d of May, 1895, a resolution was adopted authorizing the issue of 34 bonds, each for \$500, aggregating \$17,000, bearing 8 per cent., with interest coupons attached, payable semi-annually, to be secured by mortgage on all the assets owned or to be acquired; and it is stated in the resolution that the purpose of this issue of bonds was to retire and cancel the old, outstanding bonds, which were then past due and unpaid. The new bonds, for \$500 each, were issued, and the mortgage to secure them executed, which was duly acknowledged and recorded. Each of these bonds on their face purport to be one of a series of 40, each for \$500, aggregating the sum of \$20,000, and in the mortgage to secure them it is stated that the bonds were issued to purchase new machinery, lots, etc., to carry on the business of the corporation. Complainants do not aver that more than 34 bonds, aggregating \$17,000, were issued, and it is fairly inferred from their pleading that 34 bonds were issued, and delivered to S. J. Foster, the owner of all the outstanding old bonds, and that the old bonds were surrendered in lieu of them. The bill further shows that S. J. Foster indorsed said bonds without recourse, and that they were delivered, and his stock transferred to J. A. Paulk, as agreed upon; and that J. A. Paulk delivered \$13,000 of them to Bernheimer and \$2,000 to Sessions; and the bank stock held as collateral was delivered to Foster, thus carrying out the agreement between the said Foster and J. A. Paulk. So far, we discover nothing unusual or fraudulent in the transaction between S. J. Foster and J. A. Paulk, and J. A. Paulk and Bernheimer and Sessions. It seems to be a mere contract between the parties for the exchange of property, and the substitution of one collateral for another. But complainants insist that, as the resolution of the stockholders of the Bullock County Manufacturing Company authorized the issue of only 34 bonds of \$500 each, aggregating \$17,000, and as the new bonds on their face show that they were a series of 40 bonds, aggregating \$20,000, and as the mortgage executed to secure them purports to secure 40 bonds aggregating \$20,000, it is manifest that there is a simulated, fictitious debt secured, which stamps both bonds and mortgage with fraud, and vitiates them as valid claims; and, further, that the bonds were issued without authority. The bonds and mortgage bear date May 22, 1895. The mortgage seems to have been duly filed for record. Neither the bonds nor mortgage are

vold upon their face. Complainants did not become creditors until almost a year subsequent to the issue of the bonds, and the execution and record of the mortgage. They were chargeable with notice of the existence of the bonds and mortgage. It does not appear that there were creditors then, other than the holders of the bonds and coupons, and they were owned and held by a stockholder and director of the corporation, who favored the resolution at the stockholders' meeting and signed the bond. Neither the corporation, nor the bondholders, nor owners of the stock raise any objection to their validity. Probably, the stockholders may have cause to complain; but, in the absence of actual fraud,—a conclusion not authorized by the facts stated,—the complainants cannot complain. If we were to concede the invalidity of the new bonds, and mortgage to secure them, we do not see how complainants are to be benefited in this phase of the case. As stated, the corporation was indebted to S. J. Foster in the sum of \$17,000, evidenced by the old bonds, and which are secured by the first mortgage. Unless this debt was satisfied and canceled by the new bonds, it remains in force, and must be satisfied from the proceeds of the assets of the corporation debtor covered by the first mortgage, in preference to complainants' claims. We do not find that complainants are entitled to any relief from the averments thus far considered.

The complainants further aver that, after J. A. Paulk acquired the bonds and stock from S. J. Foster, at a meeting of the stockholders held in June, 1895, he, the said Paulk, was elected president, and his son secretary, and that he continued as its president, exercising a controlling influence in its management. Paragraphs 12 and 13 of the bill are quite lengthy, consisting of many disconnected statements, which seem to have no special relation to each other, and we are not sure that we fully apprehend the purpose and scope intended by them all. We are of opinion that the main purpose of these paragraphs was to assail the validity of a decree which had been rendered by the chancery court foreclosing the mortgage for the benefit of the bondholders, and also to hold the president, J. A. Paulk, and secretary and treasurer, J. L. Paulk, and certain creditors of the corporation, trustees in invitum for the proceeds of property of the corporation applied to the payment of claims due them, by which they were preferred to other creditors. The bona fides of these claims is not assailed. The complaint is that such preferences are unauthorized and illegal. The mortgage provides that, in default of the payment of the taxes due from the corporation for six months, or in default of the payment of the coupons, the whole of the bonds shall mature and become due, and, upon request of the bondholders owning one-fourth of the entire amount, the trustee shall proceed to foreclose the mortgage. The bill for the foreclosure avers de-

fault for more than six months, and that there were past due over \$1,500 of unpaid interest coupons, that the corporation had become insolvent, and that the officers of the corporation had ceased to give it any attention, and that the property was wasting for want of care, and that all the bondholders had united in demanding the foreclosure of the mortgage. The foreclosure decree is dated June 12, 1897, and complainants' bill was filed July 19, 1897. It avers the insolvency of the corporation, that its officers had ceased to give it any attention, and that its property was being wasted for want of attention; and it prays for the sale of the same property decreed to be sold by the foreclosure suit. No reason is assigned why the property will not sell for as much under the foreclosure decree as under a decree in the present proceeding, and the foreclosure decree provides that the register shall not receive a less bid than \$17,000. It is clear from complainants' bill that there is a valid debt, evidenced by bonds issued by the corporation debtor, secured by mortgage, amounting to \$17,000, which is entitled to preference over complainants' claims, and it is not shown that the assets are worth more than \$17,000. The averments of the bill of complainants fall far short of showing that the proceedings in the chancery court were fraudulent and collusive. This decree is defective and insufficient, in that the decree does not ascertain and adjudge an indebtedness, and ascertain the amount. It is probable that the decree should be amended *nunc pro tunc*, so as to authorize a sale of the property.

The bill is also without equity in its attack upon transfers of property by the corporation to, and in payment of debts held by, its directors and officers. *Corey v. Wadsworth* (Ala.) 25 South. 503. The assignments of demurrer going to this part of the bill were well taken, and the motion to dismiss the bill for want of equity should have been granted. But as this appeal is by the complainants below, and only the court's rulings in sustaining certain assignments of demurrer are assigned as error, and these rulings are without error, the decree must be affirmed. Affirmed.

The foregoing opinion, with the exception of the last paragraph, was prepared by former Justice COLEMAN.

(120 Ala. 323)

NABORS v. STATE.¹

(Supreme Court of Alabama. Feb. 1, 1899.)

MURDER TRIAL—SEPARATION OF JURY—SELF-DEFENSE—INSTRUCTION.

1. During a murder trial the jury was excused to go to the vestibule of the court room in charge of a bailiff, and shortly 11 of them returned with the bailiff, the twelfth remaining in the vestibule, another bailiff being with him. The vestibule was in full view of the judge, the door and windows on either side being open.

¹ Rehearing denied April 14, 1899.

The juror returned, and resumed his seat in the box, without communicating with any person, or seeing any one but the bailiff. *Held*, that this was not an unwarranted separation which could prejudice accused.

2. Where, in a murder trial, the evidence tends to show an unjustifiable killing, and accused pleads self-defense, a charge to acquit predicated on this plea should not be given, which omits to hypothesize the elements of self-defense, to wit, that there must exist an imperious necessity to strike in order to save his own life or himself from great bodily harm, and that he must have no reasonable mode of escape without increasing his own peril, or putting himself at a greater disadvantage.

3. The mere "belief" of the existence of great peril will not justify killing in self-defense; the appearances must be such as to create a reasonable apprehension and produce an honest belief in accused's mind of the existence of imminent peril.

4. Where accused is, in terms, charged with murder in the second degree, under a form of indictment adapted to either the first or second degree, a charge was faulty which required the jury to find premeditation.

5. A charge on self-defense is bad which states that accused must be "reasonably" free from fault.

6. A charge in part abstract, because hypothesizing impeachment on the ground of contradictory statements, when no attempt at such impeachment was made, was properly refused.

Appeal from circuit court, Shelby county; George E. Brewer, Judge.

Jasper Nabors was convicted of murder in the second degree, and appeals. Affirmed.

The defendant requested the court to give to the jury the following charges, and separately excepted to the court's refusal to give each of them as asked: (a) "The court charges the jury that, if they believe from the evidence that the defendant at the time he fired had reasonable grounds for believing that Bent Payne had a felonious design against him, and under that supposition he killed the deceased, they should not find the defendant guilty of murder." (b) "The court charges the jury that, if they believe from the evidence that the defendant was free from bringing on the difficulty at the time of the killing of the deceased, and that the deceased attacked the defendant with what the defendant thought to be a gun, then the defendant was not bound to retreat, if the appearances were such as to cause him to believe that by retreating he would increase the danger to his life." (c) "The court charges the jury that, if they believe from the evidence that the defendant was free from fault in bringing on the difficulty, and that at the time of firing the fatal shot defendant had reasonable cause to believe the existence of facts which would justify a killing, they should find him not guilty." (d) "The court charges the jury that, before they can find the defendant guilty as charged, they must be convinced by the evidence, beyond a reasonable doubt and to a moral certainty, that he killed the deceased with premeditation and malice aforethought." (e) "I charge you, gentlemen of the jury, one of the elements of self-defense is that the defendant must be reasonably free from fault in bringing on the difficulty, and I also charge

you that the burden of proof is not on the defendant to prove this element." (f) "The court charges the jury that witnesses may be impeached by proving contradictory statements, or by proving that their characters in the community where they live are bad for truth and veracity; and the court charges the jury that, when a witness has been impeached in any way, the law authorizes the— They may disregard said witness' testimony." (g) "The court charges the jury that, if they 'believe' from the evidence that at the time of the shooting of the deceased the defendant was going along the public road leading to his father's house, and the deceased 'come' out of the post office, and attacked the defendant with something that the defendant 'believed' to be a gun, then the defendant had a right to act on appearances, and defend himself; and, if they further 'believe' that he did nothing more than 'defend' himself, they must find the defendant not guilty." (h) "The court charges the jury that, if they believe from all the evidence that after defendant got the gun from Rhodes Alstone's house he started home, and that when he got near deceased's store Bent Payne came out of said store with a gun, or something that looked like a gun to defendant; and if they further believe from the evidence that defendant, acting under the reasonable apprehension of losing his life or of receiving great bodily harm, fired the fatal shot, then they should find the defendant not guilty." (i) "The court charges the jury that, if they believe from the evidence that the defendant's life was threatened, and that he went to Rhodes Alstone's house and got his gun to protect his life, and that he started to his father's house along the public road which leads near by the deceased's place of business, and that just as the defendant was passing the place of business of deceased he came out and attacked the defendant with what the defendant thought to be a gun, then the defendant had a right to act on appearances, and defend himself."

J. R. Beavens, for appellant. Chas. G. Brown, Atty. Gen., for the State.

DOWELL, J. The defendant was indicted and tried in the circuit court of Shelby county on a charge of murder. During the progress of the trial, the jury, in charge of a bailiff of the court, and by permission of the court, retired to a water-closet, which was located on the same floor with the court room, and adjoining the vestibule to the court room; the closet being entered by a door opening into the vestibule. In a short while, 11 of the jurors, in charge of the bailiff, returned to the court room, resuming their places in the jury box. The twelfth juror remained alone in the closet, no other person being within the closet during the stay of this juror in the same. While said juror remained in the closet, another bailiff of the court remained in the vestibule; the only access to

the closet being the door which opened into the vestibule. The vestibule was in front of the bench of the presiding judge, and the door leading from the court room into the vestibule being open, together with the windows on either side of the door, afforded a view of the vestibule to the judge. This twelfth juror in a short while afterwards came directly from the closet, through the vestibule, into the court room, resuming his seat in the jury box. He had no communication with any person, and saw no person in the vestibule, except the officer of the court. This was not an unwarranted separation, nor was it at all calculated to injure or prejudice the defendant. *Butler v. State*, 72 Ala. 179. The testimony offered by the state tended to show a deliberate and unprovoked killing by the defendant of the deceased. The defendant set up the plea of self-defense, and testified in his own behalf along that line. He also introduced evidence tending to impeach several of the state's witnesses on their bad character for truth and veracity. The state, in rebuttal of this impeaching testimony, introduced evidence tending to sustain the character of one of the witnesses sought to be impeached. The court, after giving a number of charges requested by the defendant, refused to give the written charges requested by the defendant, and designated as a, b, c, d, e, f, g, h, and i, and which we are now to consider.

The charges designated a, b, c, g, h, and i, based on the theory of self-defense, may well be treated and disposed of together. While some of them have more vices than others, each and every one of them is afflicted with the common infirmity of omitting an essential element of the law of self-defense. In a trial for homicide, where the defendant invokes the doctrine of self-defense, the defendant must himself be free from fault in bringing on the difficulty; and, this being so, it is incumbent upon him to show (1) that at the time of the fatal blow there existed an imperious necessity, real or apparent, to strike in order to save his own life or himself from great bodily harm, and (2) that he had no reasonable mode of escape, without increasing his own peril, or putting himself at a disadvantage under which he did not already labor. Such necessity does not exist, unless the apparent danger be such as would create a reasonable apprehension, and produce in the mind of the defendant an honest belief of its existence. Such being the law where there is evidence tending to show an unjustifiable killing, a charge to the jury, at the request of the defendant, predicated upon this plea, which omits to hypothesize these elements of self-defense, or any one of them, and containing an instruction to acquit, should not be given by the court. Testing the written charges a, b, c, g, h, and i by the foregoing standard, they were properly refused. *Roden v. State*, 97 Ala. 54, 12 South. 419; *Rutledge v. State*, 88 Ala. 85, 7 South. 335; *Zaner v.*

State, 90 Ala. 651, 8 South. 698; *Waller v. State*, 89 Ala. 79, 8 South. 153; *Naugher v. State*, 105 Ala. 28, 17 South. 24. While charges b and i do not contain instructions to acquit, they are offensive to the law laid down in other respects. The mere "thought" or imagination in the mind of the defendant, though arising from appearances of the existence of imminent peril to himself, will not justify the killing of his adversary. As said above, the appearances must be such as to create a reasonable apprehension, and produce an honest belief in the defendant's mind, of the existence of imminent peril or impending danger to his life, or of great bodily harm.

The indictment is in the form given in the Code. Cr. Code 1896, p. 333, form 63. The statute defines murder in the first and second degrees. Code 1896, § 4854. This section refers to form 63 as the form for indictment. The indictment in terms charges murder in the second degree under the law. The only conclusion, therefore, is that, while it in terms charges murder in the second degree, the statute makes it a sufficient indictment for murder in either degree. The indictment then charging murder in the second as well as in the first degree, the charge designated d, and requested by the defendant, was bad in the use of the word "premeditation"; this not being an essential ingredient of murder in the second degree, as defined by the statute. Charge e does not state the law of self-defense correctly, in that it qualifies the freedom from fault in bringing on the difficulty. *Henson v. State*, 112 Ala. 41, 21 South. 79; *McQueen v. State*, 103 Ala. 12, 15 South. 824; *Johnson v. State*, 102 Ala. 1, 16 South. 99. As there was no attempt to impeach any witness in the case by proving contradictory statements, charge f, in hypothesizing an impeachment on that ground, was to that extent abstract, and for that reason was properly refused.

We find no error in the record, and the judgment of the circuit court is affirmed.

(51 La. Ann. 902)

CUNNINGHAM v. DENIS. (No. 12,953.)

(Supreme Court of Louisiana. April 3, 1899.)

ARBITRATOR—POWERS—CHANGE OF AGREEMENT—LIABILITIES.

1. Two partners, in disagreement over the affairs of a partnership, appointed a third person as arbitrator, custodian, receiver, and depository, with authority to dispose of the partnership assets, pay debts of the partnership, and also individual debts of the partners, and settle with them for balance left over.

2. This third person, acting within the scope of the mandate thus accepted by him, will be protected against the suit of one of the partners seeking to hold him responsible, on the theory of a change, by subsequent agreement of the partners, as to disposition of part of the assets. Such subsequent agreement, to control, must appear with as much certainty and definiteness as did the first conferring the mandate.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frank A. Monroe, Judge.

Action by John M. Cunningham against Jules C. Denis. Judgment for defendant. Plaintiff appeals. Affirmed.

William S. Benedict and F. Rivers Richardson, for appellant. Buck, Walshe & Buck, for appellee.

BLANCHARD, J. Plaintiff and James L. O'Connor were partners in a contract with the city of New Orleans for constructing certain iron bridges, etc. The contract had been taken in the name of O'Connor. Payment for the bridges was made by the city in certificates of indebtedness, or warrants drawn against a certain fund, which it seems was yet to be collected. Four such certificates were issued, all in the individual name of O'Connor, aggregating the full value of \$28,983. Disagreement arose between the partners, with the result that Cunningham (plaintiff herein) filed a bill in equity in the federal court against O'Connor, the object of which was the settlement and liquidation of the partnership affairs. The appointment of a receiver was asked, an injunction pendente lite prayed for, and, pending its consideration by the court, a restraining order was issued prohibiting O'Connor from collecting or disposing of any of the partnership assets, and particularly the certificates or warrants issued or due from the city of New Orleans. This litigation in the federal court appears to have gone no further. It was ended by agreement of the parties thereto to submit all of their differences to J. C. Denis (now defendant herein), and to abide by his decision in reference to same; and it was further consented that he should act as receiver of the partnership, or, rather, as custodian and depository of its effects and funds, with authority to collect and dispose of its assets and pay its liabilities. It appears that the only assets which passed into the hands of the custodian so selected were the four certificates, hereinbefore referred to, issued by the city. The selection of defendant as arbitrator and custodian was made December 3, 1896. On the same day the two partners signed a further agreement, to the effect that the custodian was to pay the indebtedness of J. L. O'Connor (one of the partners) to the Germania Bank, and the bills of certain other creditors, who were mentioned; all bills to be approved, prior to payment, by both partners, and to be paid out of the proceeds of the certificates issued by the city. Following this, the partners appear to have agreed upon the figures of a settlement between themselves, and on January 22, 1897, placed in the hands of defendant (arbitrator and receiver aforesaid) a paper evidencing such agreement, as follows:

"James L. O'Connor to John M. Cunningham, Dr.: To balance due on one-half interest in the profits on contracts taken by J.

L. O'Connor and J. M. Cunningham under their agreement, payable out of the proceeds of sale of certificates issued by the city of New Orleans in favor of J. L. O'Connor, and now held by the Germania Bank, forty-nine hundred and eighty-four dollars (\$4,984.) Approved, subject to one-half of discount, on sale of the certificates mentioned. [Signed] J. L. O'Connor.

"Accepted in settlement of balance due me, with the right to benefit of one-half of reduction, if any, on bills now pending settlement. [Signed] J. M. Cunningham."

This agreement contemplated two things: (1) That the city certificates should be sold by the receiver; (2) that Cunningham (plaintiff) was to be paid what was stipulated to be due him out of the proceeds of the sale. But, necessarily, payment to him was to be postponed or subordinated to payment of those claims against the fund which the two partners approved or might thereafter approve for payment. Following this, the two partners repeatedly urged upon the receiver to effect a sale of the certificates, to the end of settling the debts and winding up the affairs of the partnership, and he exerted himself to dispose of them to the best advantage. Finally, through a firm of brokers, he effected a sale of the same at 90 cents on the dollar, and realized \$26,084.70 in cash for the lot, out of which he paid brokerage commissions of 1 per cent., leaving net \$25,794.87. This was on May 4, 1897. He promptly notified both partners of the sale so effected, and the next day J. L. O'Connor replied, by letter, approving the sale. It seems, however, that, following the agreement of January 22d, heretofore recited, some negotiations were had between the two partners looking to a different settlement of the \$4,984, agreed on as Cunningham's share of the profits of the contract with the city. It appears that Cunningham proposed to take at par one of the certificates issued by the city for the amount due him, paying to the receiver the difference between the face value of such certificate and the amount due him in cash. The plaintiff contends that the certificate with reference to which this offer was made by him was the second one, in point of date, of the four in the receiver's hands, and called for \$5,800. O'Connor testifies that he expressed himself as willing Cunningham should take a certificate at par under his proposition, he paying the difference in cash; that Cunningham asked for the first certificate, i. e. the one first in point of date (because it would be paid first by the city), but that he refused his assent to this, and only agreed that he should take "a" certificate (meaning one of the four), not specifying which one. Plaintiff and his attorneys, it seems, had some conversation with Jos. Brewer, attorney for O'Connor, and with Chas. F. Buck, attorney for defendant, and the claim is set up that the latter agreed to the settlement upon the basis of the surrender of the \$5,800 certificate to plaintiff in full of

his claim, he paying the difference in cash. Mr. Buck denies he agreed, on behalf of defendant, to such settlement; that he had no authority to arrange such a settlement; and that as far as he went was to say that he could see no objection to it, if defendant consented. He says he was at that time with Jos. Brewer, the attorney of O'Connor, and was also the attorney of the Germania Bank, whose president, J. C. Denis, was the receiver or custodian of the partnership of O'Connor and Cunningham; and while, in these capacities, he talked over the proposition of settlement with Cunningham and his attorneys, he never assumed to have the authority of either O'Connor or defendant to bind them by an acceptance of the proposition made by the plaintiff. The matter culminated in the following letter, to wit:

"New Orleans, La., 28th April, 1897. Jos. Brewer, Esq., Attorney at Law, City—Dear Sir: After seeing Mr. Denis about the Cunningham-O'Connor matter, I had some interview with Mr. Benedict and Mr. Richardson, and Mr. Benedict now proposes that Mr. Cunningham be given the second certificate, which is dated October 12th, 1896, and is for \$5,800, offering to make up in cash the difference between this certificate and the amount of Cunningham's claim. As there is a prior certificate for \$5,750, this proposition seems fair and reasonable to me, but I would prefer not to submit it to Col. Denis without first consulting with you about it. I understand that Mr. O'Connor will agree to whatever we and Col. Denis may decide to do. Yours truly, [Signed] Chas. F. Buck.

"April 30th, Col. J. C. Denis, respectfully referred. J. L. O'Connor."

This letter supports the contention of Mr. Buck that he had not definitely assented to any settlement proposed by plaintiff, and that the matter would rest finally with defendant and O'Connor. Instead of O'Connor and Brewer, his counsel, replying to the letter, signifying their assent, the former merely indorsed the letter over to defendant as "respectfully referred" to him, and thereafter neither defendant nor Buck, his counsel, ever agreed to the proposition of settlement which plaintiff had made. Indeed, it would seem that defendant, far from agreeing, within a few days thereafter sold all the certificates, including the one for \$5,800, which sale O'Connor, the next day, approved, as we have seen. Shortly after this, the present suit was brought, the object of which is to compel defendant to deliver to plaintiff the certificate for \$5,800, and, in default of his so doing, to recover the amount of the same from him in money, less the difference between its face value and the sum of \$4,984, admitted to be due plaintiff in his settlement with his partner O'Connor. The allegation is made of the offer of plaintiff to take the \$5,800 certificate at its face value, paying the difference, as aforesaid; which offer the petition goes on to allege "was referred to Jos.

Brewer, and also Chas. F. Buck, of counsel for J. L. O'Connor, and by them approved, and by said J. L. O'Connor referred to said J. C. Denis for settlement." And, further, that "said J. C. Denis refuses and declines to honor said order, and turn over said certificate to petitioner," etc. Defendant's answer recites his authority from the two partners to sell the certificates, and to settle the indebtedness of the firm and certain charges against its members individually, and then account for the balance to them; that he did sell the certificates, and pay the debts as agreed on; and that, thereupon, he rendered to the parties a full statement of what had been done, which showed that, after there had been deducted from the \$4,984 due plaintiff, as agreed upon between himself and his partner, certain sums which he had authorized to be paid, and a further sum equal to his share of the discount loss on the sale of the certificates, there was left to plaintiff a balance of \$2,519.10, which amount respondent tendered and deposited in court, together with \$9.75 court costs up to that point of the litigation. He expressly denied that any agreement was made by J. L. O'Connor to deliver to plaintiff the \$5,800 certificate, as alleged in the petition, and avers that no such understanding or arrangement was ever acquiesced in or assented to by him (defendant). On the issues, as thus presented, judgment below was in favor of defendant. Plaintiff was awarded the amount admitted to be due by defendant, and which had been deposited in court. He appeals.

We think the case was decided correctly. There can be no doubt that the partners not only authorized defendant to sell the certificates and pay the debts, but went further, and vested him with authority to settle the differences between the partners which had arisen or might arise, and bound themselves to abide by his decision. And the agreement of January 22, 1897, which fixed the amount to which plaintiff was entitled in the settlement of the partners between themselves, directed the payment of this amount out of the proceeds of the sale of the certificates. Not only that, but it is distinct authority to defendant to charge plaintiff with half of the discount on the sale of the certificates. So that defendant had authority—(1) to sell the certificates (and did sell them); (2) to pay the debts of the partnership and of the partners (and did pay them); (3) to charge plaintiff with half the discount loss (and did so charge him). And, under the general power vested in him to act as arbitrator, receiver, custodian, and depository, and considering the obligations he assumed in connection with his acceptance of this trust, we do not think the subsequent agreement or arrangement, if any, between the partners, making or attempting to make another disposition of one of the certificates placed in his hands as part of the assets out of which to pay debts, was binding or enforceable, unless assented to by defendant.

But we do not find that any such "subsequent agreement," as contended for by plaintiff, by which he was to have and take the \$5,800 certificate, paying the difference, as aforesaid, was consummated. The most that can be claimed for it is that negotiations to that end were opened, conducted, and progressed to the point of reaching the basis of consent; but the final act of consent and agreement, either by O'Connor or by defendant, was not consummated. The attorneys representing O'Connor and defendant were not empowered to consummate the same, if they had undertaken to do so; and we do not think it is shown they undertook to do so. The proof falls in point of showing that O'Connor agreed plaintiff should have and take the \$5,800 certificate. On the contrary, instead of indorsing his consent to this arrangement on the letter of April 28th, from Buck to Brewer, which mentioned the \$5,800 certificate as the one plaintiff proposed to take, he merely turned it over to defendant with the written indorsement, "April 30th, Col. J. C. Denis, respectfully referred," as though it was his intention to leave to defendant whether the proposition of plaintiff should be accepted or declined; and this view is sustained by the fact that when, within a few days, defendant, instead of turning over one of the certificates to plaintiff, sold them all, his act in selling received the prompt approval of O'Connor. There being, then, no subsequent agreement and consent of the partners, we find that defendant has in no wise departed from the terms of the mandate under which he accepted the trust of receiver, arbitrator, custodian and depositary, and, hence, no cause of action against him, as asserted by plaintiff, has arisen. We do not think this is a case where the principle of law, invoked by plaintiff, that a custodian or receiver, as between two partners, cannot disregard their orders in the interest of a third person, also represented by the receiver in another capacity, applies. Judgment affirmed.

MONROE, J., having decided the case in the lower court, takes no part in the case here.

(51 La. Ann. 797)

DUPUY v. ESNARD et al. (No. 13,048.)
(Supreme Court of Louisiana. April 3, 1899.)

NUNCUPATIVE WILL—VALIDITY.

1. A nuncupative will by public act, the validity of which was called in question for defects of form, is tested herein, and found valid.
2. The placing by the notary of a word omitted from the will upon the margin thereof is an immaterial circumstance, when the word can be ignored and the will stand.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Vermillion; Conrad De Baillon, Judge.

Action by Willie Dupuy, widow of R. Knight, against William Esnard and others.

Judgment for defendants, and plaintiff appeals. Affirmed.

The plaintiff, alleging herself to be the forced heir of her father, P. D. Dupuy; that he died in 1897, leaving property, real and personal, valued at over \$7,000; that on March 24, 1894, he made a will before Lastie Broussard, a notary public,—attacked the said will and the proceedings therein. She averred that the will was an absolute nullity. That it did not show on its face—First, that it was received by the notary in the presence of the three witnesses; second, that it was dictated to the notary by the testator in the presence of all the witnesses; third, that it was written by the notary in presence of all the witnesses; and, lastly, it was null and void, because it was not written and signed in presence of all the witnesses. She further averred that said will was null, because the notary, in writing out the aforesaid will, did not make express mention of all that is required by article 1578 of the Revised Civil Code of Louisiana of 1870 to make express mention of in said will; that said will was a nuncupative will by public act, and as such was null and void; that, said will being an absolute nullity, everything done under said will was null and void; that, for this reason, its attempted probaton in court, the attempted sale of the property of said P. D. Dupuy, deceased, the inventory thereof, the putting of seals thereon, and the tableau sought to be homologated, were all null and void; that the attempted probaton of said will, and homologation of said tableau, were also null, for want of citation of petitioner, who was not represented therein nor cited; that said sale of the property of P. D. Dupuy was null, because it was obtained by William Esnard, a person whose appointment was a nullity, as the will of which he claimed to be the executor was an absolute nullity. Said sale was also null, because the property was not offered on the day of sale, and the sheriff was without authority to readvertise it 15 days more, and to sell it on 12 months' credit; that said William Esnard never qualified according to law as executor in above-entitled succession. She further averred that she had been defrauded of her rights in the premises, and was entitled to have said Esnard made responsible for all debts of the succession as an intermeddler, under Rev. Civ. Code, art. 1100. In view of the premises, she prayed that she be recognized as the legitimate heir of P. D. Dupuy; that the will of said P. D. Dupuy be annulled; also, the sale of all of his property, both real and movable, the judgment probating said will, the appointment of William Esnard as testamentary executor under said will, and the tableau filed in said succession by said Esnard, and its attempted homologation. Plaintiff subsequently filed a supplemental petition, in which she averred that, through inadvertence, she failed to aver in her original petition that the will alleged to have been made by her father, and attacked by her, was null for the additional

cause that it failed to state when the executor named was to execute the desires of the deceased, whether at present or in future. She further averred that the word "written," which appears on the margin of the pretended will attacked by her, was placed there after the making of the will; that the aforesaid will was null, for that reason, and because it failed to show that the inspirations therein contained were made "mortis causa," or were to take effect after the death of the said P. D. Dupuy. Louis Dupuy and Mrs. John Ellis accepted service of petition. Judgment by default was taken against them, but they filed no answer. The testamentary executor, Esnard, answered; pleading, first, the general denial. He admitted that Pierre D. Dupuy made his last will and testament before Lastie Broussard, notary public. Further answering, he averred that he had paid out all moneys received by him as executor of the estate of Pierre D. Dupuy (except a small balance in his hands) to the creditors of said estate, in accordance with a tableau of debts and charges, and duly homologated by a judgment of the court ordering the payment to the creditors carried thereon. He prayed that there be judgment in his favor, dismissing plaintiff's demand in toto, and decreeing the will to be valid, and all proceedings in the matter of the succession of P. D. Dupuy to be valid and regular, and of full force and effect. Eugenie Dupuy, one of the defendants, answered; pleading, first, the general issue. She admitted the making of the will; and, further answering, she averred that in said will Pierre D. Dupuy acknowledged his indebtedness to her for the sum of \$1,500 principal; that said amount, with interest, was carried on the tableau of debts and charges filed by the executor testamentary, in the succession of P. D. Dupuy, and that said tableau had been duly homologated and approved by the judgment of the court. She prayed that there be judgment decreeing the will to be a good and valid will in law, and decreeing all proceedings had in the succession of P. D. Dupuy to be valid and regular, and of full force and effect. The court rendered judgment in favor of the defendants, rejecting plaintiff's demands in toto. It decreed the will, and all proceedings taken thereunder, valid. Plaintiff appealed.

Lewis L. Bourges, for appellant. Broussard & Kitchell, for appellees.

NICHOLLS, C. J. (after stating the facts). Pierre Duval Dupuy, a resident of Vermillion parish, died in said parish, leaving, as his heirs, his four children, Nora, Frederic, Louis, and Willie Dupuy. He left a last will, in nuncupative form by public act, executed before Lastie Broussard, a notary public for the parish of Vermillion. William Esnard was appointed executor, without bond. The will was probated, and the executor qualified under it. The property of the succession was sold, under order of the court, at the instance of the executor, to pay debts. The executor

subsequently filed a provisional account and tableau of debts, with proposed distribution of the funds. This account was homologated on the 30th of April, 1898, and the executor authorized to make payment as prayed for. Willie Dupuy (widow of R. Knight), a daughter of the deceased, brought an ordinary action attacking the will and all proceedings under it. The testator in his will declared that he had received from his sister, Eugenie Dupuy, the sum of \$1,500, which was then invested, as a partner, in the firm of P. D. Dupuy & Co.; that this sum of \$1,500 he desired to be paid to her before any partition of his estate; the balance, after it should have been converted into money, to be equally divided, share and share alike, between his four children, Frederic, Louis, Nora, and Willie. The testator appointed William Esnard executor, without bond, giving him the power to liquidate the estate as he thought proper to the interest of all concerned. As the residuum of the property, after the payment of debts, was made by the will, as to its disposition, to follow the very same course it would have followed had the will not been made, the main object had in view by the deceased would seem to have been to recognize his indebtedness to his sister Eugenie, and to guard her rights, and to select the person who should administer upon his estate. Whether any special advantage would be gained by plaintiff by setting the will aside is problematical, as the recognition by plaintiff's father of his indebtedness to his sister, under his signature, would still remain as a fact; and this indebtedness to her and to others would have entitled the creditors to have placed the succession in charge of an administrator. Be that as it may, our duty is to pass upon the issues raised. The will is as follows: "Be it known that, on this, the 24th day of March, Anno Domini one thousand eight hundred and ninety-four, before me, Lastie Broussard, a notary public duly commissioned and sworn in and for the parish of Vermillion, and in presence of the witnesses following, viz.: Eugenius G. Lemaire, Numa Frederick, and Willie R. Ellis, all of lawful age, and residents of the town of Abbeville, in the parish of Vermillion, personally appeared Pierre Duval Dupuy, a resident of said town and parish, who declared that: 'Being of sound mind, and in possession of all my faculties, I make this, my last will and testament. I desire that all my personal debts shall be paid. I have received from my sister, Eugenie Dupuy, now residing in the city of New Orleans, the sum of \$1,500 dollars, which is now invested, as a partner, in the firm of P. D. Dupuy & Company. This amount of fifteen hundred dollars I desire to be paid to her before making any partition of my estate. When these amounts are settled, I wish the remainder of my estate, after it shall be converted in money, to be equally divided, share and share alike, amongst my four children, Frederic, Louis, Nora, and Willie. I hereby appoint William Esnard the executor of this

will, without bond, and give him the power to liquidate my estate as he thinks proper to the interest of all concerned.' And the said P. D. Dupuy, having ceased to dictate, declared that the above contained his last will, which was dictated to me, notary, in presence of said witnesses, and written by me, notary, as dictated by said P. D. Dupuy, and was then read by me, notary, to said testator, in presence of said witnesses. The whole having been dictated by him, written and read by me, notary, and signed by the testator, the witnesses, and notary, at one time, without interruption, and without turning aside to other acts. And the said testator again, in the presence of the notary and witnesses, declared this act to contain all his desire and last will. The words 'by me, notary,' and 'by the testator, the witnesses, and notary,' interlined before signing, and approved. [Signed] P. D. Dupuy. Witnesses: [Signed] Willie R. Ellis, [Signed] Numa Frederick, [Signed] E. G. Lemaire. [Signed] Lastie Broussard, Notary Public. [Seal.] The grounds of annulment set up are that the will does not show—First, that it was received by the notary in presence of the three witnesses; second, that it was dictated to the notary by the testator in presence of all the witnesses; third, that it was written by the notary in presence of all the witnesses; fourth, because the notary, in writing out the will, did not make express mention of all that is required by article 1578 of the Revised Civil Code to make express mention of therein; fifth, that the word "written," which appears on the margin of the pretended will, was placed there after the making of the will. The will was further attacked on the allegation that, as a matter of fact, the will was not written and signed in presence of all the witnesses. All the proceedings and acts done under the will were attacked upon the theory that the instrument, being an absolute nullity, carried with it the absolute nullity of everything based thereon. The purchasers at the judicial sales, and the creditors who were paid on the strength of the homologated account, were not made parties to the suit. There was no attempt made to raise an issue with these creditors as to the verity of their claims.

The first four grounds set up by the plaintiff against the validity of the will are not sustained. The instrument contains all necessary recitals, though, perhaps, not as artistically stated as they might have been. Plaintiff does not specify what particular fact or circumstance has been omitted, the existence of which the law requires to be expressly mentioned in a nuncupative will by public act. If any such has been omitted, it has escaped our attention. The testimony sustains the allegation that the word "written," which appears on the margin of the will, was placed there after the completion of the instrument. Ignoring it altogether, the will would stand still. The will was, as a fact, written and signed in presence of all the witnesses. Remarks addressed by the notary, during the exe-

cution of a will, to the attending witnesses, insisting upon their remaining in the room until the closing of the instrument, is not such an interruption or turning aside to other acts as the law prohibits. We find no grounds for annulling the judgment; but it should be amended. For the reasons assigned, it is ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, affirmed, except in so far as it rejects definitively plaintiff's demand for the nullity of the sales of real estate made in the matter of the successions,—the said judgment in that respect being hereby changed and amended so as to dismiss plaintiff's demand as of nonsuit on that branch of the case. Costs of appeal to be borne by the succession.

MONROE, J., takes no part, as he was not a member of the court when the case was submitted.

(51 La. Ann. 887)

CHAMBERS et al. v. HUBBARD et al.
(No. 12,882.)

(Supreme Court of Louisiana. March 20, 1899.)

FACTOR—WAREHOUSE RECEIPT—PLEDGE.

1. Act No. 156 of 1888 did not repeal Act No. 72 of 1876.

2. A factor who holds a warehouse receipt may pledge the goods covered by the receipt to the extent that he is a creditor of the principal.

3. To the extent that the factor is a creditor with a warehouse receipt securing his claim, the debtor of the factor is without interest to question the form of the warehouse receipt; the factor having been, under operation of law, subrogated to the right of his principal to the extent before stated.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; George H. Théard, Judge.

Action by Chambers, Holton & Winn against John A. Hubbard & Co., the Hibernia National Bank, and John Holmes & Co. Judgment for plaintiffs, and the bank appeals. Affirmed.

Samuel L. Gilmore, for appellant, Hibernia Nat. Bank. Edwin T. Merrick, for appellees.

BREAUX, J. The defendant bank prosecutes this appeal to have the judgment appealed from amended so as to recognize the pledges claimed by the Hibernia National Bank to the amount of \$3,385.14. Appellant, at the outset, disavows any intention to bring up anew questions of the right of the Hibernia National Bank to execute its pledges of the 18th and 19th of December, 1893, in so far as these questions have been disposed of by the decision of the supreme court in the case of Holton v. Hubbard, 49 La. Ann. 715, 22 South. 338. We take it that the following is the proposition here involved, and that it presents the question before us for decision:

The bank is entitled to enforce its pledges against the individual interest of the debtor of its pledgor, to the extent that the debtor is indebted to its pledgor. The record discloses: That the firm of Chambers, Holton & Winn was a planting partnership, composed of W. Frank Chambers and the planting partnership of Holton & Winn. The interest of Chambers in this partnership was two-thirds and Holton & Winn one-third. That they consigned 1,495 sacks of rough rice to John A. Hubbard, a commission merchant of New Orleans. (Subsequently the house became known as John A. Hubbard & Co.; the company being Harris Gagné, who was before that time a partner, though his name was not made mention of as such.) The sacks were stored in a warehouse, and warehouse receipts issued for this rice, and afterwards pledged by John A. Hubbard to the Hibernia National Bank to secure a loan made by the bank to the pledgor. About a month after this pledge had been made, J. A. Hubbard & Co. and the individual members of the firm made a *cessio bonorum*. The syndic of the house was made a party to this suit. Chambers, Holton & Winn brought suit for the sacks, took out a writ of sequestration, and sequestered both the sacks and the warehouse receipts. (The latter were in the possession of Hubbard's pledgees, and the sacks of rice in the Rio Warehouse.) It is well to bear in mind that the warehouse receipts issued by the owner of the Rio Warehouse were pledged by John A. Hubbard to the appellant bank on the 18th day of December, 1893. Chambers was not a party to the suit cited *supra*. H. Gagné, partner of John A. Hubbard & Co., and bookkeeper, testified that on the account of William F. Cham- and on that day the account of Chambers was indebted to John A. Hubbard on the 29th day of January, 1893, in the sum of \$1,686.81, and on that day the account of Chambers was balanced by charging it to the account of Chambers, Holton & Winn, so that the account of W. F. Chambers was actually released on the face of the papers by adding the amount that he owed Hubbard. The plantation on which the rice was raised was owned by Holton & Winn. Chambers received two-thirds as his share, for the reason that he cultivated the land, threshed the rice, stacked it, and delivered it at the landing, giving one-third and taking two-thirds for his work. He furnished all the money to raise the rice. Holton, as a witness, swears that he was in New Orleans at the time the accounts were balanced as before stated; that he knew that the rice had been pledged, and at the time it appeared that Chambers was indebted to Hubbard; also that there was no connection whatever between the affairs of Holton & Winn and those of Chambers, Holton & Winn. He further testifies that Viterbo was Hubbard's agent. Hubbard's bookkeeper testifies as follows: "Q. Will you look at page 272 of that ledger, and state what account ap-

pears on that page? A. Wm. F. Chambers. Q. What does that account show? A. Shows, under date of January 4th, a debit of \$1,386.81; on January 2d a debit of \$300. Q. Do you know what \$1,386.81 was for that debit entry? A. A slight draft in favor of Leon Viterbo & Bro. Q. Drawn by whom? A. W. F. Chambers." Appellant also claims an amount of \$1,800, growing out of business with still another firm,—it appears, of Hubbard & Viterbo,—and also claims commission and warehouse charges it claims to have paid. Each of these claims have received attention, and will be disposed of in our opinion and by our decree. The judgment appealed from recognized the joint ownership of Chambers, Holton & Winn in the proportion of two undivided two-thirds to Chambers and one undivided third to the partnership of Holton & Winn, and in that proportion condemned the bank to pay the proceeds to plaintiffs. From the judgment the Hibernia National Bank prosecutes this appeal.

In our judgment, if one is personally indebted to the pledgor, the pledgor has the right to enforce his pledge to the amount that the debtor to the pledgor is indebted. In the case before decided (49 La. Ann. 733, 22 South. 338) the court found that Holton & Winn were not indebted to Hubbard at all, but that, on the contrary, Hubbard was indebted to them. Here there is clear and direct evidence showing that Chambers was indebted to Hubbard. Had Hubbard not failed in business, he could have deducted from Chambers' share of the crop the sum of the latter's indebtedness. Chambers, as to his indebtedness, is without right as against the pledges made. Hubbard was entitled to pledge his claim to whomsoever he pleased. After deducting the proportion to which Chambers, Holton & Winn had a right, the remainder, in our view, should be credited to the claim of the pledgees of Hubbard.

We are brought by the foregoing conclusion to the next claim of appellant to the sum of \$1,800, growing out of an asserted indebtedness by Holton & Winn to Hubbard, arising from the business between Hubbard and Viterbo. We have in our prior decision (49 La. Ann. and 22 South.) passed upon that question to the extent of holding that Holton & Winn were not indebted to Hubbard. That is an end of the question. The well-known Latin maxim applies, translated with some freedom, "There must be an end to disputes." We have none the less given some attention to this claim, and do not find, as an original question, that it stood on a solid basis. Be this as it may, the matter was disposed of heretofore, and is no longer reviewable. The claim is made by appellant for commissions and warehouse charges it claims to have paid. This claim is not sustained, as we think, by the facts. The amounts were deducted from the sum for which the judgment was rendered, and cannot again be charged to plaintiff. Therefore it is ordered, ad-

judged, and decreed that the judgment appealed from be amended by deducting \$1,434.05 from the amount of the judgment, leaving \$4,438.63, with legal interest from the date of the judgment appealed from, to be paid by appellant bank to plaintiffs. It is ordered, adjudged, and decreed that there be judgment in favor of the appellant bank for the amount of \$1,434.05, to be paid out of the proceeds of the rice crop, and that to that amount the pledge by Hubbard to the appellant bank is recognized, and is to be enforced. In other respects the judgment appealed from is affirmed. Appellee to pay costs of appeal.

On Application for Rehearing.

(April 17, 1899.)

WATKINS, J. The prayer of plaintiffs' petition is for judgment decreeing certain warehouse receipts illegal and of no effect as to them, and also that a certain pledge to the Hibernia National Bank be likewise declared illegal, and without effect as to them. Also, and in any event, that they be recognized as the owner of the rice in the proportion of two-thirds to Chambers and one-half to Holton & Winn. The district court gave judgment in favor of plaintiffs in those proportions as joint owners of 1,495 sacks of rice, free of the claim of the bank as pledgee, and further recognizing them entitled to the net proceeds of said rice in the hands of the bank, and fixed the amount which the bank should pay at the sum of \$5,872.68. The bank appealed for the purpose of having its pledge recognized to the extent of \$3,385.14. Plaintiffs consigned to John A. Hubbard, a commission merchant, 1,495 sacks of rough rice. The house afterwards became John A. Hubbard & Co. The sacks were stored in a warehouse, and warehouse receipts were issued therefor, and John A. Hubbard afterwards pledged them to the bank. Soon afterwards John A. Hubbard & Co. failed in business, and availed themselves of the insolvent laws. The plaintiffs subsequently sought to recover same by sequestration. Our judgment holds that the bank as pledgee is entitled to enforce its pledge against the rice to the extent that Chambers is indebted to its pledgor, Hubbard; the residue to go to the plaintiffs. It recognized the right of the bank to the amount of \$1,434.05, and gave plaintiffs judgment for \$4,438.63. The application for a rehearing is made on the part of the plaintiffs, and is chiefly devoted to what is termed "an error in calculation," but a brief has been filed on the part of the bank, in which a review of all the facts is given. A re-examination of the case has satisfied us that the opinion does justice to all. Rehearing refused.

MONROE, J., takes no part, not having been a member of the court when the case was submitted.

(51 La. Ann. 880)

SHERMAN et ux. v. PARISH OF VERMILION et al. (No. 13,054.)

(Supreme Court of Louisiana. April 3, 1899.)

PARISH—INJURY TO JUROR—NEGLECT OF POLICE JURY—LIABILITIES—NEGLECT OF SHERIFF.

As Relates to the Parish.

1. A juror met with an accident, which resulted in his death, while he was, together with the other members of the jury, in charge of the sheriff's deputy.

2. Complaining of the negligence of the police jury and of the deputy, this suit was brought by plaintiffs, his father and mother, for damages.

3. The parish, like the town or county, indicating the political divisions in certain states of this Union, is not responsible for damages caused by the negligence of a police jury in a matter in which they have some discretion. They represent the sovereign power, and not the taxpayer, by whom the damages, if allowed, must be paid.

As Relates to the Claim Made against the Sheriff, a Co-Defendant.

1. The action against the parish not being sustained under the state of facts, there was no right of action against the sheriff.

2. It does not appear that the order of the officer was the proximate cause of death. He directed the members of the jury, in the dark, to move further from the court house. There were other causes of the accident, which precluded plaintiff from recovering, and to which the officer did not contribute.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Vermilion; Conrad De Baillon, Judge.

Action by Emanuel Sherman and wife against the parish of Vermilion and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Walter J. Burke & Bro., Weeks & Weeks, and W. B. White, for appellants. M. T. Gordy and Gus A. Breaux (Clegg & Quintero, of counsel), for appellee parish of Vermilion. W. W. Edwards and Edwards & Greene, for appellees J. O. Hébert, sheriff, and sureties.

BREAUX, J. Plaintiffs, the father and mother of the deceased, seek to recover damages in the sum of \$25,000 for the death of their son. They, in substance, in their petition, set forth that their son, George, was serving on a jury in a criminal case, and, while in care of the deputy sheriff, under the order of the presiding judge that they should not separate, he (their son) and the other members of the jury were conducted in the nighttime out of the court house, at the request of some of the members of the body, to repair to the closets near the court house. They allege that they were compelled to avoid going into the closets for the reason that they were unclean and negligently kept. They charge that the deputy sheriff was culpably negligent in giving their son and the other members direction to go to a given spot in the dark, which, instead of being, as it should have been, a safe place, was a pit that the police jury had given permission to dig out, in which he fell, and fatally injured himself;

that their son knew nothing of that particular place at which he fell, and nothing of the danger to which he was exposed, and in regard to which he was not warned; that, in following the direction of the deputy sheriff, no notice was given to their son, and no light was furnished him, as should have been furnished, if the officer had been ordinarily careful; that the pit had been there many years, to the knowledge of the officer. The defendants filed the plea of no cause of action. The district court sustained the plea, and dismissed plaintiffs' action. From the judgment of dismissal, plaintiffs present this appeal.

Our researches have not resulted in our finding authority in support of the position that parishes can be compelled to respond in damages for the negligence of the deputy sheriff to take proper care of the jury placed in his charge by the presiding judge in a criminal case. Police juries have authority of administration of parish affairs, and have nothing to do with the trial of criminal cases. They, under delegated powers, expressed or implied, represent the parish. We have followed the argument of counsel for plaintiffs, and have given some attention to the jurisprudence of the several states of the Union regarding the subject before us. The contention of plaintiffs is that the jurisprudence in states where a county or town system prevails is necessarily different, and has no application in this state. We, on the other hand, find that, whether as relates to town, county, or parish, these divisions (towns, counties, or parishes) have only such power as is vested in them by sovereign authority. As relates to the parishes, to meet the proposition pressed by plaintiffs, that they have greater power than towns or counties in other states, we, to some extent, traced the meaning of the word to its origin. In France it was the ecclesiastical division of the territory,—“the spiritual, and, in some particulars, temporal,” division; i. e. the district in charge of a curate, and originally of the curial. The colonists of Louisiana became accustomed to similar divisions of territory in church matters. In the course of time it was used to indicate political divisions of the state. From the earliest days there were parishes in the territory,—“paroissee” at first, and afterwards “parroquia,” under Spanish rule; and when the state was admitted into the Union the French name was retained, to indicate the civil divisions of the state. But the responsibility of the parishes and of the taxpayer is limited by legislation, just the same as it is in other states of the Union. They (the county and parish) have only delegated powers, and such needful powers as are necessary to carry out the delegated powers. So, as far as we have been able to examine, all the well-considered decisions hold that the political divisions of the state are not responsible for damages in cases such as the one before us for decision. The decisions generally hold that in such cases the political divisions of the state repre-

sent the sovereign, and therefore are not responsible for damages. These decisions apply, we think, in our state, as they do where the town and county system prevails.

The complaint is directed against the parish for neglecting to provide suitable closets, and for having left open a dangerous pit near the court house. In the light of judicial decisions, the parish is not liable in an action by a party injured because of the neglect of an officer to perform a corporate duty in a criminal case, unless such action is given by statute. *Cooley*, Const. Lim. p. 246. Such a suit as the one here cannot be sustained without statutory sanction. The exemption from liability, it has been decided, does not apply to villages, boroughs, or cities, which accept special privileges from the state, covering larger powers and conferring more valuable privileges. *Id.* 247. Municipal corporations, it is held in many decisions, are made such whether they will or not, and cannot be considered in the light of persons who have voluntarily, and for a consideration, assumed obligations, so as to owe a duty to every person interested in their performance. *Id.* 245. *Cooley*, from whom we have freely quoted, cites in support of his text on Constitutional Limitation the carefully considered case of *Eastman v. Meredith*, 36 N. H. 284, in which it was decided, on the principle as stated, that the town is not liable for an accident caused by the floor giving way in an imperfectly constructed town house. (The imperfect construction was the work of the town.) The exemption of legislative officers is plain, is the view expressed in *Cooley* on Torts. “The legislature has full discretionary authority in all matters of legislation, and it is not inconsistent with this authority that members should be called to account, at the suit of individuals, for their acts and neglects. A discretionary power is, in its nature, independent.” Page 376. This commentator affirms that the principle applies to inferior legislative bodies, such as boards of supervisors, councils, and the like. *Id.* p. 376. This principle was recognized by this court in several decisions,—notably, *Lewis v. City of New Orleans*, 12 La. Ann. 180; *Stewart v. City of New Orleans*, 9 La. Ann. 461. We find in 12 La. Ann., *supra*, a striking illustration. Judge Spofford dissented in the case just cited, against the city of New Orleans; but he was the organ of the court in *King v. Police Jury*, 12 La. Ann. 859, that “no remedy is given by statute against a parish for private injury.” In 9 La. Ann. 461, *supra*, the syllabus reads, “A municipal corporation, in the exercise of power which it possesses for public purposes, and which it holds as part of the country, enjoys the exemption of government from responsibility for its own acts, and the acts of its officers deriving their authority from the sovereign power.” The syllabus covers fully the principles announced in the decision. To the same effect is 2 Dill. Mun. Corp. p. 969. “In the absence of a statute giving a remedy, public or municipal corporations are under no lia-

bility to pay for property of individuals destroyed by a mob." *Add. Torts*, 1305; 2 *Dill. Mun. Corp.* p. 959. "Usually the functions of the political divisions of the state are public." *Cooley, Const. Lim.* p. 296. "The powers empowering municipalities must be construed with reference to the object of their creation, namely, as agencies of the state for local government." *Id.* pp. 210, 290: The question was carefully considered by us recently, in the case of *City of New Orleans v. Kerr*, 50 *La. Ann.* 413, 23 *South.* 384, and the conclusion was reached which has a direct bearing upon the issues here. *Cooley* repeatedly refers to the local agents of the state. "Public corporations are but part of the machinery employed in carrying on the affairs of the state." *Cooley, Const. Lim.* p. 293. "Usually their functions are of public nature." *Id.* p. 296. Municipal corporations are agencies of government. *Black, Const. Law*, p. 280. They are, in their subordinate capacity, intrusted with some discretion. Their functions being public, and they being vested with discretion, their responsibility is to the state. They do not represent the taxpayer when they legislate in matters relating to the state and to criminal affairs. Their negligence, when the state is directly concerned, is not chargeable to the citizens of the locality. If the parish were held responsible, they alone would have to pay the damages. We have not found any law under which they may be held for such damages. They (the local authorities, the police jury) are vested with such powers and prerogatives as are necessary to make rules for the government of their affairs. The citizens cannot be held responsible for the agents of the state, when acting for the state in maintaining local government. From Judge *Cooley* we again quote: "On the other hand, it is settled that these corporations are not liable to a private action at the suit of a party injured by a neglect of their officers to perform a corporate duty, unless such action is given by the statute." *Cooley, Const. Lim.* (2d Ed.) p. 246. "We can reply, taken for granted, that the common law gives no such action." *Id.* The weight of the judicial decisions, we think, and all the commentators, upon the subject, sustain this view.

We pass to the question of the liability of the sheriff. In our view, the parish not being liable, there remains no right of action against the sheriff. The act charged was not one for which he was liable. All that the deputy sheriff did was to order the jury to move further towards the street, away from the court house. The jury was under the control of the deputy to the extent only that it was necessary, under the judge's order, not to permit them to separate. It would be difficult to conclude that one, under the circumstances here, is responsible for such an order, without a showing of negligence in having directed the victim to follow a course unavoidably leading to the pit. The direction to move further, given to the jury, does not lead one to imply

that they were to move directly to the pit, so that falling into it was unavoidable. The juror fatally injured was not by the direction of the deputy compelled to go to the pit. He was left at liberty to guard his person, and not expose himself to a fall. He was not under the necessity of exposing himself at all, if he did not choose. The order was not to separate. They were not under the physical control of the deputy, save to the extent that they were not to separate from each other. A direction such as that given under the circumstances was not an order compelling the unfortunate young man to fall into the pit; and not to have warned him to avoid the pit, in moving further, was not an act of negligence for which the sheriff can be charged. Had the deputy directed the juror to the particular spot where the accident occurred, it would be different; but he only directed the juror to move further, without reference to the pit, and it happened that the unfortunate man came to the pit, and fell into it. It cannot be said that the deputy was the cause of the fall, when the unfortunate man was directed to move further. There was nothing to show that he was directed to the pit, or to move in a direct line to the pit, in which he fell. The complaint is that the deputy failed to warn the juror of the danger. Eleven of the members complied with his direction without falling into the pit. It is alleged, in substance, that the juror was impaled in the fall, "upon a piece of wood or timber which formed part of the scaffolding" in the wall of the pit. The proximate or immediate cause of the accident was the wood or timber. The petition was carefully drawn. Whether the dangerous pit included the charge of knowledge on the part of the officer, despite the clearness of the charge, is not absolutely certain. Conceding all that is claimed for the thorough and complete allegation contained in plaintiffs' petition, the question nevertheless arises as to whether the officer had reasonable ground to expect the sad consequence. The idea is, "reasonableness of expectation." *Whart. Neg.* § 375. The charge that he had knowledge of the dangerous pit does not give rise to the imputation of reasonable ground to apprehend that in the pit was a piece of wood or timber that might cause death. One may fall in a pit—even a dangerous pit—without injury. The officer was not a wrongdoer. "The foreseeing of a harm as remotely and slightly probable does not involve the imputation of such harm; for there is nothing that we can do that may not remotely produce some harm, and therefore, if we are to avoid such imputation, we must do nothing." *Id.* § 76. Would a prudent man have had cause to expect an accident in acting as did the officer? We are not convinced that the consequence might reasonably have been expected, and that plaintiff has a right of action against the officer. Finally, in the absence of proof of the proximate cause of the accident and the responsibility arising therefrom, the officer's act, par-

ticularly if he was without knowledge of the direct and immediate cause of the accident, is not an act for which damages are due by him. For reasons assigned, the judgment appealed from is affirmed.

MONROE, J., takes no part, as he was not a member of the court when the case was heard.

(51 La. Ann. 798)

LEVY et al. v. THEIR CREDITORS (KOHN, WEIL & CO. et al., Interveners.
No. 12,948).

(Supreme Court of Louisiana. April 8, 1899.)
INSOLVENCY—RESPITE—ACTION BY CREDITOR—
APPEAL.

1. Parties seeking a respite do not bring into court any fund for distribution. On the contrary, their object is to withdraw their property from legal pursuit and beyond legal controversy.

2. A creditor for \$225, who, in the interval between an application for a respite, and the order thereon granting a stay of proceedings, and the meeting of creditors called thereby, institutes an action against the parties seeking a respite for the unpaid purchase price of goods sold them, with recognition of privilege, and for judgment, and accompanies his demand with an application for a writ of sequestration, is not entitled, when the sequestration is set aside, and his suit dismissed, on the ground that the allegations of his petition are untrue, to appeal to the supreme court. The fact that he may have filed this suit in the respite proceedings, and called it an "intervention," or "third opposition," does not affect the question. There is no concursus formed by such a proceeding, and there is no fund in court for distribution.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frederick D. King, Judge.

In the matter of the application of Levy & Block against their creditors for a respite. Kohn, Weil & Co. and Layman, Kenney & Boze filed pleas of intervention. From a judgment against interveners, they appeal. Dismissed.

On October 14, 1898, Levy & Block filed an application in the civil district court for a respite. Accompanying this petition were different schedules, one of them containing a list of their ordinary, and another of their privileged, creditors. Kohn, Weil & Co. and Layman, Kenney & Boze figured on the first of these lists, but not upon the second. The former were recognized as creditors to the amount of \$226.25, and the latter as creditors in the sum of \$113. The district court rendered an order, upon the application for respite, for a meeting of the creditors of Levy & Block on the 14th of November, and directed that in the meantime proceedings against their persons and property be stayed. On the 14th of October, Kohn, Weil & Co. and Layman, Kenney & Boze filed separate petitions of intervention and third opposition in the respite proceedings. The pleadings and prayers of their petitions were similar in character and as nearly identical as the pleadings and prayers of different parties could be.

The plaintiffs alleged themselves to be creditors of Levy & Block,—the former for the sum of \$226.25, and the latter for the sum of \$113. They alleged that their claims were for the unpaid portion of the price of goods sold by them to their said debtors; that the claims were past due; that they were secured, as to payment, by vendor's privilege on the goods so sold by them, which were still in the possession of Levy & Block; and that they feared that the latter would conceal, part with, and dispose of the goods on which their privilege rested during the pendency of the suit. In view of their allegations, they prayed that said property be sequestered under orders of sequestration, which they asked should be issued; that their debtors be cited, and that, after due proceedings, they have judgment against them for the amount of their respective claims, with recognition of their privilege; and that they be paid, respectively, by preference, out of the proceeds of the sale of said property, over all other persons. Orders for writs of sequestration issued upon these petitions and were executed by the sheriff. Levy & Block appeared, and moved for the dissolution of the sequestrations and the dismissal of the petitions of intervention and third opposition, upon the ground that they were issued illegally, improperly, and in defiance of the court's order staying proceedings, and the further ground that the allegations of the petitions and affidavits were untrue. The district court, in two different judgments, dissolved the sequestrations and dismissed the interventions and third oppositions, and the plaintiffs in those suits appealed to the supreme court. An admission appears in the record that, after the writs of sequestration were issued, the sheriff appointed Levy & Block keepers of the property sequestered, under instructions from the attorneys of the interveners and third opponents, and that the goods were left at the store of the debtors at the request of their counsel at a casual meeting. The cases were argued before the supreme court upon the single proposition, advanced by Levy & Block and sustained by the district court, that when plaintiffs, who have obtained writs of sequestration upon sworn allegations that they fear defendants will conceal, part with, or dispose of merchandise sequestered, instruct the sheriff, in executing the writs, to appoint the defendants themselves keepers of such merchandise, they effectually disprove their own allegations, and the writs must fail. Contest over the right of Kohn, Weil & Co. and Layman, Kenney & Boze to have brought suit and sequestered, in spite of the orders of the district court staying proceedings against Levy & Block and their property, appears to have been abandoned, if ever insisted upon.

Solomon Wolff, for appellants. Parkerson & Tobin and H. W. Robinson, for appellees.

NICHOLLS, C. J. (after stating the facts). No motion has been made to dismiss these ap-

peals; but, if the subject-matters involved are not such as to bring them within an appellate jurisdiction, we have no discretion, but must decline to pass upon the questions submitted. Appellants, having been called on, through our clerk, for the theory upon which they have brought the appeals before us, have replied that they rely upon that portion of article 85 of the constitution of 1898, which give the supreme court appellate jurisdiction "in all cases where the fund to be distributed, whatever may be the amount therein, shall exceed two thousand dollars." Levy & Block have not only not brought into court any fund to be distributed, but the object of their suit is, on the contrary, through respite proceedings, to have their entire property left in their hands for a given period, secured from being brought into court for the payment of claims against them. Appellants, in the suits which they have brought, have not attacked the respite proceedings in any manner. Appellants simply brought two independent suits, as vendors of goods sold by them to Levy & Block, to recover judgments for the unpaid portions of the price due them, with recognition of a vendor's privilege upon the same, coupled with sequestrations. There is no allusion to or connection with the respite proceedings, further than that which results from the fact that the plaintiffs refer to their own proceedings as interventions and third oppositions therein, and that their actions bear the title and are given the number of the suit of Levy & Block against their creditors. Appellants each claim to be privileged creditors. If so, they are expressly excluded by article 3095 of the Revised Civil Code for the operation of the respite laws. They have the right, notwithstanding the application of their debtor for a respite, to proceed judicially, by separate and independent suits, to have their status ascertained and fixed, and to have payment of their claims enforced, to the extent, at least, of the exhaustion in their favor of the property struck by privilege. If the debtors question their rights of privilege, the proper and legal course for them to pursue is to contest the same in the suits which have been brought against them.

Appellants cannot, by altering the mere form of their proceedings, and calling them "interventions" and "third oppositions," alter the substance of things. Were we to take cognizance of appellants' suits, and reverse the judgments which have been rendered against them, they would not, as the result of our decree, be entitled to take out of court any portion of a fund which is now in court for distribution. We would have had simply to deal, in each case, with the sequestration which was issued therein, and confirm their right to maintain it. There is no concurso involved in these proceedings,—no questions of conflicting rights de hors those of each of the plaintiffs and their debtors. Appellants say that, when the creditors meet, they may possibly refuse the respite, and, should they do so, a cessio

bonorum will follow, and the entire estate of Levy & Block will pass into the hands of a syndic for liquidation and distribution. That is possible, but it is a remote contingency, upon which no decree affecting the rights of the parties can be presently predicated. We regret very much that we have to dispose of these appeals in the way we do, as all the parties seem desirous of having the opinion of this court upon the issues made; but we have no alternative but to dismiss the appeals. The principles announced in *Freyhan v. Berry*, 49 La. Ann. 309, 21 South. 911, *Denegre v. Mushet*, 46 La. Ann. 90, 14 South. 348, and *Wheelwright v. Transportation Co.*, 47 La. Ann. 540, 17 South. 183, find application here. The appeals are hereby dismissed.

MONROE, J., takes no part in this case, as he was not a member of the court when the case was submitted.

(51 La. Ann. 347)

SHEPHARD v. CITY OF NEW ORLEANS
et al. (No. 12,943.)

(Supreme Court of Louisiana. April 3, 1899.)
INTOXICATING LIQUORS—OPENING BARROOM—PETITION—HOUSE-HOLDER.

1. The provision of the city charter that the council shall not grant any privileges for the opening of a barroom, except upon the written consent of a majority of the bona fide house-holders or property-holders within 300 feet of the place proposed for its establishment, means either one or the other, indifferently and without distinction.

2. A house-holder is a person who occupies a house as a place of residence or business, without any relation to the character of the title by which the property is held.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frank A. Monroe, Judge.

Suit by C. L. Shephard against the city of New Orleans and Mrs. F. Ault. Judgment for plaintiff, and the city of New Orleans appeals. Affirmed.

Charles H. La Villebeuvre, Asst. City Atty., for appellant city of New Orleans. Parker-son & Tobin, for appellee Shephard. Buck, Walshe & Buck, for appellee Mrs. Ault.

WATKINS, J. Alleging himself to be a citizen and taxpayer residing at the corner of Toledano and Carondelet streets, in the city of New Orleans, the plaintiff avers that the defendant the widow Ault applied to the city council for permission to operate a barroom at the corner of the two aforesaid streets, and that said permission was granted her by the said council, by an ordinance which was passed over the veto of the mayor; that said permission to operate said barroom "is contrary to law, in utter disregard of the rights of petitioner and the other residents of that neighborhood, and is a gross usurpation of authority on the part of the city council." He represents that a majority of those entitled to vote upon the question are opposed to the

granting of said permit, and that the city council is without authority to grant it otherwise; that a barroom at said corner is detrimental to the welfare of the neighborhood, and will work irreparable injury to him, as it will be a loafing place for disorderly persons, who, becoming intoxicated upon liquors sold on the premises, will disturb the peace and quiet of the residents, and render it unsafe, and even dangerous, for the women and children; that said locality is in the center of the residential portion of the city, and the location of a barroom there is an outrage upon decency, and a wanton disregard of the rights of the reputable people who live there. Alleging prospective damages at \$2,500, in the depreciation in the value of his property, as in the nature of an injury which is perpetual, petitioner prays that an injunction issue against the city of New Orleans, prohibiting it from promulgating said ordinance, and from issuing to the defendant Mrs. Ault the proposed permit, and enjoining and restraining Mrs. Ault from opening or operating a barroom at said locality. His prayer is for the maintenance and perpetuation of his injunction, and a decree pronouncing said ordinance to be illegal, null, and void. After pleading an exception of no cause of action, the defendant Mrs. Ault filed an answer, pleading the general issue, and prayed for the dissolution of the plaintiff's injunction. The city urged a like exception, and made a similar answer. On the trial there was judgment in favor of the plaintiff, maintaining and perpetuating his injunction as to both of the defendants, and from that judgment the city of New Orleans has alone appealed.

The following is substantially the statement of facts upon which the suit was tried, viz.: That Mrs. Ault petitioned the city council for a permit to open a barroom at the locality specified on the 17th of July, 1897, and that 19 property owners signed her petition. Subsequently 5 of the signers withdrew their signatures, and signed a protest against the allowance of the permit, thus reducing the number of signers to 14. On the protest opposing the permit were 12 property owners and 5 tenants, making a total of 17. The protestants have 300 feet more frontage than is prescribed by city ordinance regulating the matter. An ordinance granting the permit was passed over the mayor's veto, and contrary to the advice of the city attorney. The mayor's veto contains the statement, viz.: "I do so on the opinion of the city attorney that the prerequisites to granting this privilege have not been complied with; and, as the law is clearly set forth in the accompanying documents * * *." The city attorney's statement is that Mrs. Ault signed her own petition, and her signature was counted, and that Mr. Frank signed her petition as the owner of a piece of property which was occupied by Mr. Graham as tenant, whereas Mr. Graham signed the protest against it; that Mr. Henry, who lives in Cov-

ington, and owns two houses in the neighborhood, signed the petition for the permit, whereas his two tenants occupying the houses signed the protest; that the names of the two property owners were counted, whereas the signatures of the other tenants were disregarded. The opinion of the city attorney on this question is as follows, viz.: "My opinion is that the votes of Mr. Graham and Mr. Henry's tenants should have been counted, and the votes of Mr. Frank and Mr. Henry rejected." Section 21 of the city charter provides that the council shall not grant any privileges for the opening of any bar-room, saloon, concert-saloon, or dance-hall, except upon the written consent of a majority of the bona fide house-holders, or, property-holders within three hundred (300) feet, measured along the street fronts, etc. In his opinion, which was introduced in evidence (as well as the foregoing section of the charter), he says: "House-holders [within the contemplation of that section] are any persons who occupy houses for the purposes of residence or business, and have control of the inmates thereof. The nature of the title under which the occupant holds possession of the house is immaterial." Referring to the phrase of the charter, "bona fide house-holders or property-holders," he says: "As it was clearly the intention of the legislature to give to a majority of the persons residing in said neighborhood the right to prevent or permit the establishment of a barroom, they being the persons directly affected by such an establishment, the only reasonable construction to be put upon [that] section of the charter is that the privileges for the opening of barrooms shall be preceded by a petition signed by a majority of the house-holders, and, when there is vacant property, [then] by the owners of such vacant property. It was certainly never contemplated that a nonresident property-holder, owning all or a greater part of the property in a neighborhood where it is proposed to locate a barroom, should have the right to allow the location of a barroom, even if its establishment was opposed by all of the house-holders, who alone would be subject to the annoyance and damage the barroom might cause." In his reply to a letter of the city engineer requesting an interpretation of the word "house-holder," the city attorney said: "I beg leave to say that, in my opinion, a house-holder is any person who occupies a house for the purpose of residence or business, and has control of the inmates thereof. The nature of the title under which he holds possession of the house is immaterial." It is admitted, per contra, that the city council, by Ordinance No. 112,636, S. S., put a different construction upon that section (21) of the charter. The provision of that ordinance is as follows, viz.: "That, hereafter, it shall not be lawful for any one to set up or establish a bar-room, saloon, concert-saloon, dance-hall, beer-house, or place where liquors are sold * * * without permission of the

council previously applied for in writing, which shall be accompanied by a written consent of a majority of the bona fide property-holders along the street fronts," etc. That ordinance bears date of passage, September 3, 1896, subsequent to the enactment of the city charter; and the conspicuous feature of its phraseology is that the word "house-holder" is completely eliminated therefrom, *ex industria*. The only legitimate inference to be drawn therefrom is that, in the opinion of the council, "house-holder" and "property-holder" possessed the same identical meaning or signification; but that interpretation cannot be correct, because the owner of property unimproved could not, in any sense, be termed a "house-holder."

Counsel for Mrs. Ault does not agree with either the city attorney or the city council with regard to the interpretation to be placed upon the aforesaid phrase of the city charter. He says in his brief, viz.: "And when we consider that, after all, this statute is a 'regulation'; that the right to carry on a barroom or similar business, in the absence of restrictive legislation, is as absolute as the right to do any other business,—this interpretation becomes reasonable, because the lawmaker may have had it in mind to ask only a certain moral condition, that would justify the council in granting the privilege, and it may well have considered that such privilege to do what otherwise a man might naturally do might well be primarily accorded when a majority in number of either house-holders or owners of property within a certain limit recommend the person as a fit one to be permitted to carry on such business, and consent to the establishment of the business itself."

It is, in our opinion, quite a conspicuous fact that the term "owner" was omitted from the statute, and in its stead the terms "house-holder" and "property-holder" were employed. The owner of unimproved real property is, in a certain sense, a property-holder, and a tenant by the month or year is a house-holder. Webster speaks of the word "or" as indicating an "alternative generally corresponding to 'either,'—as 'either this or that'; that is to say, either one thing or another thing." Applying this rule to the phrase in question, and we will have it read thus, viz.: "Either house-holder or property-holder;" that is to say, either one or the other, indifferently. On this hypothesis, either one could sign the petition or protest, without distinction, and the name of either must be accepted and considered as equally efficacious. But it does not possess the significance of allowing both to sign either petition or protest; either one or both. Everything else being equal, the preference of right should be given to the house-holder, as being the party most interested; and particularly when the property-holder is an absentee. And, indeed, some significance should be attributed to the fact that the word "house-holder" is the first one mentioned in the statute. On this interpretation of the city

charter, protestants were in the majority, and the petition of Mrs. Ault was defeated. Judgment affirmed.

MONROE, J., having decided this case in the lower court, takes no part on the trial of the case on appeal.

(51 La. Ann. 892)

DORSETT v. SCOTT. (No. 13,101.)¹

SCOTT v. DORSETT.

(Supreme Court of Louisiana. April 3, 1899.)

APPEAL—CHANGE OF ISSUES—WAIVER OF OBJECTIONS—REVIEW.

1. Originally, the action was possessory. In subsequent proceedings the action, without objection on the part of plaintiff in the possessory action, was changed into an action of boundary, wherein the rights of the parties were considered and decided.

2. The plaintiff, having waived his right as set forth in the possessory action, could not ignore the suit to fix the boundary line, and return to the possessory action.

3. While the supreme court expresses its views on certain issues, taken as a whole, the questions presented are not reviewable under article 101 of the constitution. The article was not intended to give a right of review, as if on appeal, in all cases.

(Syllabus by the Court.)

Certiorari to court of appeals, Third circuit.

Actions by Oran Dorsett against B. F. Scott and B. F. Scott against Oran Dorsett. Judgment for Scott. Application by Dorsett for certiorari or writ of review. Application denied.

R. J. Bowman and Andrews & Hakenyos, for relator.

BREAUX, J. This was an application for a writ of certiorari and to have a judgment of the court of appeals reviewed, under article 101 of the constitution. The relator, Dorsett, brought suit in the district court to be protected, he averred, in his right of possession of a farm against the invasion and trespass of his neighbor, Scott. He alleged that he had been in peaceable possession of his farm for more than 30 years; that his neighbor, the defendant in the suit, was tearing down their dividing fence, and was erecting another dividing fence, and taking possession of a part of relator's land. He averred further that the fence had been a boundary line for more than 30 years, and that his right of possession cannot be taken from him except by due process of law. The relator's prayer is that defendant be enjoined from coming on the land of petitioner, from preventing petitioner from rebuilding the fence which he was tearing down, from building any fence on the land of petitioner, and preventing petitioner from removing any fence he may have built, and for damages. Some time after, petitioner (relator here) filed an amended petition, alleging, substantially, that Scott had violated his injunction, and had torn down the fence. Scott, the

¹ Rehearing denied, April 17, 1899.

defendant in the suit, filed a general denial, and also special denial that he was attempting to erect any fence on the land belonging to, or which was ever in the possession of, the plaintiff, and averred, specially, that he had built a fence on his own land, of which he had been in possession for more than 30 years, and that the injunction which plaintiff had sued out was taken without cause. In April following January of 1898, Scott, the defendant in the suit of Dorsett against Scott, filed a suit in the district court, alleging that he is the owner of a plantation, and that Dorsett is the owner of the tract adjacent to his own; that some time since there had arisen a dispute as to the boundary between these said plantations; that in 1885 he and Dorsett jointly employed Bringham, parish surveyor, to establish the boundary between these two tracts of land, and, when it was found that the line would run deep into Dorsett's land, in order to avoid a lawsuit, and adjust the matter in a friendly way, he and Dorsett agreed to adopt as the boundary line the middle of the ditch, which had been dug years before, and while the two estates had been in possession of Thompson, the vendor, from whom each of the parties by mesne conveyance holds his land; that the two ends of the ditch were then marked by the surveyor by planting iron posts to mark the boundary as agreed on by them. The petitioner further alleged that at the request of Dorsett he consented that the portion of the division fence to be built by Dorsett for his convenience should be built on his (petitioner's) side of the ditch, and that recently, when said Dorsett had permitted his portion of the fence to fall into decay, and it became necessary, to protect petitioner's crop from depredation from stock and cattle, for the fence to be rebuilt, he (petitioner) undertook to rebuild the fence along the line of division, and altogether on his side of the ditch, and in no way interfering with the land or rights of the said Dorsett, when he was met by an injunction restraining him from building his fence. The prayer of the petitioner is that the middle of the ditch be recognized as the boundary line. In this action defendant joined by filing an answer, in which he alleged that the fence that Scott tore down and destroyed was built by him (Dorsett) at his own expense, years ago; that he had inherited the land included within the fence as a boundary, and of which he and his father had been in peaceable possession for more than 30 years, and that it was the boundary line between him and Thompson, from whom plaintiff acquired his land; that Scott tore down the fence, against his remonstrances, and that, instead of erecting his fence on the old line, he ran it across the old line, and on the land of defendant, for the distance of 70 or 80 yards in length, thereby disturbing the possession of defendant (relator here). Relator (Dorsett) avers that the district court found it impossible to try the two suits as a consolidated suit, although it appears that an

order of consolidation had been previously issued; that, in consequence of its not being possible to try the two suits together, the suit of relator (Dorsett) was taken up; that plaintiff (Dorsett) offered his evidence in chief; that defendant offered his evidence, and then plaintiff offered his evidence in rebuttal; that the same method was pursued in the case of Scott against Dorsett. It was agreed that the testimony taken in each case could be used as evidence in the other, as far as it was practicable. Relator avers that the district judge rendered a separate and distinct judgment in each case, but made the judgment he rendered in the case of Scott against Dorsett the criterion by which he decided the suit of Dorsett against Scott; that he rendered a judgment in the case of Scott against Dorsett, decreeing that the middle of the ditch be the boundary, and in the trial of Dorsett against Scott rejected relator's (Dorsett's) demand, with \$100 damages.

Relator complains, in the first place, of the consolidation of the two suits. It was not alleged that he took a bill of exceptions to the court's ruling in consolidating the two cases. Moreover, the cases were gathered from the averments were virtually tried separately, and it does not appear that relator's rights were prejudiced by the consolidation. With reference to the complaint that the court took the judgment rendered in one case as the basis for its judgment in the other, we think it sufficient to say the court could not well avoid taking its judgment in one suit as a basis for a judgment in another suit. Both cases had the same cause of action. All the rights of each of the parties were involved in each suit relating to the same subject-matter.

The next complaint is that the issues were viewed as those arising in a boundary action, when, in reality, the action was possessory. Granted that plaintiff's action was possessory at first, we have seen that some time after that action was brought,—i. e. the suit by Scott to fix the boundary line,—he (Dorsett) met the issues presented by Scott's action to fix the boundary line. He pleaded a general denial, and in effect consented to try the question of boundary, as we glean from the expressions of the answer. He did not interpose the least objection to the form, or even to the name, of the action, which was unquestionably an action to fix a boundary. After this he had no right to return to his first suit (his possessory action), and claim a right of possession which he failed to claim in the action of boundary. It being evident, in our view, that the issues were all merged in the action of boundary by the effect of the pleadings, we do not discover that there was an error in admitting verbal testimony going to show that the boundary line had been fixed as alleged by Scott in his action of boundary. It is well settled that in an action of boundary verbal testimony is admissible in re-establishing lines.

We have given the record before us our

careful attention, and from it have gathered that there is no question of law to be reviewed, and no fact which we think we should consider on the application made. In re Ingersoll, 50 La. Ann. 743, 23 South. 889. It is therefore ordered, adjudged, and decreed that plaintiff's (relator's) application be rejected, and his action dismissed.

Rehearings, under a rule of this court, are not admissible in this class of cases.

(51 La. Ann. 896)

HINNRICKS v. MONTELEONE. (No. 18-129).¹

(Supreme Court of Louisiana. April 3, 1899.)

APPEAL—REVIEW.

It appears by the statement of facts that relator consented to pay for the work done by the workman in whose favor judgment was pronounced, after the loss of his house, which rendered useless the completion of the work (almost complete at the time of the accident). The district court and court of appeals, upon the state of facts shown, decided that the workman was not at fault. This court found no ground to grant an application to review the proceedings.

(Syllabus by the Court.)

Certiorari to court of appeals, parish of Orleans.

Action by J. H. Hinnricks against A. Monteleone. Judgment for plaintiff. Application by defendant for certiorari. Dismissed.

Albert Voorhies, for petitioner. Respondent judges, pro se.

BREAUX, J. Relator, in substance, sets forth that a judgment of the court of appeals affirming a judgment of division D of the civil district court is erroneous, on a number of grounds; and he asks that a writ of certiorari be issued to the court of appeals, directing that court to transmit to this court the whole record of the suit of J. H. Hinnricks against A. Monteleone, for review and decision of questions of law, and, further, to pass upon all facts involved, as in the case of an appeal to the supreme court. The grounds of the relator are that the court of appeals overlooked, or practically overruled, the opinion rendered in *Hunt v. Suarez*, 9 La. 434, which decision properly interpreted articles 2758 and 2759 of the Revised Civil Code. The first article of the Code cited reads: "When the undertaker furnished the material for the work, if the work be destroyed, in whatever manner it may happen, previous to its being delivered to the owner, the loss shall be sustained by the undertaker, unless the proprietor be in default for not receiving it." There can be no considerable dispute about the law, as it is plain. Relator contends that his case comes within its terms. This, on the other hand, is practically answered in a contrary sense by the pleading before us and the statement of facts. With reference to the

statement of facts, we find that, plaintiff and defendant having failed to agree, the district judge made it up under article 603, Code Prac., as a deposition had not been taken in writing. This statement now before us sets forth that relator agreed to pay the sum of \$480 for a show case made at plaintiff's factory; that on the 28th of October, 1891, the show case was set as agreed upon, and there remained only the glass to be fitted in; that the glass was in a box on the premises, in sizes to suit, and the fitting in could have been done in two hours. Then a fire occurred, damaging defendant's building; doing no damage, however, to the show case or to the glass. On the day after the fire, plaintiff offered to put the glass in place, but defendant told him not to do so, and that the bill would be paid. The city authorities, finding defendant's building unsafe, ordered its demolition. It was done, and the relator secured the full amount of his insurance on the building. When plaintiff offered to prove the value of the show case, the defendant (relator here) admitted that he did not rest his defense on article 2765 of the Revised Civil Code; that plaintiff should either recover all he claimed, or recover nothing; that this was made as a matter of argument in his admission during the trial. The glass, which was packed in a box, was removed away from the premises, as defendant refused to take care of it. In a few days it was carried to Hinnricks' factory, but he notified defendant, Monteleone, that he held it subject to his orders. Subsequently this glass was destroyed by fire in plaintiff's factory. The case of *Monteleone v. Insurance Co.*, 47 La. Ann. 1563, 18 South. 472, in which case the court decreed insurance money for the house in which the show case was erected, was made part of the statement of facts to prove that Monteleone collected the policies of insurance on the building. This statement is signed by the district judge by whom it was made.

From the foregoing it is manifest—First, by the effect of the consent; and, second, by the evidence, and the theory on which the case was argued,—that relator's case was taken out entirely from the application of the quoted article. If the facts be as stated, the matter was one of consent on the part of Monteleone. He consented to pay plaintiff the two hours due on the work. The statement of facts was made under the authority of law. No objection appears of record, and no bill of exception was taken. We would not be warranted in remanding the case to ascertain in what respect an error of fact might have been committed. The matter, in our judgment, is finally settled. Relator has had his day in court. In order to have another here, we would have to treat as not written the statement of facts accompanying his application. This we are constrained to decline.

Again, relator avers that in preparing a

¹ Rehearings in this class of cases are not admissible, under the rules of this court.

statement of facts, counsel disagreeing, the judge a quo found upon the isolated statement, showing Monteleone's consent to pay for the work, which was in direct conflict with plaintiff's judicial admission in both petitions, and against the insertion of which in the statement of facts he was powerless; that the court of appeals, disregarding all the proceedings, found, as an additional ground for affirming the judgment of the district court, that Monteleone particularly promised to pay the amount of plaintiff's claim. From this it appears that the court of appeals had accepted the statement of facts made out in the district court as correct. We must say, in answer to this position, that we have not found great conflict between the statement of facts and the allegations of plaintiff's petition (relator here). The allegation of Hinricks which relator says is contradicted by the statement of facts is, in substance, that Monteleone forbade him (Hinricks) from finishing the work, and refused to pay him. This would not necessarily be in conflict with evidence showing that at some prior time Monteleone had stated to Hinricks that he would pay for the work as a whole, and not to finish it. Besides, the judge having in fact certified that Monteleone consented to pay for the work, in the absence of any evidence of objection to the proof we are warranted in concluding that there was no conflict, and that the evidence was admitted without objection. Relator was not without some remedy in the district court, and, if the statement of facts was erroneous, there should be something before us to show that objection was timely made before the district court. There is here nothing of the sort.

Returning to our first proposition, in answer to relator's complaint of the contradiction between the statement of facts prepared by the district judge and Hinricks' admission contained in his petition, we heretofore copied the asserted admission as decided by the relator. The admission, if it be one, must be taken as a whole. It reads: "That on the evening of said fire the said Monteleone requested petitioner not to go on with the work of putting in the plate glass for some days; and finally (say, about the end of November) your petitioner having offered to put in said plate glass and finish his work under the contract, the said Monteleone forbade him to finish the work, and refused to pay him the amount contracted for." Taken as a whole, it may well be that at some time Monteleone promised to pay for the work, and afterwards "he forbade him to finish the work, and refused the amount contracted for." It does not follow that there was necessarily a contradiction, and the evidence having been admitted, so far as the record discloses and the pleadings, without objection, a ground does not arise here upon which we can reverse the judgment. The application is not granted, and the petition is dismissed.

(51 La. Ann. 923)

DELPIT et al. v. YOUNG. (No. 12,871.)
(Supreme Court of Louisiana. April 3, 1899.)
MARRIAGE—NULLITY—MISTAKE IN PERSON—RIGHT
OF ACTION—DEFENSE—APPEAL.

1. Where the nullity charged against a marriage is relative, and not absolute, the contracting parties retain their status as married persons until such nullity is ascertained and declared by a competent court.

2. In such case, the father of the minor emancipated by marriage has no right of action, in himself, to sue for the nullity of such marriage, and his minor son does not need his aid in bringing the suit.

3. Nor does the female minor emancipated by such marriage need a tutor or curator, nor the authorization of her husband, nor of the court, in order to enable her to defend such suit.

4. An appellee, who files an answer to the appeal, praying that the judgment appealed from be affirmed, will not be heard, through the argument of counsel, complaining of the basis upon which such judgment rests.

5. The words "mistake in the person," as used in articles 91 and 110 of the Revised Civil Code, which prescribe the causes for which marriages may be annulled, do not mean mistake in the character of the person, or in his or her attributes, condition in life, or previous habits.

Nicholls, C. J., and Blanchard, J., dissenting.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Nicholas H. Rightor, Judge.

Action by A. Delpit and G. A. Delpit against Lizzie Young. Judgment for defendant, and plaintiffs appeal. Affirmed.

Auguste F. Delpit, "acting in his own behalf and as natural guardian of George Augustin Delpit, his minor son," and George Augustin Delpit, "suing for himself," allege that George Augustin Delpit, then 20 years old, was married in this city, September 28, 1897, without his father's knowledge or consent, to Lizzie Young, the defendant, and that said marriage was and is null and void for the reasons (1) that said Delpit was a minor, living under the paternal roof, and his father and mother have never consented to his marriage, but objected thereto as soon as they were informed of it, and still object; (2) that said Delpit, in consenting to said marriage, was deceived and imposed upon, and was in error as to the person whom he was marrying, in that she represented herself, and he believed her, to be a virtuous woman, whereas, as he has been informed since said marriage, she had previously been living in illicit connection with divers persons, one of whom is named in the petition. It is further alleged that said Delpit would not have married defendant if he had not been led to believe that she was virtuous and of previous good moral character. The prayer of the petition is "that the marriage be invalidated, and declared null and void." Defendant excepted, on the following grounds: (1) That she is a minor, and incompetent to stand in judgment; (2) that, as a married woman, she is incompetent to stand in judgment without the authorization of her husband, or the court, and that no such authorization has been obtained; and,

in the event that these exceptions are overruled, she further excepts that the allegations of the petition are too vague and indefinite, and that they disclose no cause of action. These exceptions were argued before, and taken under advisement by, the learned judge a quo, April 25, 1898. Upon May 4th, following, a supplemental petition was filed, in which plaintiffs allege that, immediately after the discovery by him of defendant's immoral cohabitation before marriage, as charged in the original petition, George Augustin Delpit broke off all connection, and has never since cohabited, with her. Upon this supplemental petition there was an order of court authorizing it to be filed, and authorizing the defendant to stand in judgment; but the supplemental petition was not served upon defendant, nor was she cited to answer it, and thereafter, in that condition of the case, there was judgment maintaining the "exception" and dismissing the suit. The plaintiffs have appealed, and the defendant has filed an answer to the appeal, praying that the judgment be affirmed, with damages as for frivolous appeal. In the course of his oral argument, counsel for defendant called the attention of this court to the fact that the supplemental petition had not been served on his client, and that she had not been cited to answer it, and suggested that the averments contained in it should be disregarded in passing upon the exceptions, which, as he claims, were only addressed to the original petition.

Albert Voorhies, for appellants. Theodore Cotonio, for appellee.

MONROE, J. (after stating the facts). It will be observed that the defendant is not complaining of the judgment of the court a quo, but, on the contrary, has filed in this court a written answer to the appeal, praying that that judgment be affirmed. The suggestion, therefore, that the judgment in question lacks the essential elements of citation and service of petition, quoad at least so much of plaintiffs' case as is stated in the supplemental petition, is illogical. She cannot attack the basis upon which the judgment rests, and at the same time ask that the judgment be affirmed; and, as the latter request has been placed of record as part of the pleadings in the case, we are of opinion that she cannot be heard to urge the former by way of argument. *Gayoso de Lemos v. Garcia*, 1 Mart. (N. S.) 326, 327.

Dealing with the question of the capacity of the parties litigant, it is evident that the nullity charged against the marriage is relative, and not absolute; from which it follows that, until said marriage is annulled by a judgment of a competent court, the contracting parties occupy the status of minors emancipated by marriage. This being the case, the husband needs no tutor or guardian to aid him in bringing the suit, and his father, having no right of action on his own account, is a supernumerary in the case. If the wife's

status as a minor emancipated by marriage could be disassociated from her status as a married woman, the same thing might be said of her. "The minor emancipated by marriage," says the Code, "can appear in courts of justice without the assistance of a curator. The husband, who is a minor, can also authorize his wife to appear therein, whether she is a minor or of full age." Rev. Civ. Code, art. 380. See, also, *Id.* art. 382; Code Prac. art. 110.

Considering the question with reference to defendant's status as a married woman, it was said in *Favaron v. Rideau*, 14 La. Ann. 805, that "the object of the law in requiring the authorization of the husband, or court, before the wife can be sued, is fully accomplished when the husband joins the wife in the answer to the suit, even if they have not been designated as husband and wife in the petition"; and the reason which underlies this construction applies with greater force to the present case, where the husband does not authorize the wife merely by implication to appear in court, but invokes the authority of the court to compel her to appear, while the court, upon the other hand, could not refuse to hear her without denying a sacred right, guaranteed by the fundamental law. *Lacoste v. Guidroz*, 47 La. Ann. 283, 16 South. 836.

Considering, now, the exception of "no cause of action," it is addressed to the two following propositions, which the plaintiff husband relies on as embodying his cause of action, to wit: (1) That the plaintiff was a minor when the marriage took place, that he did not have the consent of his parents, and that he did not furnish proof of such consent to the officer to whom he applied for permission to marry; and hence that the marriage was and is null. (2) That, inasmuch as he was led to believe that he was marrying a virtuous woman, when in point of fact the defendant had previously led an immoral life, there was a mistake in the person, within the meaning of articles 91 and 110 of the Revised Civil Code. The first of these propositions is answered by article 112, Civ. Code, which provides that "the marriage of minors, contracted without the consent of the father and mother, cannot, for that cause, be annulled." The second proposition finds a divided support in the refined analyses of some of the commentators on the Code Napoleon. The following are the provisions of that Code and of the Civil Code of Louisiana bearing upon the subject: Code Nap. art. 146: "Il n'y a pas de mariage lorsqu'il n'y a point de consentement." Rev. Civ. Code, art. 91: "No marriage is valid to which the parties have not freely consented. Consent is not free: (1) When given to a ravisher, unless it has been given by the party ravished after she has been restored to the enjoyment of liberty. (2) When it is extorted by violence. (3) When there is a mistake respecting the person whom one of the parties intended to marry." Code Nap. art. 180: "Le mariage qui a été contracté sans la con-

seulement libre des deux époux, en de l'un deux, ne peut être attaqué que par les époux, ou par celui des deux dont le consentement n'a pas été libre. Lorsqu'il y a eu erreur dans la personne, le mariage ne peut être attaqué que par celui des deux époux qui a été induit en erreur." Rev. Civ. Code, art. 110: "Marriages celebrated without the free consent of the married persons, or one of them, can only be annulled upon application of both the parties, or of that one of them whose consent was not free. When there has been a mistake in the person, the party laboring under the mistake can alone impeach the marriage."

Under the old law, in France, the only exception to the rule that nullity of marriage, by reason of error in the person, existed only where the error was one of physical identity, was where a slave was taken in marriage in the belief that such slave was free. Poth. *Traité du Mar.* Nos. 308, 310, 311. When the Code was under discussion before the council appointed by him, the Emperor Napoleon, then, as Marcadé remarks, "only thirty-one years of age," took a very active part in that discussion, and appears to have given the assembled juriconsults his views in very plain language, "exercising," according to the author mentioned, "a much greater influence than one could believe." He told them that they had not even the idea of the institution of marriage, and that a particular article, which they had favorably considered, would produce results in conflict with his system, and the proposed text was thereupon rejected. Among other things, in the same connection, he appears to have insisted that "error in the person," as a ground for annulling a marriage, should be considered as meaning the same thing, or as including within its meaning, "error in the character, attributes, or quality of the person." Thus, he is quoted as having said to the council: "Rappelez-vous ce que vous avez dit sur les nullités. L'erreur des qualités, que vous appelez erreur de personne, permet de faire annuler le mariage." 1 Marcadé, p. 475. Nevertheless, the articles to which he referred were incorporated in the Code as they have been hereinabove quoted, and this notwithstanding the fact that, as the law was then construed, the most that was claimed was that "error in person," as a ground of nullity, extended to, and included, error in social, as well as physical, identity; that is to say, that it included, or might include, a case where a woman, marrying a man in the belief that he is a nobleman of high social position, learns afterwards that he is a liberated convict. The only exception admitted by Pothier, however, to the rule of physical identity, is in the case of a slave supposed to be free, while as to other claimed exceptions he says: "Il est en autrement lorsqu'elle ne tombe que sur quelque qualité de la personne. Par exemple, si j'ai épousé Marie, la croyant noble, quoiqu'elle soit de la basse roture; ou la croyant vertueuse

quoiqu'elle se fut prostituée; ou la croyant de bonne renommée quoiqu'elle ait été flétrie par la justice; dans tous ces cas, le mariage que j'ai contracté avec elle ne laisse pas d'être valable, non-obstant l'erreur dans laquelle j'ai été à son sujet." Poth. *Traité du Mar.* No. 310.

It is said by Marcadé that the change in the French law was affected, more particularly, by the second paragraph of article 180 of the Code Napoleon, which is fairly translated by the second paragraph of article 110 of our Code, and, so translated, reads: "Where there has been a mistake in the person, the party laboring under the mistake can alone impeach the marriage." And the learned author claims that this paragraph contemplates error in the qualities of the person, rather than in the physical identity, and that it can contemplate nothing else. He therefore considers as embraced within its meaning such cases as the following, to wit: Where one of the parties proves to be impotent; where one marries a prostitute, believing her to be virtuous; where one, being a Catholic, marries a person who has taken vows; where one marries a liberated convict, believing him to be honorable; where one, being a Catholic, contracts a civil marriage with a person who thereafter refuses to receive the benediction of the church. Upon the other hand, he thinks that, to annul a contract so sacred as that of marriage, the error should be profoundly grave, and that it should be personal with respect to one of the contracting parties, and that, if one marries a person believing him to possess talent or to be versed in science when he has and is neither, or marries a person believing him to be rich when in fact he is poor, or believing him to be noble when in fact he is plebeian, the marriage ought not to be annulled for these reasons. He also thinks that the status, or (perhaps it is) the probable sensitiveness, of the party who is deceived, ought to be considered; for he says that the prostitution of the woman and the fact that the man has been a convict ought not to be considered, if the other contracting party in the first case is himself a person of no great morality, and if in the second case it turns out that the convict was more unfortunate than criminal. And finally he concludes that the whole matter ought to be left to the discretion of the judge, to determine in any given case whether either party to a marriage contract has been mistaken or deceived in the other, and, if so, whether the matter is sufficiently serious to justify him in declaring the contract null and void. The author mentions but two cases in which his theory had been applied under the Code Napoleon,—the one, decided in 1811, where one of the contracting parties proved to be a priest, and the other, decided in 1827, where an adventurer passed himself off in marriage as an Italian baron; both marriages being annulled.

Demolombe seems to be much of the same opinion as Marcadé, while other French writ-

ers shade off into various degrees of perplexity. It will be observed that the Civil Code was first adopted in Louisiana before either of the cases referred to by Marcadé had been decided, and hence, in all probability, at a time when the interpretation of the French law as given by Pothier and the older writers still obtained, and there was no reason to suppose that any other interpretation would be placed on it.

Our present Code was approved, as an act of the general assembly, in March, 1870. It was adopted in the English language, by a legislative body composed mainly of English-speaking members; and, while we are not informed as to how many of them were familiar with the Code Napoleon, or with the commentaries upon that Code, we think it probable that the language contained in the articles under consideration was used rather because it was found in our previous Codes than because of any intention to adopt the theories of the French commentators on the Code Napoleon. So that, if we are to be influenced by the French interpretation of the French law, as operating on the minds of our legislators, the logical thing would seem to be, not to endeavor to find out what that interpretation is, amid the multiplicity and contrariety of opinion of the later writers, but to go back to the time of the adoption of our Code of 1808, when, as we have seen, "*erreur dans la personne*" was interpreted to mean but little, if anything, more than error in the physical identity of the person. Beyond this, it must be remembered that the views of these later commentators are to be considered with reference to the conditions by which they were surrounded, and for the purposes of which they interpreted the law. There was a state church and a national religion, and a social fabric built up of classes separated by wide and deep gulfs. There were strong influences, therefore, pulling in the direction of that construction of the law whereby the marriage of a priest vowed to celibacy would be decreed null, and whereby the marriage of an adventurer masquerading as a nobleman would be similarly dealt with. But in Louisiana the church and state are separate. We have no distinctions between princes and peasants, but all men are born free and equal, and marriage, in the eye of the law, is purely and absolutely a civil contract. The law prescribes who may enter into it, how it may be entered into, and specifies the causes for which it may be annulled or avoided. Under these circumstances, it seems better to interpret our marriage law without the aid of criticism which is inappropriate to the conditions under which it was enacted and to which it is intended to apply; and, so interpreting it, we think that, if the general assembly had intended that marriages should be annulled when the one party mistakes the character, the social standing, the pedigree, the acquirements, the pecuniary means, the habits, the temperament, or the religion of the other, or when

the one party, after the marriage, discovers "redhibitory" vices in the other, some language, beyond the words "mistake respecting the person," would have been found to express that intention.

If the marriage of a woman is to be annulled because she was unchaste before marriage, what is to be done in the case of a man? If the courts are to determine whether the mistake is sufficiently serious, how are they to deal with people who, having united themselves together "for better, for worse, in sickness and in health," etc., present a case where the one develops hereditary disease, such as consumption or insanity, of the possibility of which the other was ignorant, or becomes confirmed in a pre-existing alcohol or opium habit, of which the other had no knowledge? No such doctrine as that propounded by the learned counsel for the appellant has as yet found a place in our jurisprudence, and the language of our Code, interpreted according to familiar canons of construction, does not justify its introduction. In 1897 a case was presented to the high court of justice in England where it appeared that the defendant wife was actually pregnant at the date of the marriage, without the knowledge of the husband, and gave birth to a child shortly afterwards, thus imposing upon the unfortunate husband a child not his own. The court reviewed the entire jurisprudence of the English courts, compared it with that of the continent of Europe, criticised adversely certain American cases, and in a most elaborate and exhaustive opinion reached the conclusion that by the law of England error as to the chastity of the wife is not such a "mistake as to the person" as will entitle the deceived husband to annul the marriage; such an error not involving the want of consent, for which, alone, marriages can be annulled under the English law. *Moss v. Moss* [1897] Prob. 283.

The case is not one in which the appellee is entitled to damages. The judgment appealed from is therefore affirmed, at the cost of the appellants.

NICHOLLS, C. J., and BLANCHARD, J., dissent.

(61 La. Ann. 56)

JORDY v. MUIR. (No. 12,571.)

(Supreme Court of Louisiana. May 30, 1898.)

MARRIED WOMEN—SEPARATE ESTATE—EVIDENCE—CONTRACTS.

1. Jurisprudence has affirmed the principle that the ability of the wife to acquire, during the marriage, property in her own name, and for her separate, paraphernal account, is an exception to the general rule which is established by the Civil Code, and it must be strictly and rigidly construed.

2. That, in order to sustain her title, she is required to prove that she had paraphernal effects at her disposal adequate to enable her to make the new acquisition.

3. That it is against the policy of the law, and the spirit and letter of our system of legal community, to sanction contracts made by mar-

ried women, under the pretext of investing her paraphernal effects, when the amount invested bears no just proportion to the value of the property that is substituted therefor.

On Rehearing.

The recital, in the act by which the wife purchases, that it is made with her paraphernal funds, the husband a party to the act, the sale made on credit, is evidence for her to charge the husband with the amount of the cash payment, it being established that he subsequently sold the property and received and applied the proceeds.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; George H. Théard, Judge.

Action by Numa Jordy against Sophie Muir, his wife. Judgment for plaintiff. Defendant appeals. Reversed.

A. B. Phillips and Albert Voorhies, for appellant. Armand Romain and Charles A. Butler, for appellee.

WATKINS, J. The demand and prayer of the plaintiff for a judgment of divorce a vinculo matrimonii from his wife, the defendant, forever dissolving the bonds of matrimony between them, and granting him the custody of their minor children. On the trial there was judgment rejecting the plaintiff's demands, and one rendered in favor of the defendant, decreeing a separation a mensa et thoro, and giving her "the permanent care and custody of the minor children" of the marriage, the defendant's money demand being dismissed. In the lower court the defendant filed a rule for a new trial solely on the ground that her money demand against her husband had been rejected, affirming the correctness of the judgment in all other respects, and, the same having been discharged, she prosecutes this appeal; the plaintiff having acquiesced in the decree as rendered, confessing thereby that the charge of adultery he had preferred against his wife was not sustained by the evidence. Hence the question presented for decision is rather one of money than of divorce. In the answer of the defendant she avers that "in the month of April, 1895, she gave to her husband her check for \$2,300, proceeds of the sale of her paraphernal property, old No. 232, N. Galvez street, which said property was sold for \$2,550, he receiving the check from her, amounting to \$2,300, and that he collected same, and converted it to his own use," for which sum she prays judgment against him personally. It appears from other averments of her answer that these alleged transactions occurred during the marriage which was celebrated on the 11th of March, 1879; and the deed of sale which was executed in favor of the defendant bears date December 10, 1886. The position assumed in argument by defendant's counsel is that the property acquired thereby became the separate paraphernal property of the wife, and that the proceeds of its sale were likewise; and the receipt and use of the proceeds by the husband created a paraphernal indebtedness

in her favor, for which she is entitled to recover judgment in such suit as this. On the contrary, it is assumed in the argument by plaintiff's counsel that the property purchased became and was an asset of the matrimonial community at the time existing between the spouses, and that the proceeds were likewise, the purchase price of said property having been paid with funds and money of the community. To this last contention defendant's counsel replies that the plaintiff is equitably estopped from urging the aforesaid plea as a defense, because he appeared before the notary who passed the act of sale, and in his presence, and that of the witnesses, signed and ratified the sale to his wife as paraphernal property, and cannot now be heard to gainsay or deny that act of ratification and acquiescence in an action to which the husband and wife are the only parties, no creditor of either asserting any interest therein. For this last contention counsel for the defendant relies upon the support furnished by the opinions of this court in *Kerwin v. Insurance Co.*, 35 La. Ann. 33, and *Maguire v. Maguire*, 40 La. Ann. 579, 4 South. 492; and, having consulted those decisions we have found that the plea of estoppel was maintained in each of them. But in *Succession of Belande*, 41 La. Ann. 491, 6 South. 505, the court held that under appropriate averments error might be shown, the act reciting that the property "was acquired by [the] wife with her paraphernal funds, and for her separate benefit and advantage, although [the husband] was a party to the act." And in the same case (42 La. Ann. 241, 7 South. 535) we repeated what was said in the first report of that case,—that the husband "must be held to establish the error by strong legal and convincing evidence." But, even giving the defendant the full benefit of those decisions, she is, at all events, bound by the recitals which are contained in the act of sale to her. Consulting them, we find the following, viz.: "That Charles Garvey, * * * for the consideration and on the terms and conditions herein after set forth and expressed, does by these presents grant, bargain, sell," etc., "unto Mrs. Sophie Muir, wife * * * of Joseph Numa Jordy, * * * her said husband, with her here present, * * * accepting and purchasing with her own separate paraphernal funds, for herself * * * the following described property, to wit," etc. Omitting the description of the property, the consideration is thus stated, to wit: "This sale is made and accepted for and in consideration of the price and sum of \$2,500, of which the sum of \$716.19 has been paid in cash by said purchaser to said vendor; and for the balance of said price said purchaser assumes and binds herself to pay in the lieu and stead of said vendor a certain promissory note, drawn by said vendor to his own order, and by himself indorsed, dated 12th of September, 1885, and made payable for \$400, in two years after date [and secured by mortgage] * * *; and for

the balance of said price said purchaser has made and furnished her two promissory notes, drawn by him to her own order, and countersigned by her said husband to authorize her, dated this day, and made payable, each for the sum of \$691.90, respectively, at one and two years after date," and secured by vendor's lien and mortgage.

From the foregoing it appears that of the total price the sum of \$716.19 only was paid on the execution of the deed, and that she assumed and promised to pay for the vendor a mortgage note which burdened the property, and executed two notes for the aggregate balance of \$1,383.80, secured by mortgage and vendor's lien on the same. The question necessarily arises, on the face of the act containing these recitals, whether it carried to the defendant a separate, paraphernal title to the property. We are not disposed to think it did. In *Bouligny v. Fortier*, 16 La. Ann. 209, our predecessors gave this question most serious and thoughtful consideration, and in the course of their opinion said: "We have stated that the right of the wife to invest or reinvest her paraphernal effects is derived from the liberal interpretations given to articles 2361 and 2367 of the Civil Code. Were it not so, the investment would inure to the community to the extent of the amount invested. We have searched in vain in our reports for a case where the right of the wife to invest beyond her means was sanctioned by this court, but we have, on the contrary, found numerous decisions either setting aside conveyances made to the wife, on her failure to show adequate means, or maintaining similar conveyances by reason of such adequate means. *Ellis v. Rush*, 5 La. Ann. 116; *Sculer v. Stockton*, Id. 742. *Young v. Young*, Id. 611; *Metcalf v. Clark*, 8 La. Ann. 286; *Pearson v. Pearson*, 15 La. Ann. 119; *Clark v. Norwood*, 12 La. Ann. 598; *Cormier v. Ryan*, 10 La. Ann. 688; *Bass v. Larche*, 7 La. Ann. 104. As the ability of the wife to acquire, during the marriage, property in her own name, and for her separate account, is, in our jurisprudence, an exception to the general rule (Civ. Code, art. 2374), it must be therefore strictly and rigidly construed; and, consequently, the wife is required, not only to prove that she had paraphernal effects at her disposal, but also that they were ample to enable her, reasonably at least, to make the new acquisition; otherwise, the contract will be treated as a contract of the community. * * * The authority to invest does not carry with it the unbounded liberty to run into wild and ruinous speculations, and was never intended to place the wife having paraphernal property on a footing of perfect equality with a wife separated in property by judgment or by contract, as would be the case did we hold the third opponent to her contract. We therefore conclude that it is against the policy of the law, and the spirit and letter of our system of legal community, to sanction contracts made by the wife under the pretext of investing her

paraphernal effects, when, as in the case at bar, the amount invested bears no proportion to the value of the property substituted in its place; but, on the contrary, that all such acquisitions belong to the community, saving always to the wife her action for the reimbursement of the price contributed by her." In that, as in the instant case, the wife attempted to purchase a piece of real estate in her own paraphernal title, during the existence of her marriage, to a large extent upon terms of credit, the greater portion of the purchase price being represented by the vendee's assumption of the vendor's obligations, which were secured by mortgage on the property. To our thinking, there is a strong analogy between the two cases, in each of which the wife, during her marriage, sought to acquire paraphernal property, largely upon terms of credit, without making any proof of her possession of adequate separate property or revenues to meet her obligations at their maturity. Under this state of facts, it goes without saying that same would have to be met by the application of community revenues when they become due, to avoid a seizure and sale of the property; and this result demonstrates clearly that the wife had no separate title at the time of the sale. But there was evidence administered by the defendant at the trial which strengthens the conclusion that the property was not her paraphernal property, same being to the effect that the credit part of the purchase price was paid by the husband to a great extent. The statement of Numa Jordy, Jr., one of the children of the marriage, is shown by the following interrogation, to wit: "Q. Who paid the notes as they became due? A. My mother and father, both. They both threw in and helped. My mother gave music lessons, and she borrowed money when she did not have the requisite amount,—the required amount." In addition to this, the fact was developed that the plaintiff was in the employ of the firm of Stauffer, Eschelman & Co. at the time the deed was executed, and borrowed from them the sum of \$750 on that day,—that being about the amount which was paid in cash for the property, as recited in the deed. The cashier of the firm, as a witness, makes the following statement, viz.: "I will state to the court that when I received instructions to pay out those sums it was stated to me, and instructed, that I should make a memorandum that this money was to be refunded by monthly payments, and that it was given for the purpose of paying up for a residence." After making this statement, the following occurred, viz.: "Q. Will you swear also that those advances were made by you, as an agent of that firm, through instructions of the senior member of that firm, and that those instructions were that those advances were to be made on condition and for the purpose of meeting partial payments on a residence,—due on a residence? A. To the best of my recollection, those were my instructions." To the foregoing interrogatory and

the answer sought counsel for the defendant objected on the ground that the testimony was "hearsay, irrelevant, and incompetent," and, his objection having been overruled, he reserved a bill of exceptions. In our opinion, the testimony was relative and competent. It was not hearsay, because the alleged instructions came from the senior member of the firm; and it was not made to appear that they were given primarily by the plaintiff. This evidence goes to strengthen the inference that is to be drawn from the book entry showing that the amount the plaintiff borrowed on the day of the sale was the identical money used in making the purchase. Altogether, we are thoroughly impressed with the belief, founded upon the law and the evidence, that the sale did not invest a separate, paraphernal title to the property in the defendant; and, resting our decision upon this basis, we feel constrained to hold that the judge a quo decided the case correctly. Judgment affirmed.

On Application for a Rehearing.

(June 30, 1898.)

BREAUX, J. Plaintiff sued for a divorce. Defendant reconvened, and prayed for a separation from bed and board, and for a judgment on a moneyed demand representing her paraphernal rights. Plaintiff's demand for a divorce was rejected. Defendant's prayer for a separation a mensa et thoro, and for the care and custody of the children of the marriage, was granted. To this extent the judgment is a finality. To this length it will be affirmed by our decree.

Now, as to the remainder of the case, relating exclusively to a moneyed demand, defendant applies for a rehearing on the ground that she is entitled to relief, at least, to the amount set forth in her application for a rehearing. She avers that there is no estoppel in her favor as to the amount claimed, but that there is proof sustaining her moneyed demand growing out of a declaration contained in an act of purchase made during the existence of the community, to which act her husband was a party; that subsequently an act of sale was made during the existence of the community, also signed by her husband, containing recitals which she avers also sustain her moneyed demand. The asserted proof contained in these deeds is supported, she alleged, by the statement of her witnesses. As relates to this moneyed demand only, a rehearing is granted. As to it only the issues are left open for reargument, consideration, and final decision. Rehearing is refused save as to certain issues stated in foregoing reasons.

On Rehearing.

(January 9, 1899.)

MILLER, J. The sole issue now before us arises on the demand of the defendant against her husband for judgment for the amount of her paraphernal funds she claims he received and applied to his own use. To prove her

demand, she mainly relied on the statement in the act of sale of immovable property to her that the purchase was with her paraphernal funds, her husband being a party to the act, the purchase having been effected during the marriage, and it being established that the husband subsequently sold, received, and applied the proceeds of the property thus purchased. The purchase price was part cash and part to be paid on one and two years' credit. We held that in a purchase of that character by the wife to maintain her title she must show that, besides the paraphernal funds used in the cash payment, she had such means to an amount adequate to make the credit payments, and in this connection we cited the leading case of *Boulligny v. Fortier*, 16 La. Ann. 209. It is insisted on the rehearing that on this branch of the case we failed to give effect to the recital in the act claimed to furnish full proof against the husband that the entire price was paid with paraphernal funds, and of his liability for the proceeds received by him from the sale of the property. The right of the wife, under our Code, to administer and alienate her separate or paraphernal property, has been deemed to carry her right to acquire paraphernal property during the marriage. Our jurisprudence in this respect exempts such acquisitions from the general rule that all property bought during the marriage by either spouse falls into the community. But to maintain the wife's title to property bought by her during the marriage she must prove that such purchases are made with paraphernal funds not under the husband's administration. *Rev. Civ. Code*, arts. 2383, 2384, 2390, 2400; *Terrell v. Cutrer*, 1 Rob. (La.) 367; *Stroud v. Humble*, 2 La. Ann. 930; *Boulligny v. Fortier*, 16 La. Ann. 209; *Miller v. Handy*, 33 La. Ann. 166. In a controversy like this between the spouses, no creditors asserting rights, the recital in the act of purchase that it is made with paraphernal funds is undoubtedly entitled to appropriate effect, and our decisions have accorded that effect. *Barbet v. Roth*, 16 La. Ann. 271; *Succession of Wade*, 21 La. Ann. 343; *Kerwin v. Insurance Co.*, 35 La. Ann. 33; *Succession of Bellande*, 42 La. Ann. 242, 7 South. 536. When, along with that recital, the entire price is paid cash, there would seem to be no difficulty in applying the husband's admission in the recital to the entire price. In this case we are asked to give to the recital the effect of an admission by the husband not only that the cash payment was with paraphernal funds, but that the future payments—i. e. the credit portions of the price—were paid with such funds. The wife's capacity to acquire paraphernal property is necessarily limited by the paraphernal means she possesses, and an admission by the husband of her use of paraphernal funds, naturally referable to the time when she buys, could not easily be applied as an admission of future payments with such means. On this question of the wife's competency to buy

on credit reason would seem to suggest that in such cases the proof at least should be exacted beyond such a recital as we find in this act, and should show that she was possessed of paraphernal funds adequate not only for the cash, but to meet the credit payments; and our decisions on the line of public policy, as well as law, have enforced the necessity of such proof. The wife has produced testimony to show she had the means to buy, but we think it fails of its purpose. The testimony tends to prove that after her marriage she gave music lessons; besides followed the occupation of a milliner, and borrowed from friends. But the earnings of the wife, not separate in property, fall into the community, and the debts incurred by the spouses are community debts. Rev. Civ. Code, arts. 2402, 2403; *Davock v. Darcy*, 6 Rob. (La.) 342; *Chauviere v. Fliege*, 6 La. Ann. 56. Hence payments of the credit installments of the price from such resources would not aid her pretensions in this controversy that the property was paraphernal. This is not, however, a demand for the property. That has been sold. The husband has received the proceeds, and she seeks a judgment against him for the amount of the proceeds as her paraphernal funds. In this form of controversy it seems to us that the declaration of the husband, in the act of purchase, that it was made with paraphernal funds, may, with reason, be applied as an admission that the cash payment was with paraphernal funds. We more readily reach this conclusion in view of the testimony in the record—not at all definite as to the amount—that she had some money when she married. The recital is, in our view, to be accepted as an admission that her paraphernal funds, to the extent of the cash payment, were used in the purchase of the property, and hence to that extent her claim as a creditor of the husband, in our opinion, is sustained. It is therefore ordered, adjudged, and decreed that our previous decision be avoided, and it is now ordered and decreed that the judgment of the lower court, in so far as it dismisses the money demand of the defendant, be, and it is hereby, reversed, and set aside, and that the defendant recover from plaintiff, her husband, the sum of \$716, with legal interest and costs.

NICHOLLS, C. J., absent.

(51 La. Ann. 367)

JENNINGS et al. v. HARDY, City Treasurer,
et al. (No. 12,870.)

(Supreme Court of Louisiana. April 3, 1890.)

DISMISSAL—LACHES.

1. Plaintiffs sued out an injunction in 1890 against the sale of their property, on the ground of a void assessment.

2. The case was not, for many years, called for trial. The papers were lost or mislaid in the clerk's office. The case was continued indefinitely. On motion of the assistant city at-

torney, it was reinstated, and plaintiffs ruled to supply the loss of their papers.

3. Held that, plaintiffs not having availed themselves of the opportunity afforded of supplying the loss, the suit was properly dismissed.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; George H. Théard, Judge.

Action by Mrs. A. M. Jennings and others against J. N. Hardy, city treasurer, and the city of New Orleans. Judgment for defendants, and plaintiffs appeal. Affirmed.

Benjamin Rice Forman, for appellants. Samuel L. Gilmore, City Atty., and Walter B. Sommerville, Asst. City Atty., for appellees.

BREAUX, J. Plaintiffs appeal from a judgment dismissing their demand as in case of nonsuit. Plaintiffs sued out an injunction to restrain defendant J. N. Hardy, city treasurer, from selling their property for taxes, on the ground that the assessments were void, not having been assessed in the name of the owners, nor the property described as required, and because it was sold without notice. Plaintiffs further averred that three of their number were in New Orleans at the date the injunction was filed; that the case was continued 13 times; that the defendant showed no disposition to try the case; that the case was continued indefinitely, and the record finally lost or mislaid; that on the 14th day of April, 1890, on motion of Mr. Sommerville, assistant city attorney, those of their number living were directed to show cause why the injunction should not be set aside and the suit dismissed. The following is a copy of the motion of W. B. Sommerville, assistant city attorney: " * * * And upon suggesting to the court that Mrs. A. M. Jennings, one of the plaintiffs herein, is now deceased, and that her co-plaintiffs are her heirs, and the only parties in interest; and upon further suggesting that the docket entries in this suit show that an injunction was issued in this case in the year 1891, and mover is informed that said injunction restrains the sale of lot No. 15 in square 228, bounded by Gravier, Baronne, Union, and Carondelet streets, in this city, measuring 42 feet by 103 feet, assessed in the name of Mrs. Anna H. Carter et al., all for causes unknown to mover; and upon further suggesting that the record in this case has been lost, and that defendant has no copies whatever of the papers served upon it, and has invoked the assistance of plaintiffs' counsel in vain to make up a record; and upon further suggesting that mover is willing to try this case upon any record that plaintiffs may now produce and file; and upon further suggesting that defendant cannot be kept in court without day, and that it is entitled to proceed against the property hereinbefore mentioned for the collection of the taxes due, without placing itself in contempt of the authority of this honorable court, and that one Henry Cleveland Perkins now claims to be the owner of the prop-

erty above described; and upon further suggesting that plaintiffs are nonresidents: It is ordered that the co-plaintiffs of Mrs. A. M. Jennings be recognized as the only parties in interest in this cause, and that they, through B. R. Forman, their attorney of record, or through a curator ad hoc to be appointed for the purpose, show cause on Monday April 11, 1898, at 11 a. m., if there be an injunction in this case, why said injunction should not be set aside, and this suit dismissed." We are also informed that Mrs. A. M. Jennings, one of the plaintiffs, is dead, and that there is no evidence of record showing who are the heirs, and that J. M. Hardy is also dead, and his successors in office were not made parties. The clause in the judgment of the district court dismissing plaintiffs' injunction, which is material in the case, is as follows: "And no evidence having been offered in support of plaintiffs' demand, and counsel for defendants having moved for a nonsuit, it is ordered that plaintiffs' demand be dismissed as in the case before stated." Plaintiffs ask that the judgment be reversed, and the case remanded.

Plaintiffs, in support of their demand on appeal, invoke Act No. 57 of 1886, and insist that the remedy of the defendant is provided for in that article; that the assistant city attorney made no attempt to comply with the statute which provides that all of the lost original papers of a suit may be supplied, and the suit reinstated, by either plaintiff or defendant filing with the clerk of court certified papers as required, or by producing any other admissible evidence of contents of lost papers. No attempt was made by either plaintiffs or defendant to comply with that statute. In our judgment, it was incumbent upon plaintiffs to reinstate its injunction. We take it that plaintiffs did not choose to avail themselves of the offer made by the defendant to assist in making up a record. Nothing we have discovered on record evinces the least intimation on the part of plaintiffs of a willingness to make up the record in the manner we understand was proposed by counsel for defendant. The judgment itself shows that plaintiffs failed to offer any evidence in support of their claim when the case was before the court for trial. The suit was continued after the motion to reinstate it had been filed, and, in our view, ample time was given to enable plaintiffs to get secondary evidence, if needed, and contents of papers filed. In addition to the fact that ordinarily the burden is on plaintiff to make up the record of his case, in the present suit, plaintiffs being plaintiffs in injunction, it was incumbent upon them to sustain their position by showing that they had grounds for an injunction as set forth in the papers which had been lost or mislaid. They did nothing of the sort, and remained inactive, despite the fact that they had been ruled to produce evidence in regard to their right to enjoin the sale it appeared that they had enjoined. The defendant, we

think, under repeated decisions, could compel plaintiffs to produce their proof. *Forsyth v. Lacost*, 2 La. 321. The burden of pleading being primarily with the plaintiffs, at least to the extent of proving the allegations of their petition, no good reason suggests itself why defendant should be compelled to supply plaintiffs' mislaid or lost papers. It would be different, had defendant insisted, after plaintiffs had, by competent evidence, reinstated their part of the case, that they should also reinstate its defense, as shown by its (defendant's) pleadings; but the reverse is the case here, and we feel constrained to affirm the judgment of the lower court. For reasons assigned, the judgment is affirmed.

MONROE, J., takes no part, as he was not a member of the court when the case was heard.

(51 La. Ann. 761)

GOLDMAN et al. v. GOLDMAN.

(No. 12,875.)

(Supreme Court of Louisiana. March 7, 1899.)

CONTRACT—CONSTRUCTION—LIQUIDATED DAMAGES—REDUCTION—ACTION FOR BREACH—BURDEN OF PROOF—RES JUDICATA.

1. A contract by a vendor of a mercantile business and good will not to engage in similar business in a specified place for three years, and stipulating for the payment by the obligor of a certain sum to the obligee in the event of a violation of the agreement, provides for "liquidated damages," and not for a penalty.

2. It will not do to apply to the results of a violation of an agreement "not to do" the rules applicable to a violation of an obligation "to do." There is an entire breach of an obligation "not to do" the moment the obligor does what he has covenanted "not to do," and the obligee is entitled to sue the obligor at once for the breach. He is not forced to wait until the end of the term fixed as that during which the obligor had covenanted not to engage in business, in order to ascertain (even if he could do so) the actual damage to result from the obligor's action.

3. An amount stipulated to be paid by way of "liquidated damages" is subject to reduction under certain circumstances no less than is that stipulated to be paid as a "penalty." In either class of cases, when reduction is permissible, and the obligee sues for the whole amount upon the instrument evidencing the agreement, the onus is upon the party claiming a reduction to establish the extent of the same. The obligee is entitled to rest upon the amount primarily agreed upon as that due, and is not called on to make extrinsic affirmative proof of his damages. In the absence of counter proof, he is entitled to judgment upon establishing the contract and showing its violation.

4. The mere length of time during which defendant may have observed or may have violated his obligation not to engage in business for a certain period furnishes no basis upon which to estimate a reduction either of a penalty or of liquidated damages.

On Rehearing.

1. Issues between parties in another suit had not been settled, and were not a bar to review.

2. This ruling was not binding upon the supreme court.

3. Issues involved interpretation of a penal clause of contract.

(Syllabus by the Court.)

Certiorari to court of appeals, Second circuit.

Action by Goldman & Masur against L. H. Goldman. Judgment for defendant affirmed on appeal, and Goldman & Masur bring certiorari. Reversed.

A. A. Gunby and E. T. Lamkin, for relators. Hudson, Potts & Bernstein (Charles J. Boatner, of counsel), for respondent L. H. Goldman. Respondent Judges, pro se.

NICHOLLS, C. J. It is represented in the petition: That on the 14th of January, 1894, Goldman & Masur, a commercial firm, composed of Simon Goldman and David Masur, both residents of the city of Monroe, parish of Ouachita, in this state, purchased from L. H. Goldman a stock of goods in the city of Monroe, and the good will of the business of selling goods, boots, shoes, notions, etc., carried on by L. H. Goldman in that city. In order to protect and procure the good will so purchased, L. H. Goldman executed and filed a written obligation to pay the petitioner the sum of \$2,000, in the event that he should, within three years after the date of the sale, carry on, or assist any other person to carry on, in person, the business of selling or retailing dry goods, notions, shoes, etc. That they filed suit in the Fifth district court of the parish of Ouachita on the 5th day of August, 1895, alleging that L. H. Goldman had openly and continuously violated his contract, and, after answer filed and trial had in that court, the judge rendered judgment in favor of petitioners for the sum of \$2,000, with 5 per cent. interest from judicial demand, from which an appeal was taken to the Second circuit court of appeals. That the court of appeals decided that there had been a breach of the contract, according to its plain terms, but that petitioners could only recover the amount of damages they could prove were caused by the open violation of the contract, holding that an obligation to pay a specified amount for breach of that contract did not liquidate or fix the amount to be paid. That the circuit court reluctantly remanded the suit to the district court, where it was again tried, and a large amount of evidence introduced to show the nature and extent of the damages caused by defendant's breach of contract; but the judge a quo held that the proof was not specific enough, and nonsuited plaintiffs, which judgment was affirmed by the circuit court at Monroe on the 19th day of May, 1898, and the rehearing refused on the 27th day of that month and year. That they are aggrieved by that decision, which is a practical denial of justice. That the amount of damages caused by the violation of the good will of a business is not susceptible of proof by any known or satisfactory rule. That the clear intention of the parties to that written contract sued on was to fix the amount of damages or penalty to be paid in the event said good will was violated.

That such contracts have been held to be valid and binding by the decision of this court, and effect and interpretation given to them, according to the clear intention of the parties. That the judgment of nonsuit completely and effectually destroys all right and interest of petitioners in the contract, for it is manifestly impossible to comply with the rules of proving the damages laid down and required by the court of appeals. That the decision of the court of appeals was rendered after the constitution of 1898 was adopted and in force, and is subject to review by this court. That the opinions and decrees of that court are at variance with the jurisprudence of the state of Louisiana, and in contravention of the laws of the state of Louisiana as to the rights of parties under such contracts, and the proper effect and construction of the same, and they aver that the ends of justice require that that decision should be brought up for review by the supreme court of Louisiana. They accordingly pray that a certiorari and all proper orders issue, directing that the papers and proceedings in the suit above mentioned be sent up for review by this court.

The respondent judges, for answer to the writs of error and certiorari issued, annex copies of their opinions and decrees pronounced and filed in the suit on the 15th of January, 1897, and May 19, 1898, stating that the opinions contained a full and succinct statement of all the questions of law determined by them in the cause, and of the facts bearing thereon, as shown by the record of that cause. They pray to be discharged, for costs, and general relief. The following is an extract from the opinion and judgment rendered by them on the 15th of January, 1897:

"This suit is brought to enforce the penal clause in the following agreement, entered into between plaintiffs and defendant, to wit: 'Know all men by these presents, whereas on or about the 14th day of January, 1893, L. H. Goldman sold to Goldman & Masur his mercantile business at Monroe, Louisiana, consisting of dry goods, notions, boots, shoes, hats, and gents' furnishing goods, and also the good will of said business; and whereas, since that time the said L. H. Goldman has purchased the interest of W. M. Ethridge in the mercantile business of E. & F. at Monroe, Louisiana; and whereas, the said E. & F. stock is partly composed of dry goods, notions, shoes, and gents' furnishing goods, etc.: Now, therefore, it is mutually agreed and contracted by and between the parties hereto that the said L. H. Goldman may sell the stock on hand of said E. & F., but that after this stock is closed out the said L. H. G. hereby obligates and binds himself to and in favor of Goldman & Masur not to engage in the retail mercantile business at Monroe, La., for three years from and after this date, for the sale of dry goods, notions, shoes, and gents' furnishing goods, either in his own name, or in the name of another, or of a company in which he is interested, nor assist an-

other to do so. In event of a violation of this contract, the said L. H. G. agrees to forfeit and pay to the said G. & M. the sum of \$2,000.00, to be recovered in any court of competent jurisdiction. February 24th, 1893.' The plaintiffs aver that in a short while after the execution of the above contract the defendant openly and actively violated the obligations assumed by him therein; that early in March thereafter he organized a mercantile corporation for the purpose of conducting a general retail mercantile business in the city of Monroe, of which he was the president and active business manager; and carried on said business in said city in active competition with them, and to their great detriment and damage; that the intent, purposes, and object of the said contract was to fix and liquidate the damages which defendant was to pay in case of a violation of the agreement by him; that they had been damaged more than \$2,000, but, as the amount had been fixed at that sum, they could not recover more; and therefore prayed for judgment for that sum. The defendant pleaded a general denial, admitting the execution of the contract. He further specially averred that the contract was one with a penal clause, and, if it could be enforced at all, it could only be done to the extent of the actual damages inflicted upon plaintiffs by the alleged violation; and he specially denied that he had violated the agreement in any degree whatever, or that damages to any amount had been suffered by plaintiffs. The lower court held that there had been a breach of the contract, and, as the parties had determined the sum themselves to be fixed paid as damages, gave judgment for the full amount, from which judgment defendant is appellat to this court.

"The main issue in the case turns upon the question whether the sum of \$2,000 named in the contract as the sum which defendant agreed to pay in case of its violation by him is to be considered as a penalty in the sense of article 2127 and paragraph 5 of article 1934 of the Revised Civil Code, and can, therefore, be modified or reduced by the courts in case of a partial execution of the principal obligation; or is it to be considered as 'stipulated' or 'liquidated' damages, in the sense that it is the amount agreed on and fixed by the parties in advance as the damages that the plaintiffs would suffer on account of a breach by defendant; and, thus having been fixed and liquidated by the parties themselves, they intended that the plaintiffs should recover that sum, and no other, in which case the courts would be powerless to reduce the amount, and could only award the amount named in the contract. * * * In the instant case the parties to the contract have not expressly declared that the sum named should be considered as stipulated or liquidated damages, nor have they used any terms which necessarily imply that the whole sum was to become due, even on the least or a partial breach of the agreement; nor is the contract one of that

kind where the damages are not capable of being ascertained by any satisfactory or known rule. * * * In the present case the primary object to be attained by the parties, the cause and object of their agreement, in aid and to secure the performance of which this penalty was stipulated, was that the defendant should not engage in the retail mercantile business in dry goods, boots, shoes, etc., for the space of three years in the city of Monroe. It was not to recover the sum of \$2,000. And plaintiffs, instead of suing for the penalty, might have enforced a specific performance. Otherwise, we would have a facultative obligation on the part of defendant either to abstain from business, or to pay the money and engage therein,—in other words, purchase the right from plaintiffs; in which case he would have the option, and not plaintiffs, and the obligation to pay the money would be a distinctly primary obligation, with the agreement not to engage in business as only secondary, to be enforced only in case of nonexecution of the primary. But plaintiffs repudiate any such construction, and rightly maintain that they had the option either to specifically enforce the principal obligation or sue for the penalty. Such being the case, we cannot presume that the intention of the parties was to make this secondary obligation of paying the money extinguish the principal one of refraining from business, nor to base the principal one upon it. Poth. Obl. p. 841. * * * We conclude that the intention of the parties was to prevent the defendant from engaging in the business specified for the entire term of the contract, and that the penal clause was stipulated for the purpose of accomplishing that end; and, inasmuch as the payment of the whole sum would novate or satisfy the original or primary agreement, thereby releasing him therefrom, we conclude that the amount named should be considered technically as a 'penalty,' and not as 'liquidated damages.' * * * In the case at bar there is no such 'contrary agreement,' no express agreement that the sum fixed by the contract shall be paid, even on a partial breach of the agreement. And, the principal obligation having been 'partly executed,' and there having been only a 'partial breach' of the contract, the other provisions of the articles mentioned apply also, viz. the right of the court to modify the penalty, to reduce the damages agreed on to the loss suffered and the gain of which the obligee has been deprived. We do not conceive that any of the authorities cited by plaintiffs' counsel on this point militate against this proposition. They merely hold that such contracts as the one before us are not invalid, as being in restraint of trade, or contrary to public policy; and therefore the penalty may be enforced when incurred. But they nowhere touch upon the point whether there can be a modification of the penalty where there is only a partial breach, or has been a partial execution. In none of them was there any claim of a partial execution or a

partial breach only, and, consequently, no claim for a modification or reduction of penalty.

"The case of *Solomon v. Diefenthal*, 46 La. Ann. 897, 15 South. 183, cited and quoted by plaintiffs' counsel in no way conflicts with the foregoing positions, but rather inferentially sustains them. * * * In the case of the present defendant against the present plaintiffs, reported in 47 La. Ann. 1463, 17 South. 881, this same demand for \$2,000 penalty for violation of this contract was pleaded in compensation of the note for \$6,648.46 given by the vendees as part of the purchase price of the goods and business which they had bought from the defendant. Objection was made to its consideration by the court upon the ground that it was not 'equally liquidated and demandable,' as provided by article 2209 of the Revised Civil Code, notwithstanding the question of the breach of the contract, and the resulting damages had been gone into fully without objection from the plaintiff in the case, and the court had as much evidence before it as we have. But the court declined to consider the demand, holding it not to be 'equally liquidated' and demandable 'with the note sued on.' The court say: 'The defendant pleaded in compensation the amount of the penal obligation of the plaintiff not to engage in business.' The penal obligation is, of course, conditional in its character, and, if susceptible of enforcement at all, the amount is modified in case of the partial execution of the principal obligation. The plaintiff denies any violation of the agreement in aid of which the penalty was stipulated; or, if any, insists it was but partial, and inconsiderable. The demand in compensation must be fixed; 'equally liquidated and demandable,' as the Code puts it. We think it clear that the demand on a penal clause *unliquidated* and undisputed cannot be pleaded in compensation against a promissory note. [Italics ours.] It will be seen that it is indirectly held that the demand in the penal clause in this contract was 'unliquidated.' If then 'unliquidated,' why? Because it was subject to reduction—to modification—in the case of a partial execution of the principal obligation, for, if it was 'liquidated damages,' it was not subject to any reduction or modification, and was 'equally liquidated' with the note, as was ably contended for by the counsel for the defendant there, now counsel for the plaintiffs here. It is true, the demand in compensation was rejected upon the double ground that it was not 'equally liquidated' and not 'equally demandable' with that of the plaintiff, as a breach had to be proven dehors the instrument, and that the decision might have been rested upon the latter ground alone; but it is nevertheless true that the character of the demand, as to its being fixed and liquidated damages, and not a penalty, subject to reduction, was distinctly put at issue by the pleadings, was fully argued by counsel, and directly passed upon by the court, and held

to be unliquidated, and, consequently, a penalty, subject to modification and reduction. Therefore, then, both upon reason and authority, and upon the construction which we think the supreme court has already placed upon this instrument, we consider the amount of \$2,000 as in the nature of a penalty, subject to modification and reduction upon a partial execution of the principal obligation. With this view of the legal construction of the clause of the contract which this suit is brought to enforce we are brought to the consideration of the question of fact presented, to wit, was there a breach of the principal obligation? If so, to what extent and in what sum were plaintiffs actually damaged by said breach? the maximum limit for which the court render a judgment being the said sum of \$2,000. The evidence is voluminous, and that of the immediate parties very conflicting, as well as acrimonious. The extent to which this opinion has already progressed in arguing and determining the legal questions involved forbids any extended statement or analysis thereof, and we must content ourselves with stating only the conclusion we have drawn, referring to the able opinion of the judge ad hoc in the case of *Goldman v. Goldman*, which is in evidence in this cause, for a more extended statement, and which contains a very fair resumé of the facts. We think the evidence clearly proves that there was a breach by the defendant in the establishing and conducting of the business of the Parlor City Company, Limited; that he continued the business for two months; but that, with the exception of these two months, and of the fact of the carrying on of this business, he has observed the obligations of the contract, and therefore that the contract has been executed by him in by far the greater part of the time. Therefore the plaintiffs are entitled to recover the real and actual damages suffered by them; that is, 'the loss really suffered, and the gain of which [they] have been deprived.' This damage, the evidence fails to furnish us a basis to estimate. There is page on page of it, but it all seems to have been directed to the disputed point whether there was a violation of the agreement by defendant. Around this point the testimonial battle raged, and but little attention was paid to the matter of actual damages. Especially was this so with plaintiffs, their counsel resting on the position that when he had established a breach of the principal obligation, the instrument itself fixed the damages. But when he apparently endeavored to enter on a line of testimony tending to prove actual damages, he was met with an objection of irrelevancy which was sustained by the court, and he was cut off from the inquiry. Under the view of the law of the case taken by the judge a quo, this ruling was correct, but, under the views expressed by us, it was erroneous. What plaintiffs might have been able to prove on this line had they been allowed to do so, of course we are unable to say, but it was very material evidence, as, without

evidence showing their actual damage, they could not recover. Plaintiffs have a cause of action. The contract has been violated, and damages are due them, such as they have suffered. It is probable from the record that they have suffered some damage; and we think that entire justice requires, under the circumstances, that they should be allowed another opportunity to show what that damage is. We have concluded, therefore, to remand the case. We do this with reluctance, as it is to the interest of both parties that this litigation should cease; but, if we should attempt to estimate the damages from the evidence before us, we would either have to proceed upon an illegal basis, or resort to mere guesswork. It is therefore ordered, adjudged, and decreed that the judgment of the lower court be avoided and reversed, and that this case be remanded to the lower court to be proceeded with in accordance with law and the views herein expressed; the plaintiffs and appellees to pay the costs of this appeal, those of the lower court to await the final decision of the cause."

On the return of the cause the district court nonsuited the plaintiffs, and they appealed. On the second appeal the circuit court handed down an opinion in which it said: "This case was before us at the January term, 1897, and the issues involved and the nature of the obligation sued on were fully set forth and discussed in our opinion rendered on January 15, 1897. In our decree of that date we remanded the case for a new trial, for the reason that the district judge had declined to receive evidence to show how much plaintiffs had been damaged by defendant's breach of the contract sued on. This contract had in the suit of Goldman & Masur been pleaded in compensation, and a large amount of testimony taken in support of the plea, which also was before us on the former appeal, but with it we could not find sufficient evidence upon which we could base an estimate of the damages or loss suffered by those plaintiffs; so we then said: 'If we should attempt to estimate the damages from the evidence before us, we would either have to proceed on an illogical basis or resort to mere guesswork.' The case was again tried in the district court, and a judgment of nonsuit rendered, and plaintiffs appealed."

After reciting the evidence found in the record on the second trial, the court said: "The judge ad hoc who tried the case the last time felt unable or unwilling to fix upon any sum, and rendered a judgment of nonsuit against plaintiffs, and we cannot say that there was any error in the judgment. It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed at appellants' costs."

The judgment of the circuit court was based upon the ground that it had been shown that the defendant had violated during only a short period the obligation which he had assumed to not carry on or assist any other

person in carrying on at Monroe, La., the business of selling or retailing dry goods, notions, shoes, etc., during the term of three years; that, having observed the same for the balance of the term, this observance was a partial execution of the contract, entitling defendant to a reduction of the amount which had been fixed in the agreement as that which was to be paid to the plaintiff; that under such circumstances the burden was not thrown upon the defendant of showing the extent of the reduction to which he was entitled, but upon the plaintiffs of establishing affirmatively to what extent they had been damaged. The court seems to have reached the conclusion, under the belief that plaintiffs would occupy a different position when they were suing for enforcement of a conventional penalty from that which they would if suing upon a demand for liquidated damages, when the defense set up was a partial execution by the defendant of his contract. Article 2125 of the Revised Civil Code declares the penal clause to be "the compensation for the damages which the creditor sustains by the nonexecution of the principal demand"; that "the creditor cannot demand the principal and the penalty together, unless the latter be stipulated for the mere delay"; and article 2127 that the penalty may be modified by the judge when the principal obligation has been partly executed; while article 1984 (an article found in the Code under the heading of "Damages Resulting from the Inexecution of Obligations") declares that: "When the parties by their contract have determined the sum that shall be paid as damages for its breach, the creditor must recover that sum, but is not entitled to more. But when the contract is executed in part, the damages agreed on by the parties may be reduced to the loss really suffered and the gain of which the party has been deprived unless there has been an express agreement that the sum fixed by the contract shall be paid even on a partial breach of the agreement." It will be seen that the law provides for a reduction in case of partial execution as well as in a case where damages have been liquidated by agreement, as one where a "penalty" has been provided for; the claim for reduction in the case of a penalty being cut off only "in case of a contrary agreement," and in the other case only when there is an express agreement that the sum fixed by the contract shall be paid even on a partial breach of agreement. Article 2232 declares that: "He who claims the execution of an obligation, must prove it. On the other hand, he who contends that he is exonerated, must prove the payment, or the fact which has produced the extinction of the obligation." The plaintiffs in this case have not attempted any judicial proceedings by injunction to force the defendant to comply with his obligation of not engaging in business, nor have they asked in this suit either for a specific performance of that obligation without damages,

or for a specific performance with damages added. They have abandoned all claims for a specific performance, and sue upon the instrument for the full amount of the damages expressly stipulated and fixed in the agreement which it evidences. The agreement between the parties as to the amount which defendant would have to pay in the event of a breach of the contract under such circumstances cannot be ignored by the court or by the parties, and be made to count for nothing, whether the amount should have been agreed upon by way of "penalty" or by way of "liquidated damages." It would stand (even if the case were a proper one for reduction) as prima facie proof of the extent of defendant's rights in either case, and to be accepted as the measure thereof, unless defendant could affirmatively establish, not only his right to a reduction, but the extent of the reduction. Plaintiffs, upon establishing the obligation, and proving the breach, and exhibiting the contract between the parties as to what should be the amount to be due by the obligor in case of the breach of the contract, could safely rest upon the latter until a right to a reduction and the extent of the reduction should be shown. It may be that, had the plaintiffs brought suit claiming partial damages, and coupled with the same one for an injunction, they might, as plaintiffs, be held to proof of the special damages, but they did nothing of the kind. The circuit court, on the first appeal before it of this cause, reversed the judgment of the district court, which was for plaintiffs for the amount fixed by the parties in their agreement, and nonsuited him. On the return of the case, plaintiffs attempted to prove up the specific amount of the damage received by them, and were met in their attempt to offer evidence to establish the same by objection on the part of the defendant that such testimony was irrelevant. The district court overruled the objection, but, after consideration of the whole evidence, nonsuited the plaintiffs. They appealed, and the judgment of the district court was affirmed. We are of the opinion that the court erred in forcing upon the plaintiffs the obligation of establishing by proof the amount of the damage they had sustained, precisely as if the agreement between the parties as to the amount the defendant was to pay in case of a breach by him of his obligation had not been made. In the case at bar the obligation for the violation of which damages are claimed is not an obligation "to do," but one "not to do," and, in the very nature of things, as said in the case of *Stafford v. Shortreed* (Iowa) 17 N. W. 756 (referred to in *Solomon v. Diefenthal*, 46 La. Ann. 897, 15 South. 183), and as recognized by the court of appeals itself, the amount of the damages must be the subject of mere conjecture, and could not be established by evidence even approximately. Plaintiffs would be in ignorance of the extent of the business conducted by the

defendant to their detriment. If the damage admitted of being gauged at all, defendant would be in much better position for doing so, by reason of his knowledge of his own affairs, than plaintiffs would. The mere length of time during which defendant may have observed or may have violated his agreement not to engage in business for a certain period would furnish no basis whatever upon which to estimate a reduction either of a penalty or of liquidated damages, for the whole damage may have resulted from damage done upon one single day. It will not do to apply to the results of a violation of an agreement "not to do" the rules applicable to a violation of an obligation "to do." There is an entire breach of an obligation "not to do" the moment the obligor does what he has covenanted "not to do," and the obligee is entitled to sue the obligor at once for the breach. He is not forced to wait until the end of the term fixed as that during which the obligor is not to engage in business, in order to ascertain (if he could do so) the actual extent of the injury to result from the obligor's conduct. There is no hardship in holding the latter to a strict observance of his duty, and the results of the same. He was well advised of the expressly stipulated consequences of his actions, and when he made an election as to his course he should be compelled to pay the money stipulated to be paid. *Bagley v. Peddie*, 16 N. Y. 469. In obligations "not to do" the right of the obligee to enforce a "specific performance" by injunction is absolute, unless waived; while in obligations "to do" the right to a "specific performance" by "mandamus" or otherwise is dependent upon circumstances, and, to a considerable extent, discretionary. By interpreting defendant's obligations to be those resulting from an agreement providing for stipulated damages, instead of those resulting from an agreement stipulating a penalty, we would not decide that the agreement created a "facultative obligation" entitling defendant to recede from his obligation not to engage in business upon payment of \$5,000, thus depriving plaintiffs of any legal power of control over defendant's actions in that respect. Plaintiffs would themselves, in that event, determine what the situation would be. The latter's ability in the present case to do so would be broader by holding the agreement to be one calling for liquidated damages than it would be by holding it one calling for a penalty. The amount stipulated to be paid by defendant in the event he should violate his engagement not being for a mere delay in doing something, plaintiffs would be restricted in their remedy, should the agreement be considered as evidencing a penal obligation, either to demanding a special performance of the obligation by means of an "injunction" or to a demand for the penalty. They could not ask both. On the other hand, it should be held that the amount stipulated to be paid was simply fixed

as liquidated damages to cover a breach for the whole term the plaintiffs might elect (should the situation permit) to claim a smaller amount at a given date, and simultaneously exact specific performance for the future by injunction. In the case before us the obligation "not to do" is not in aid of the enforcement of a primary obligation "to do" something. There is no second obligation back of this obligation "not to do." The parties were stipulating as to this single obligation for its own breach, not of that of any other obligation. They were contracting with direct reference to a fixed amount to be paid by defendant for violation of this particular obligation, not for the consequences of some other.

Agreements of the character of the one involved in this litigation, by which a party bound himself "not to engage in business during a certain time," and stipulating for the payment by the obligor of a certain sum to the obligee in the event of a violation of the agreement, have been very generally held to provide for liquidated damages, and not for a penalty. A number of decisions on this subject, with comment upon them, will be found in the American and English Encyclopedia of Law under the head of "Liquidated Damages," subdivision "When a Stipulation Will be Treated as a Liquidation of Damages." 1st Ed. p. 854. It is there stated that: "It is now well settled that a sum (if it be at all reasonable) stipulated to be paid as liquidated damages for the breach of a covenant will be regarded as such, and not as a penalty, where, from the nature of the covenant, the damages arising from its breach are entirely uncertain, and cannot be ascertained upon an issue of fact." The following, among other, cases were cited as instances of this class of contracts: An agreement not to engage in a business or occupation named within a specified time or at a certain place, or within certain boundaries or limits, such as a contract that obligor's steamboats will not navigate certain waters for three years. *Navigation Co. v. Wright*, 6 Cal. 259. An obligation to discontinue the operation of a laboratory near obligee's real estate after the expiration of five years. *Grasselli v. Lowden*, 11 Ohio St. 349. A covenant to refrain from the manufacture of stearin or star candles in a specified county and state until a time named (*Lange v. Werk*, 2 Ohio St. 520), or from publishing, editing, or printing any newspaper within a certain village while obligee continues in that business (*Dakin v. Williams*, 17 Wend. 447), or from engaging in the express business in a certain town in competition with obligee (*Cushing v. Drew*, 97 Mass. 445). An agreement by a physician, surgeon, or apothecary (*Sainter v. Ferguson*, 1 Macn. & G. 286), or an attorney or solicitor (*Galsworthy v. Strutt*, 1 Exch. 658), not to engage in the practice of his profession within certain limits, or before the expiration of a given period. A covenant by a partner upon dissolution of partnership and sale to partner not to engage in

the business within 20 miles. *Nobles v. Bates*, 7 Cow. 307. A contract not to run a stage on a certain line in competition with obligee. *Pierce v. Fuller*, 8 Mass. 223. A contract by a vendor of a mercantile business and good will not to engage as proprietor, clerk, or employé in the general mercantile business for seven years within certain specified townships. *Stewart v. Bedell*, 79 Pa. St. 336. A covenant that obligor will not go into the butchering business in a certain town, unless with obligee's consent, under a penalty of \$400 (*Streeter v. Rush*, 25 Cal. 67), or a marble shop under a forfeit of \$1,000. It is stated that in cases of this character, where the intent of the parties is so clear, the use of the word "forfeit" in the clause providing for damages in case of a breach is not regarded as of much weight. *Hall v. Crowley*, 5 Allen, 304. That where a stipulation in a contract of an amount to be paid by one party to the other for the breach of a covenant is held to be liquidated damages, there can be no controverted question of fact, except as to breach of the agreement, as the stipulation absolutely and alone controls the recovery and fixes its amount. *Welch v. McDonald (Va.)* 8 S. E. 711. This latter proposition is too broadly stated to be thoroughly correct in Louisiana. The opinion of the circuit court was based to a very considerable extent upon the decision of this court in *Goldman v. Goldman*, 47 La. Ann. 1464, 17 South. 881, in which, referring to the very instrument involved in this litigation, we stated it could not be urged in support of a plea of compensation filed by the defendants therein, in a suit brought by the present defendant as vendor on notes given by the latter for the price of a stock of goods purchased by them. The circuit court gave to that decision a much wider scope than we intended it to have. We simply held that the instrument in question was not of that fixed absolute character as to justify its being used at once by way of compensation; that it was to a certain extent a conditional obligation, as it would require extrinsic evidence—evidence dehors the instrument—to establish not the extent of the liability of the plaintiffs, but the fact of the right of its present enforcement. The circuit court having found that plaintiffs had shown a breach by defendant of his obligation, it should have reversed the judgment of the district court, and given plaintiffs a judgment as prayed for in their petition. We are of the opinion that the agreement between plaintiffs and the defendant fixed the sum of \$2,000 as being liquidated damages to be paid to plaintiffs in the event of its violation. For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the judgment of the court of appeals of the Second circuit in the matter of *Goldman & Masur* against *L. H. Goldman*, on appeal before it from the Fifth judicial district court for the parish of Orachita, and the judgment of said district court in said matter, which was affirmed by the said court of appeals, be, and they are hereby, an-

nulled, avoided, and reversed, and it is now ordered, adjudged, and decreed that the plaintiffs do have judgment against and receive from the defendant the sum of \$2,000, with legal interest from judicial demand until paid, with costs in this court, in the court of appeals, and in the district court.

On Application for Rehearing.

(April 17, 1899.)

BREAUX, J. Plaintiffs, through their counsel, urge that this court has fallen into an error in its decision on the application for writ of certiorari in holding the issues involved as *res nova*, when instead we should have considered them settled by the effect usually given to the thing already passed upon and finally adjudged with the force and effect always attending the *res judicata*. The position taken renders it necessary to restate some of the facts. In the case of Goldman against Goldman & Masur, filed in 1895, the court *qua* decided that the defendants, Goldman & Masur, could not plead, as an offset to a note he (L. H. Goldman) held the bond he had executed in their favor, in which he had obligated himself for a specific time not to engage in the retail merchandise business in Monroe, La. Defendants' demand, based on a contract not to engage in business under a penalty of \$2,000 if plaintiff violated it, was not allowed, but defendants were reserved all their legal rights to proceed against plaintiff for its violation. On appeal to this court the judgment was affirmed, the court holding that the defendants pleaded in compensation the amount of the penal obligation of the plaintiff not to engage in business, and that this penal obligation was conditional in its character, and, if susceptible of enforcement at all, the amount is modified in case of the partial execution of the principal obligation; that the plaintiff denied any violation of the agreement in aid of which the penalty was stipulated; if there was any, it was but partial and inconsiderable; that a demand in compensation must be equally as liquidated as the claim against which it is pleaded; and that demand in a penal clause, unliquidated and disputed, cannot be pleaded against a promissory note. The judgment of the lower court, including the reservation made, was affirmed. *Goldman v. Goldman*, 47 La. Ann. 1463, 17 South. 881. Afterwards, Goldman & Masur brought suit on the contract, and on appeal to the court of appeals it was decided that the proof of the nature and extent of the damages caused by defendant's breach of contract was not specific enough, and nonsuited plaintiffs, as previously they had been nonsuited in the district court.

1. Defendants complain of the decree of this court rendered in the proceedings by the writ of certiorari on the ground that it was too late to decree that the obligation involved made *prima facie* proof of the extent of defendants' right to be accepted as the measure

of damages, unless the defendants can affirmatively establish not only a right to a reduction, but its extent. In our view, the decision before cited is not as far-reaching in its effect as interpreted by the learned judges of the court of appeals. It held that both claims—the claim of plaintiff on his note secured by mortgage, and the claim of defendants—were not “equally liquidated and demandable,” and that the demand in a penal clause cannot be pleaded in compensation against a promissory note. It does not follow, from these views as expressed in the cited decree, that the burden of proof was made thereby to shift from plaintiff to defendants, and that the *prima facie* presumption arising from such an obligation was brought thereby to an end. The claim presented in support of defendants' (Goldman & Masur) plea, did not, as in case of the note identified with the mortgage, make proof of itself. It would have been needful, in case the proof had been admitted, to prove the breach of contract, and dispose of the questions which do not arise in a suit on a note and mortgage, and for that reason this court sustained the lower court's ruling dismissing the demand as in case of nonsuit.

2. Defendants set forth that this case was before the court of appeals for the Second circuit at its January term, 1897, and that that court, following the decision before cited, construed the contract sued on as an obligation with a penal clause, entitling plaintiff, on proof of its breach, to the recovery of such damages as he might prove growing out of the breach; that the character of the obligation had been determined, and with whom was the onus of proof, as between the parties, was finally decided, and the cause remanded for the sole purpose of enabling plaintiff to show the quantity of damages which he suffered; that the decree was conclusive and final, and not subject to the revision of the court; that the circuit court on the second appeal in the case was limited to the sole question of determining from the evidence how much damages, if any, plaintiff had suffered by the alleged breach of contract; and that, the certiorari jurisdiction of the supreme court having attached long subsequent to the rendition of the first decree, rendered in January, 1897, it is without jurisdiction to review any legal question decided then, and is limited to the review of the cause as presented to the circuit court at its last meeting, in which the judgment now under review was rendered. We find as a fact that it is not disputed that the last judgment rendered during the current year is clearly within the jurisdiction of this court under article 101 of the constitution, and that all issues involved may be reviewed by this court. The contention is that the ruling in the prior case has already disposed of the issues now raised, and that it is not within the range of possibility in law to modify them in a subsequent appeal. There was nothing finally decided in the previous appeal. The evidence failed to furnish a basis to estimate

damages. It appears there was page after page taken, all directed to the question of violation of the contract *vel non*. We are informed that on this question a testimonial battle raged, and the matter of damages received little attention, particularly from plaintiffs, who chose to rest their case exclusively on breach of the principal obligation, and the consequent damages therefrom arising in any contingency, as fixed in the bond; and when, in the course of the trial, they did attempt to prove actual damages, they were met by the objection of irrelevancy, which was sustained by the court. This, under the view of the court of appeals, was erroneous. The court found that plaintiffs had a right of action, but they must prove their damages, and, to give the opportunity, the case was remanded. Thus it appears that the decision which the defendant contends fixed a right in his behalf was one remanding the case to hear evidence under the court's opinion as to the burden of proof. We have examined the decisions cited by defendant's counsel, and find that they sustain the rule that whatever has been decided by the supreme court of the United States on one writ of error obviously cannot be re-examined on a subsequent writ brought in the same suit. *Clark v. Keith*, 106 U. S. 464, 1 Sup. Ct. 568, citing a number of decisions of that court to the same effect. Here the supreme court has not passed upon the point at all. The law of the case may be in full force and effect in the court *a quo*, and should have been given due regard—as was given—on the trial in the district court; but when it comes here the ruling no longer controls. The defendant had acquired no vested right growing out of the court's view. The plea of *res judicata* was not pleaded. If it had been, it would have had nothing upon which to stand. There was only a ruling as to the effect to be given to testimony, which ruling is binding upon the court of appeals and the district court, but not upon this court, called upon, under the law, to review all issues not finally disposed of.

8. We take up defendant's last objection in the order of his argument,—that, the questions involved being exclusively questions of fact, this court is without jurisdiction. We have already given our reasons for entertaining jurisdiction, and from our standpoint it is manifest, after considering the reasons given, that the questions involved are not questions of fact. They involved throughout the construction to be placed on an agreement containing a penal clause, and we held that the issues were not so settled as to render it no longer possible for the supreme court to correct an error it conceived had been committed. We are constrained to differ from counsel, and hold that the court has jurisdiction.

MONROE, J., not having been a member of the court when this case was submitted, takes no part in the opinion.

POLLOCK et al. v. SIMMONS et al.

(Supreme Court of Mississippi. April 17, 1899.)

On reargument. Affirmed.

For former opinion, see 23 South. 626.

TERRAL, J. We adhere to our former decision in this case. Affirmed.

(121 Ala. 327)

Ex parte STATE.

(Supreme Court of Alabama. April 13, 1899.)

CRIMINAL LAW—COSTS—SHERIFF'S FEES.

Code, § 5423, providing that, when a fine is assessed, the court may allow defendant to confess judgment, with good and sufficient sureties, for the fine and "costs," does not include sheriff's fees for feeding defendant while in jail, since not a part of the costs taxable against defendant for which he may be sentenced to hard labor (section 5422).

Petition by the state for a writ of mandamus to the judge of the criminal court of Jefferson county. Denied.

Section 5423 of the Code prescribes that "when a fine is assessed, the court may allow the defendant to confess judgment with good and sufficient sureties, for the fine and costs." That was done in this case. In taxing the costs for the sureties to pay, the clerk, as a part thereof taxed the sum of \$24.90 as sheriff's fees for 83 days' board of defendant, while confined in jail, at 30 cents per day. The sureties disputed this claim as a proper one in the bill of costs, and tendered the clerk \$114.55, the total bill of costs as made out, less said sum of \$24.90 jail fees, making \$89.65 in full payment of their obligation, but the clerk refused to receive the same. Whereupon they deposited with the clerk said sum of \$89.65, and moved the criminal court of Jefferson county, in which the defendant was indicted and confessed judgment, that the clerk of said court be required to accept the tender deposited with him, in full satisfaction of their obligation, and that they be discharged from further liability thereon, which motion the court granted. This petition is by the state for a writ of mandamus to require the judge of said criminal court to vacate said order.

Wm. C. Fitts, Atty. Gen., for the State.
Lee C. Bradley, for defendant.

HARALSON, J. Under former statutes (Code 1876, §§ 5043, 5044), it was decided by this court, that the compensation of the sheriff for feeding a defendant in a criminal case, while confined in jail to answer an indictment, was a part of the costs in the strictest sense of the term, taxable against him on conviction, and for the payment of which hard labor might be imposed. *Bradley v. State*, 69 Ala. 318; but this was afterwards changed by statute (Acts 1882-83, p. 14; Code 1886, § 4872) and such fees were required to be paid

by the state. The present statute provides, "In no case shall any defendant, on conviction, be sentenced to hard labor for the payment of sheriff's fees for feeding him while in jail." Code 1896, § 4565 (4872). Such fees, then, are not a part of the costs in a criminal case, taxable against a defendant for which he may be sentenced to hard labor for the county. Section 5422. (4501). It is only for costs proper, in which jail fees do not enter, and the fine assessed, that the sureties become liable on a confession of judgment for fine and costs under section 5423 (4502) of the Code. There was no error in the ruling of the court below, and mandamus is denied. Mandamus denied.

(121 Ala. 295)

SOUTHERN HOME BUILDING & LOAN ASS'N v. GILLESPIE.

(Supreme Court of Alabama. April 12, 1899.)

CORPORATIONS—JUDGMENT BY DEFAULT—PROCESS.

To authorize a judgment by default against a corporation, the record or judgment entry should show that the person on whom process was served was such an officer or agent of defendant as by law was authorized to receive service on its behalf.

Appeal from circuit court, Morgan county; H. C. Speake, Judge.

Bill by James O. Gillespie against the Southern Home Building & Loan Association. From a decree for complainant, defendant appeals. Reversed.

This is a suit in equity, the bill having been filed in the circuit court of Morgan county, which has equitable jurisdiction, bestowed by special act (Acts 1894-95, p. 881), by J. C. Gillespie against the Southern Home Building & Loan Association, and seeks the cancellation of a mortgage made by him to the association and which the bill alleges has been fully paid. The defendant, as shown by the bill, is a corporation having its principal place of business in Atlanta, in the state of Georgia. A summons to answer the bill was issued on the same day the bill was filed, viz., the 8th day of July, 1897, and was returned by the sheriff with the following indorsement: "Executed by handing C. Collins, agent for the defendant, a copy of the within, on the 8th day of July, 1897. S. P. Ryan, Sheriff, by T. F. Turley, Deputy Sheriff." On the 9th day of August, 1897, a decree pro confesso was taken against the defendant before the clerk. The language of the decree, so far as it relates to service of the summons, is in these words: "In this cause, it being made to appear to the clerk that a summons requiring the defendant, the Southern Building & Loan Association, to appear and plead to or answer the bill of complaint in this cause, within thirty days from the service of said summons upon him, was served upon him by the sheriff of Morgan county on the 8th day of August, 1897, and the said defendant having failed,

etc." There is nothing in the record to show that any proof was made to the clerk of the agency of Collins. After the decree pro confesso was taken, a commission was issued for the oral examination of complainant and also of C. Collins, in behalf of complainant, and they were examined on the 13th day of August, 1898. Collins testified, on that examination, that he was the general agent of the defendant and had been since 1890. A final decree was rendered on the 1st day of November, 1897, granting complainant the relief prayed in his bill. The decree recites that the cause had been submitted "upon the original bill and the testimony taken after a decree pro confesso having been duly entered upon personal service," etc. The assignments of error are based on the contention that the final decree was erroneous because founded on a decree pro confesso which was improperly rendered, for the reason that no sufficient proof had been made of the service of the summons.

Cabaniss & Weakley and Harris & Eyster, for appellant. M. E. Matthews, for appellee.

HARALSON, J. A decree pro confesso and a final decree were rendered against the defendant corporation in the court below, appellant here, on service on "C. Collins agent for defendant," without proof being made to the clerk and register before entering the decree pro confesso, or to the court, before rendering final decree, that said Collins was an agent of the corporation at the time of the service. Neither the decree pro confesso, nor the final decree in the cause recited the fact that such proof had been made. We have always maintained that to authorize a judgment by default against a corporation, the record or judgment entry must recite the fact that proof was made to the court that the person on whom the process was served, was at the time of service such an officer or agent of the defendant as by law was authorized to receive service of process for and in behalf of the defendant. *Norwood v. Riddle*, 1 Ala. 195; *Association v. Agee*, 99 Ala. 591, 13 South. 280; *Insurance Co. v. Fowler*, 76 Ala. 372; *Independent Pub. Co. v. American Press Ass'n*, 102 Ala. 475, 15 South. 947.

Reversed and remanded.

(123 Ala. 264)

LISTER v. VOWELL et al.

(Supreme Court of Alabama. Feb. 2, 1899.)

PLEADING—AMENDMENT—PARTIES—PARTNERSHIP—SHERIFFS—HARMLESS ERROR—MARRIED WOMEN—SEPARATE ESTATE—ACQUISITION—RIGHTS OF HUSBAND'S CREDITORS.

1. The amendment of the title of an action brought by individuals, composing a co-partnership, on a partnership claim, by adding, after the individual names, the words, "as partners doing business," etc., does not constitute a departure.

1 Rehearing denied April 15, 1899.

2. An amendment which added the words, "as sheriff of Etowah county," after the name of defendant, is merely descriptive, and does not constitute a departure.

3. An amendment which added the words, "as sheriff of Etowah county," after the name of defendant, is merely descriptive, and the refusal to strike it out on the ground that it adds nothing to the complaint is harmless.

4. A married woman, to establish her title, need not, as against strangers to the contract by which she acquired property, show that it was a written contract assented to by her husband.

5. Where a husband has acted as agent of the wife in purchasing property, it is immaterial, as to a stranger to the contract by which she acquired the property, seeking to subject such property to the husband's debts, whether the husband's authority was in writing or not.

6. The fact that a husband's services have indirectly contributed to the acquisition of the property of the wife does not make it subject to his debts.

7. A judgment in excess of the amount claimed in the complaint will be reduced to that amount, though the proof would support a finding for the larger amount.

Appeal from city court of Gadsden; John H. Disque, Judge.

Action by A. P. Vowell and others against T. W. Lister. From a judgment in favor of plaintiffs, defendant appealed. Reversed.

This suit was originally brought in the name of A. P. Vowell, R. D. Vowell, and J. A. Vowell against T. W. Lister, and claimed of the defendant damages for wrongfully taking the following property, viz.: "One 15 horse power boiler and Peerless engine, one sawmill and fixtures, and 26,000 feet of lumber." The complaint was amended by adding after the name of T. W. Lister, the defendant, the following words: "As sheriff of Etowah county." The defendant made a motion to strike this amendment, on the ground that it was a complete departure from the original complaint. This motion was overruled, and the defendant duly excepted. The defendant then moved to strike the amendment upon the ground that it added nothing to the complaint. This motion was overruled, and the defendant thereupon duly excepted. Thereupon the plaintiffs, by leave of the court, amended the complaint by adding after the names of the plaintiffs, as they appear in the title of the case, the following words: "As partners doing business under the name and style of the Vowell Lumber Company." The defendant moved the court to strike said complaint, as amended, from the file, upon the ground that it was a complete departure from the original complaint. This motion was overruled, and the defendant duly excepted. It was shown that the property alleged to have been wrongfully taken from the possession of the plaintiffs was levied upon by the defendant, as sheriff, under an execution issued on a judgment recovered against D. N. Vowell, who was the husband of the plaintiff A. P. Vowell, and that the property so levied upon was at the time in the possession of the plaintiffs, who were conducting a lumber business under the firm name of the Vowell Lumber Com-

pany. The other facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion. The cause was tried by the court without the intervention of a jury, and upon the hearing of all the evidence the court rendered judgment in favor of the plaintiffs, assessing the damages at the sum of \$366.73. To the rendition of this judgment the defendant duly excepted. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

George D. Motley and E. H. Hanna, for appellant. N. G. Canning, for appellees.

SHARPE, J. Upon the theory that the plaintiffs were partners, and were suing for the taking of their partnership property, the action was properly brought in their individual names; and the amendment describing the plaintiffs as partners, if not necessary to be made, did not make any change of parties. Since a partnership is not a person, either natural or artificial, it cannot sue, as a party plaintiff, in the firm name. *Moore v. Burns*, 60 Ala. 269; *Lanford v. Patton*, 44 Ala. 584. The addition of the firm name, "Vowell Lumber Company," whereby it appears in the complaint as a party plaintiff, was unavailing for such purpose. But the objection to these amendments, coming by motion to strike out the whole complaint, as amended, on the ground that it was a departure, was not well taken, and was properly overruled. The addition of the words, "as sheriff of Etowah County, Alabama," to the defendant's name, was merely descriptive of the defendant, and the refusal of the court to strike them out was harmless to the defendant.

This appeal is from a judgment rendered against appellant for the value only of lumber levied on and sold by him as sheriff, and the other property mentioned in the complaint is not here involved. It appears from the evidence: That a half interest in the sawmill at which the lumber was made was rented in 1886 for plaintiff A. P. Vowell by her husband, who used therefor \$200 of her money. That he thereafter worked at the mill, and managed her interest as her agent, until about 1891, when the mill was bought for her for \$500, of which \$200 was paid from proceeds of a sale of her land, and the rest was paid out of the proceeds of the business. Thereafter the other plaintiffs, R. D. and J. A. Vowell, each became the owner of a third interest in the mill, by purchase from A. P. Vowell; and from February, 1896, the business was carried on by the plaintiffs jointly under the name of the Vowell Lumber Company, during which time D. N. Vowell continued to work in the mill, and to manage his wife's interest as her agent, and at the same time the plaintiffs R. D. and J. A. Vowell also worked in the mill, and made payments on the purchase of their respective interests from the proceeds of the business. The lumber was

taken by defendant under an execution which he held as sheriff against D. N. Vowell, and, when taken, the lumber was stacked near the mill, and was owned by the Vowell Lumber Company, and was produced at the mill after plaintiffs R. D. and J. A. Vowell acquired their interests. The fact that Mrs. Vowell, through her husband, bought the mill, entered into the partnership, and engaged in the business, was testified to without objection or contradiction. If the proceeding were one seeking to bind her upon the contracts involved in those transactions, it would be material to inquire whether they were in writing, assented to by the husband, according to the statute then in force. But she had capacity to acquire property without a written contract, and, in this controversy between her and a third person, such written contract and assent was not essential to sustain her claim of ownership to the lumber; and whether her husband had written authority to act as her agent was likewise immaterial.

The creditors of D. N. Vowell had no legal right to require that his personal services should be devoted to the extinguishment of their claims, and the fact that his labor in and management of the business resulted in profits which paid in part for the mill and for its operation did not render the lumber or Mrs. Vowell's interest therein subject to the execution. *Wheeler v. Biggs* (Miss.) 15 South. 118.

The evidence was sufficient to authorize a judgment for the value of the lumber sued for, with interest. The complaint claims for only 28,000 feet, the value of which, estimated according to the proof, and upon the lumber of the best class taken, is \$227.65. The judgment of the city court is for \$366.73, which, though corresponding to the value of the lumber shown by the proof to have been taken, was plainly excessive of the claim as made by the complaint. The jury having been waived, the judgment will be reversed, and here rendered that the plaintiffs recover of the defendant \$255.20, being the value, with interest, of the lumber claimed for in the complaint, besides his costs in the city court, exclusive of the costs of the appeal, which will be taxed against the appellees. Reversed and rendered.

(121 Ala. 340)

CHRISTIAN & CRAFT GROCERY CO. v. FRUITDALE LUMBER CO.

(Supreme Court of Alabama. April 4, 1899.)

CORPORATIONS—ESTOPPEL TO DENY CORPORATE EXISTENCE—FRAUDULENT INCORPORATION—VALIDITY—EVIDENCE.

1. Where defendants contend that they contracted the debt sued on as officers of a corporation, evidence that plaintiff dealt with the company on the representations of one of the defendants that it was a co-partnership is admissible to show that plaintiff, by reason of not having contracted with the company as a corporation, was not estopped to deny its corporate existence.

2. On an issue whether persons who had contracted a debt in the name of a corporation were personally liable because the organization of the corporation was fraudulent, devised solely to shield the corporators from personal liability, evidence that nothing was paid for the stock, that the affidavits as to subscriptions paid were false, that no property was ever transferred to it to constitute its capital, and that no corporate function was ever performed, except the election of officers, is admissible.

3. Evidence that the incorporation fee required by Acts 1894-95, pp. 1024-1028, as a condition precedent to doing business in the corporate name, was not paid, is admissible on such issue, though the nonpayment of such fee does not of itself prevent a company from being a de facto corporation.

4. Where a corporation was organized without capital to cover a real partnership, and to permit the carrying on of a partnership business exempt from personal liability, the persons constituting the company are personally liable to all who did not deal with it as a corporation, though the incorporation was regular and complete.

5. The existence of a corporation may be attacked collaterally in a suit against the incorporators as individuals by a person who did not contract with the corporation as such.

Appeal from circuit court, Washington county; William S. Anderson, Judge.

This action was brought by the appellant, the Christian & Craft Grocery Company, a corporation, against the defendants, John Hardcastle Hall, John W. Blanchard, and Julius G. Goodrich, doing business as partners under the name of the Fruitdale Lumber Company, claiming in one count of the complaint upon an account stated; in another, upon an open count; and in another, for goods, wares, and merchandise sold. The defendant Hall did not plead, but the defendants Blanchard and Goodrich pleaded—First, the general issue; and, second, that they were not parties of the co-partnership. It was admitted by the parties that the defendant John Hardcastle Hall purchased the goods, wares, and merchandise in question from the plaintiff in the name of the Fruitdale Lumber Company; that the goods were charged in the name of the Fruitdale Lumber Company; that itemized accounts therefor were rendered to John Hardcastle Hall in the name of the Fruitdale Lumber Company; and that no question as to the correctness of these accounts had ever been made by any of the defendants, and upon the trial of the case these accounts were admitted to be correct. The only question in controversy between the parties was the question as to whether the defendants were liable as partners doing business under the name of the Fruitdale Lumber Company. It was undisputed that on March 5, 1896, the defendants Blanchard and Hall filed in the office of the probate court of Washington county a declaration of an incorporation to be known as the Fruitdale Lumber Company. On March 16th, the said Blanchard and Hall made their report as commissioners, in which they reported a regular incorporation of said company, and that \$13,000 of the capital stock had been subscribed for, \$12,500 of which was reported to have been paid in property at the reasonable

value thereof, and \$500 of which was reported as paid by contracts for services to be rendered to said company. Said report contained an original subscription list of the capital stock of the proposed corporation. There were also attached to this report the proceedings of a meeting of the said three subscribers, showing that at a meeting held by them on said 16th day of March, 1896, they had elected themselves the board of directors of said corporation,—John Hardcastle Hall as the president, and the said John W. Blanchard as the secretary and treasurer thereof. These documents were filed in the probate court of Washington county on the 21st day of March, 1896, and a certificate of incorporation was thereupon issued. Defendants claim in this case that the fact that the proceedings above stated were had in the probate court of Washington county protected them from liability as partners for goods purchased by them under the name of the Fruitdale Lumber Company. It is contended, on the other hand, by the appellant, that these proceedings were fraudulent, and that they were also void because of the failure of said parties or of said alleged corporation to pay the privilege tax provided by the statute; that these three men are individually liable for any debts which they contracted under the name of the Fruitdale Lumber Company, because they in fact did business as partners under that name, whether there was such a corporation or not. All the rulings of the court which are complained of on this appeal are referable to this controversy; and the facts pertaining to the rulings upon the evidence, which are reviewed on the present appeal, are sufficiently stated in the opinion. Upon the introduction of all the evidence, the court, at the request of the defendants, gave to the jury the following written charge, to the giving of which the defendants duly excepted: "If the jury believe the evidence, they must find a verdict for the defendants John W. Blanchard and Julius G. Goodrich." There were verdict and judgment for the defendants. The plaintiff appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved. Reversed.

Chas. L. Bromberg, Jr., and Gregory L. & H. T. Smith, for appellant. W. D. Dunn and McIntosh & Rich, for appellees.

MCCLELLAN, C. J. The appellees in this case contend for, the appellant recognizes, and nobody doubts the principle that, where parties contract with each other as corporations, they are in respect of such contracts estopped to deny corporate existence. It must be equally free from doubt that where a party contracts with another, but not as a corporation, he is not as to such contract estopped to deny the corporate existence of such other party, or to show that the entity with which he dealt was an individual or partnership. So that in a case like the present one, where

the plaintiff, the grocery company, seeks to establish and enforce a personal liability against certain individuals who defend on the ground that they were only stockholders and officers of a de facto corporation with which plaintiff, they assert, dealt as a corporation, it is obviously competent and most material for the plaintiff to show that it did not deal with the defendants as a corporation, but as individuals composing a partnership; and this, though the partnership assumed and did business under a name more appropriate to a corporation than to a partnership, and the plaintiff contracted with the defendants under that name. The plaintiff sought to prove that it sold its goods to the Fruitdale Lumber Company as a partnership composed of the individuals now sued, and not as a corporation, by testimony to the effect that the defendant Hall purchased said goods for the Fruitdale Lumber Company on the representation that said company was a partnership composed of himself and the other defendants. The trial court excluded this evidence. This was error. It was not competent to show that the Fruitdale Lumber Company was not a corporation de jure or de facto, nor that it was a partnership composed of the defendants; but it was competent as tending to show that the plaintiff did not contract with that company as a corporation, but as a partnership, and hence was not estopped to show by other evidence, if any such it could adduce, competent to that result, that said company was not a corporation, but was a partnership composed of the defendants. Whether this error was prejudicial to plaintiff, and therefore available to reverse the judgment, depends upon whether the presumption of injury from error committed is overturned by unconflicting evidence that the Fruitdale Lumber Company was in fact a corporation. Assuming that the jury would have believed the excluded testimony, as they had a right to do, and have found in line with it, as it would have been open to them to do, that plaintiff did not deal with the Fruitdale Lumber Company as a corporation, the effect of admitting this testimony would have been to raise the estoppel resting on plaintiff from the fact that it had contracted with the lumber company in the name under which it was attempted to be incorporated or was nominally incorporated, and to leave the plaintiff free to prove by other evidence that the company was a partnership whose members were individually liable for plaintiff's debt. And we could not assume that there was no such other evidence, even if the record were silent on the point. We should have to take it that there was such other evidence which plaintiff was prevented to introduce by the ruling which virtually estopped him to show the fact it would have tended to establish; and we should have to allow the presumption of injury from error to stand. But the record is not silent. It does not stop here. It shows further that the plaintiff proposed to assault and

offered evidence attacking the corporate existence of the Fruitdale Lumber Company. It proposed to show that said company had never paid the incorporation fee required by the act of 1896, without which, by the terms of the statute, the issuance of a commission to the corporators to do business as a corporation is forbidden, and all contracts attempted to be made by the concern are wholly void. Acts 1894-95, pp. 1024-1026. And, in addition to this, it offered further evidence tending to show that the pretended corporation was a sham, a delusion, and a snare, fraudulent in intent and execution, wholly without capital, and devised solely to cloak a partnership enterprise against individual liability of partnership members. The evidence offered and rejected went to show that nothing was paid for the shares of the pretended corporation's pretended capital stock, that the affidavits of subscriptions made and paid were knowingly false and fraudulent, that no money nor any property of value was ever paid or transferred to the company to constitute its capital, that no corporate function was ever performed except the pretended election of officers and directors, that no meeting of the directors was ever held; but the business for which the corporation was pretended to be formed was carried on by these defendants as individuals associated together as partners, and that all this was in furtherance and execution of an intention all along existing to carry on a partnership by means of the pretended incorporation in such a way as that the company would have no assets to meet debts, and as that these individuals could not be held liable for debts contracted in the name of the company. We are therefore clear to the conclusion, not only that the plaintiff should have been allowed to prove the declarations of Hall that the Fruitdale Lumber Company was a partnership composed of the defendants, but that all the evidence offered by it tending to show that the incorporation of said company was a fraud and a pretense intended to cover a partnership business, to shield the partners from individual liability and to set up a straw corporation without capital and without assets, should have been allowed to go to the jury. And the fact that the fee for incorporation had not been paid was also competent in this connection as some evidence towards a conclusion of fraud,—a badge of fraud, so to speak, going in some degree to show that the parties did not in good faith intend and attempt to bring into being a real, substantive, artificial entity. But this fact of the nonpayment of the fee would not of itself, in our opinion, prevent the imperfect and incomplete organization from being a de facto corporation. It is a prerequisite to the issuance of a commission, but if, without it, a commission is issued, the contemplation of the statute is not that there is no de facto corporation, but that the contracts of such a corporation should be wholly void.

Of course the views we have expressed lead to and involve this proposition: That where

there is no bona fide purpose and effort to organize a real corporation with a capital to respond to its liabilities, but the purpose and effort are to put forward a sham without capital or assets to cover a real partnership and the carrying on of a partnership business exempt from liability as a partnership, the purpose and effort are abortive, the pretended existence of a corporation is open to collateral attack as a mere fraudulent device, and, though on the face of the proceedings there is a regular and complete incorporation, the pretended corporate entity is to be taken as non-existent except as to persons who have contracted with it as a corporation in such way as to estop themselves to show the fraud.

For the error committed by the trial court in excluding the evidence referred to, offered by plaintiff, the judgment must be reversed. The cause is remanded. Reversed and remanded.

(120 Ala. 394)

WITHERS et al. v. STATE.¹

(Supreme Court of Alabama. Feb. 2, 1899.)

CRIMINAL TRESPASS — POSSESSION — OWNERSHIP — EVIDENCE.

1. Parol evidence is inadmissible to show ownership of real estate, where such ownership is based on title deeds, without having first laid the proper predicate for its introduction.

2. In a prosecution for trespass after warning, where the evidence discloses a claim by the prosecuting witnesses that they were in possession of the premises, and defendants attempt to justify on the ground that they are joint owners of the premises, a charge that "there cannot be two possessions at the same time which are antagonistic and adverse to each other," and that "if [the prosecuting witnesses] were in possession antagonistic to the world, then no one else could be in possession," is not erroneous.

Appeal from Shelby county court; D. R. McMillan, Judge.

Milo Withers and others were prosecuted and convicted for trespass after warning, and they appeal. Affirmed.

The premises alleged to have been trespassed upon was a certain upper story in a building in the town of Montevallo, and this upper story had been formerly used as a lodge room by the Anub Lodge of Immaculates. Two of the witnesses who were introduced for the state testified that they bought this lodge room, and went into possession of it a short time before the alleged trespass; that their possession consisted in using it as an office by going there and reading; that the furniture in the room consisted of a broken desk, left there by the Anub Lodge, and another desk and three or four chairs, which were carried there by the witnesses; that prior to the time they took possession the room had been vacant for some time; that about three weeks after they went into possession the defendants had started up the steps that led to the lodge room, and that about this time Brazier and Gill, the said

¹ Rehearing denied April 14, 1899.

witnesses for the state, who claimed to have owned it, warned them, while they were standing upon the steps, not to go into the upper story. It was shown that this was the only personal warning the defendants had, and that, after receiving it, they went on up into the rooms. It was further shown that Brazier and Gill, after having purchased said room, posted a notice on the door a day or two before the alleged trespass, warning people not to enter upon it. The defendants, as witnesses in their own behalf, testified that they were members of the Anub Lodge of Immaculates; that they had one of the two keys to said room, and had had free access to it, and that at the time of the alleged trespass they used the key they had to go into the room; that at the time they started up the steps they had no knowledge that Brazier and Gill were in possession of said room, and that the only warning they ever received was while they were standing on the steps, and Brazier and Gill said to them that they had better not go up there. The defendants asked the state's witnesses several questions as to when they purchased the property, and if there were not other joint owners of said property, and if it was not a fact that the Anub Lodge was in possession of the property before the alleged trespass, and if they did not know the defendants owned an interest in said property. To each of these questions the state separately objected. The court sustained each of said objections, and to each of these rulings the defendants separately excepted. Upon the examination of each of the defendants as a witness they were severally asked if they were not joint owners with Brazier and Gill in the room alleged to have been trespassed upon, and to state who were the owners of said property at the time of the alleged trespass. To each of these questions the state separately objected. The court sustained each of the objections, and the defendants separately excepted. In the court's oral charge to the jury he instructed them, among other things, as follows: (1) "There cannot be two possessions at the same time which are antagonistic and adverse to each other." (2) "If George Brazier and John Gill were in possession antagonistic to the world, then no one else could be in possession."

Brown & Leeper, for appellants. Charles G. Brown, Atty. Gen., for the State.

DOWDELL, J. The defendants were prosecuted and convicted under section 5606, Code 1896, for trespass after warning. The offense denounced by the statute is one against the possession, and ordinarily the question of title or ownership of the property cannot be inquired into. Cases may arise where a perfect legal title in the defendant would not justify his entry upon land after warning. *Lawson v. State*, 100 Ala. 7, 14 South. 870. We do not question the soundness of the argument of appellants' counsel that one joint tenant or ten-

ant in common cannot prosecute his co-tenant for trespass after warning in going upon the common property before actual ouster by such tenant. But that is not the case presented by the record. The question propounded by the defendants to the several witnesses, and to which the court sustained objections interposed by the state, sought to prove a joint ownership by the defendants with the prosecutor in the property trespassed on by parol evidence. Title or ownership of real property cannot be shown by parol testimony without having first laid the proper predicate for the introduction of such evidence, where the ownership is founded upon title deeds. There was no pretense in this case that the joint ownership sought to be proved was based otherwise than upon paper title. The court very properly sustained the objection interposed by the state to the defendants' questions. That part of the general charge of the court excepted to by the defendants, in which the court stated "there cannot be two possessions at the same time which are antagonistic and adverse to each other," and, "If George Brazier and John Gill were in possession antagonistic to the world, then no one else could be in possession," was a correct exposition of the law when referred to the facts in this case. We deem it unnecessary to discuss the other objections presented in the record, as they are without merit, and not insisted on by defendants' counsel in his brief and argument. We find no error in the record, and the judgment of the court below is affirmed.

(121 Ala. 548)

BUSH et al. v. COLEMAN et al.

(Supreme Court of Alabama. April 4, 1899.)

JUDGMENT—RES JUDICATA—CREDITORS' SUIT—PLEADING.

1. In a suit to subject land conveyed to defendant to the payment of a debt due to plaintiff from a decedent, on the ground that decedent had paid the price, thereby defrauding his creditors, a decree of the probate court showing the insolvency of decedent's estate was inadmissible against defendant to prove such insolvency, as defendant was not interested in the probate proceedings, under Code 1896, § 296, prohibiting persons not interested in a decedent's estate from making an issue as to the correctness of the report of insolvency, and the decree as to him was res inter alios acta.

2. A creditors' suit to reach land conveyed by a decedent in his life must allege insolvency of his estate, or a deficiency of legal assets.

Appeal from chancery court, Mobile county; W. H. Tayloe, Chancellor.

Bill by T. G. Bush & Co. against Elvira Coleman and others to subject to the payment of the complainants' demand a certain piece of land which had been deeded to Elvira Coleman, and which it avers had been paid for by said Smith, out of his own funds, without consideration and while indebted to the complainants. The defendant Elvira Coleman demurred to the bill originally filed upon many grounds, one of which was that it was not shown thereby that the estate of said Smith

was insolvent, or that there was a deficiency of legal assets. The demurrer was sustained, and thereupon the complainants amended their bill to meet the defects pointed out by the demurrer. There was a decree pro confesso against Jasper S. Knight, as administrator of the estate of A. G. Smith, deceased. The defendant Elvira Coleman answered the bill as amended, denying the averments thereof. The other facts of the case necessary to an understanding of the decision on this appeal are sufficiently stated in the opinion. Upon the final submission of the cause on the pleadings and proof, the chancellor decreed that the complainants were not entitled to the relief prayed for, and ordered their bill dismissed. From this decree, the complainants appeal, and assign the rendition thereof as error. Affirmed.

R. T. Ervin, for appellants. L. H. & E. W. Faith, for appellees.

TYSON, J. The bill in this cause was filed by appellants, simple contract creditors, to condemn to the satisfaction of a debt due them by Smith in his lifetime a certain lot in the city of Mobile, in which it is averred the purchase by him of this lot was out of his own funds, and the procurement by him of the execution of the deed by the vendor to the appellees; also the fact of his death, and the appointment of respondent Knight as administrator of his estate. There was a demurrer to the bill, in which many grounds were assigned, and a decree sustaining the demurrer generally. One of the grounds assigned was the failure to aver that Smith's estate is insolvent or that there is a deficiency of legal assets. If this ground of demurrer was well taken, there was no error in the decree, and it is of no consequence that the other grounds were bad. *McDonald v. Pearson*, 114 Ala. 630, 21 South. 534; *Tatum v. Tatum*, 111 Ala. 209, 20 South. 341; *Steiner v. Parker*, 108 Ala. 357, 19 South. 386. That the averment that the estate was insolvent or a deficiency of legal assets to satisfy plaintiffs' demand was essential to give the bill equity, and that the burden was on complainants to prove this fact, there cannot be serious controversy. *Battle v. Reid*, 68 Ala. 152; *Cawthorn v. Jones*, 73 Ala. 82; *Houston v. Blackman*, 66 Ala. 559; *Jenkins v. Lockard's Adm'r*, 66 Ala. 377; *Halfman's Ex'r v. Ellison*, 51 Ala. 543; *Sharp v. Sharp*, 76 Ala. 319; *Bank v. Ellis*, 30 Ala. 478; *Handley v. Heflin*, 84 Ala. 600, 4 South. 725. There was an amendment to the bill curing this defect. This amendment averred that the payment of the purchase price by Smith for the lot was made without any valuable consideration and while he was indebted to complainants, and that his estate is largely indebted and there are not legal assets sufficient to pay his debts. There was a decree pro confesso against Knight. Appellee filed her answer to the bill as amended, denying its averments, and set up special matters of

defense not necessary to be considered. The only evidence offered by complainants to prove the insolvency of Smith's estate, or the deficiency of legal assets to pay complainants' demand in the hands of the administrator of said estate, was a certified copy from the records of the probate court of Mobile county of the report of insolvency of said estate by the administrator de bonis non and a decree of the court adjudging it to be insolvent upon said report. The introduction of this transcript in evidence was objected to by the respondent Coleman, appellee here. The appellee, not having been shown to be a creditor of the estate or otherwise interested in it, could have had no legal notice of this proceeding, and was not therefore bound by it. Section 296, Code 1896, provides that only creditors or other persons interested in the estate may make an issue as to the correctness of the report of insolvency. Clearly, the appellee would have had no right to institute a contest under this section. Having acquired the legal title to the lot in controversy and of necessity all her rights to it against Smith and his creditors, during the lifetime of Smith, we must confess our inability to see how those rights could be impaired by a declaration of insolvency by Smith's administrator or the decree of the probate court adjudging such insolvency, without affording her the right to become a party to the proceeding and contesting the declaration made by the administrator.

In the case of *Bank v. Ellis*, supra, the bill alleged that the administrator had "declared and returned said estate insolvent and besought the orphans' court of Pickens county to make the proper order therein." Upon a demurrer, the court said: "It is not alleged in the bill that the fraudulent grantee was a creditor of the estate at the time that representation and return were made by the administrator; and it is too clear for argument that the allegation that the estate was declared and returned by the administrator to be wholly insolvent is not, as against one who was not a creditor of the estate, equivalent to an allegation that the estate was in fact insolvent. Such a declaration and return has been held not even to be evidence against one who was not a creditor of the estate." In *Randle v. Carter*, 62 Ala. 102, it was held that: "A decree of insolvency in the court of probate merely ascertains, as between the personal representative and the creditors, the status of the estate, and its operation is to transfer to the court of probate exclusive jurisdiction of all claims against the estate (claims of creditors, of course, not the claims of legatees or next of kin); for the whole proceeding is founded on the fact that the assets are insufficient for the payment of the debts to which they are primarily liable. There are no other parties, or were not under the statute existing when this decree was rendered, than the personal representative and the creditors. As to the next of kin or legatees, the record is *res inter alios acta*, not affecting their rights and not evidence against

them of any fact as ascertained by it." The doctrine quoted above from the two cases will be found to obtain in the following cases: Kilgore v. Kilgore, 103 Ala. 814, 15 South. 897; Lambeth v. Garber, 6 Ala. 870; McGuire v. Shelby, 20 Ala. 456; McMillan v. Rushing, 80 Ala. 403; Thames v. Herbert's Adm'r, 61 Ala. 343; Insurance Co. v. Bledsoe, 52 Ala. 551.

In the case of Means v. Hicks' Adm'r, 65 Ala. 241, the bill was filed by a creditor of the intestate, just as here, to set aside as fraudulent certain voluntary conveyances of property made by the intestate in his lifetime, and to subject it to the payment of complainant's debt growing out of a liability paid by complainant upon an administrator's bond upon which the intestate was a co-surety. This court held that the decree of the probate court, made after the conveyances assailed by the bill and after the death of the intestate, adjudging the default of their principal, was *res inter alios acta* as to the grantees in the conveyances attacked as fraudulent.

The decree in this case does not disclose that any ruling was made by the chancellor upon the respondent's (Coleman's) objection to the transcript; but, as the bill was dismissed upon final hearing, we will presume that he excluded from his consideration this evidence which we have shown to be clearly illegal. There being no other testimony in the record to support the averment in the bill of the insolvency of the estate, the complainants must fail for want of proof. This renders it unnecessary to discuss the question as to whether the respondent Coleman furnished the money to Smith which he paid to the purchaser for the lot. But even upon this point we are not prepared to say that the evidence does not prove that she did so. However, that is not now a material inquiry.

The decree of the chancellor dismissing the bill must be affirmed. Affirmed.

(121 Ala. 34)

CHRISTIAN & CRAFT GROCERY CO. v. MICHAEL et al.

(Supreme Court of Alabama. April 4, 1899.)

EXECUTION—CLAIMS—PRESUMPTIONS—IRREGULARITIES—CHATTEL MORTGAGES—AFTER-ACQUIRED PROPERTY—FRAUDULENT CONVEYANCES.

1. One levying an execution under a judgment in his favor on property in the debtor's possession is presumed to be entitled to the property, in the absence of evidence to the contrary.

2. A mortgage of such logs as the mortgagee may own subsequent to a default under the mortgage does not confer a lien on subsequently acquired logs, as against the mortgagor's execution creditors.

3. Under Code, § 2150, making all transfers of chattels in trust for the use of the person making the same void against his creditors, a mortgage of logs is void against the mortgagor's creditors, where there is an agreement outside the mortgage that the mortgagor may remain in possession and manufacture lumber from the logs, and sell it for his own use.

4. A premature issuance of an execution is an irregularity that does not render it void.

5. An irregularity in the issuance of an execution is a matter of which a statutory claimant of the property levied on cannot complain.

Appeal from circuit court, Monroe county; John C. Anderson, Judge.

Action by Michael & Lyons against the Monroe Mill Company. Plaintiffs obtained judgment, and issued execution, and the Christian & Craft Grocery Company interposed a claim to the property levied on. Judgment for plaintiffs, and claimant appeals. Affirmed.

This was a statutory claim suit. Appellees, Michael & Lyons, obtained judgment in the city court of Mobile against the Monroe Mill Company on the 20th day of April, 1898, in the sum of \$879.40 and costs. Execution was issued thereon, April 21, 1898, and placed in the hands of the sheriff of Monroe county on the following day, and on May 7, 1898, that officer levied the same upon the logs and timber now in question, as the property of the defendant. The Christian & Craft Grocery Company thereupon interposed a claim to the property levied upon, made affidavit, gave bond, and obtained possession from the sheriff thereunder, all in exact accordance with the statute. At the trial issue was joined between the plaintiffs and the claimant as to whether the property "was subject to the levy of the execution issued at the suit of the plaintiffs against the Monroe Mill Company." Appellant claimed under a mortgage from the defendant in execution. Subsequent to the execution of this mortgage, but prior to any default thereunder, the mortgagor, the Monroe Mill Company, became indebted to the plaintiffs by the nonpayment of certain drafts in the full sum of the execution, which was levied upon the property in question, and on the 20th day of April the plaintiffs obtained a judgment against the mortgagor upon such indebtedness, caused an execution to be issued thereon, and levied upon the logs and timber in question; and thereupon the mortgagee, present appellant, the Christian & Craft Grocery Company, filed a claim for such property, and thereupon this trial was had. The property at the time of the levy was found in the possession of the mortgagor, defendant in execution, and it was admitted that it was the defendant's property; the claim being based entirely upon the mortgage. There was no evidence tending to show that this property was on hand at the time of the execution of the mortgage, or at the time of, or prior to, the default in the conditions of the mortgage. The evidence for the claimant showed substantially the following facts: On the 1st day of August, 1895, the Monroe Mill Company, a corporation doing business in Monroe county, executed and delivered to Christian & Craft Grocery Company, a corporation doing business in Mobile, a mortgage, upon the recited consideration of \$10,000, conveying its sawmill plant and a large body of lands situated in Monroe county. Said mortgage also contained a provision in the following words:

"Also all of the logs, timber, lumber, and other manufactured wood products that the said Monroe Mill Company may own, or have on hand, at the time of, and subsequent to, any default that may accrue under the terms of this instrument." On or about the 15th day of April, 1896, and after default by the mortgagor, John Craft, the vice president and agent of appellant, went to the mill of the Monroe Mill Company, and in the name of appellant took possession of all of the logs, lumber, and manufactured timber at said mill, on account of the debt due to it, and gave directions to the employes, including the general manager of the Monroe Mill Company, to keep said logs and timber separate from other logs and timber coming to said mill, and to ship said logs and timber at once to Mobile, as the property of appellant. The execution, and the return of the sheriff thereon, were introduced in evidence without objection. During the examination of the witness, R. W. Stoutz, he testified that the city court was in session the day upon which the execution was issued. Thereupon the claimant moved the court to exclude the execution from the evidence, "because it had not been shown that the affidavit required by law before the issuance of the execution before the adjournment of the court had been made." The court overruled this motion, and the claimant duly excepted. Upon the introduction of all the evidence, the court, at the request of the plaintiffs, gave the general affirmative charge in their behalf. To the giving of this charge the claimant duly excepted. There were verdict and judgment for the plaintiffs. The claimant appeals, and assigns as error the ruling upon the evidence, to which exception was reserved, and the giving of the general affirmative charge requested by the plaintiffs.

McIntosh & Rich, for appellant. Gregory L. & H. T. Smith, for appellees.

DOWDELL, J. The claimant, on the trial in the court below, asserted title to the property in question, levied on by plaintiffs as the property of the defendant in execution, under a mortgage executed by defendant to claimant. The plaintiffs, having proved their debt against the defendant, and the levy of the execution on the property in defendant's possession, made a prima facie case, and, unless the claimant offered evidence tending to show a better right or claim, the plaintiffs were entitled to the affirmative charge. The mortgage offered in evidence by the claimant purported to convey a large quantity of real estate and personal property, and contained the following clause, namely: "Also all of the logs, timbers, lumbers, and other manufactured wood products that the said Monroe Mill Company may own or have on hand at the time of, and subsequent to, any default that may occur under the terms of this instrument." The mortgage also contained the following defeasance clause: "The conditions

of the foregoing conveyance are such that whereas, the Monroe Mill Company is indebted to the said Christian & Craft Grocery Company in the sum of ten thousand dollars, evidenced by its three several negotiable promissory notes of even date herewith, payable to the order of itself at the First National Bank of Mobile, Ala., one of the said notes being for the sum of three thousand dollars, payable sixty days after date; one of said notes being for \$3,000, payable four months after date; and the other of said notes being for four thousand dollars, and payable six months after date: Now, therefore, should the said Monroe Mill Company well and truly pay, or cause to be paid, said promissory notes at their respective maturities, then this conveyance is to be void; otherwise, the same is to be and remain in full force and effect. Should default be made in any one of the payments of said notes at its maturity, then all of said promissory notes shall become due and payable, and the said Christian & Craft Grocery Company may, through such agents or attorneys as it may appoint, take possession of and sell all of its said property, of every kind and description, at public outcry, either for cash or upon such credit as it may deem to its best interest. Said sale to be made at Perdue Hill, and notice of the time, place, and terms of said sale to be given for ten days or more, by posting written notices thereof upon the premises of the Monroe Mill Company, in Monroe county, and at least two public places in said county. And it is hereby expressly agreed that the said Christian & Craft Grocery Company may, if it sees fit so to do, bid at and become the purchaser of any of it or all of said property, should its bid be the highest and best therefor."

The evidence, without conflict, shows that the defendant mill company was engaged in the manufacture of lumber; that it remained in possession of the property mortgaged, and continued in the said business, after the execution of said mortgage to claimant, and after default had been made in the payment of the notes for which the mortgage had been given to secure, even on down to the time of the levy of plaintiffs' execution; that the logs which it cut and made into timber and lumber were obtained in part from the lands described in the mortgage and in part from other sources; that the timber and lumber so manufactured by the defendant company was shipped to the claimant at Mobile, and by it, the said claimant, was sold, and the proceeds of such sales applied largely to the unsecured account of the defendant company with claimant for supplies and advances, and part of such proceeds applied in payment of orders given by the defendant company to third persons on claimant, and only a small part of such proceeds were applied to the mortgage debt. There is no evidence that the logs and timber levied upon by plaintiffs' execution were cut from the land described in the mortgage. Nor is there any evidence in

the case that the property levied on was the product of, or manufactured from, logs owned by defendant mill company at the time of the execution of the mortgage, or until after default by the mortgagor under the terms of the mortgage. So far as the record discloses, it was after-acquired property, and acquired after default made by the mortgagor. It is said by this court in *Burns v. Campbell*, 71 Ala. 288: "So, a mortgage of subsequently acquired property, especially by general terms of description, which is not the product, increase, or accretion of something already owned by the mortgagor, amounts to nothing more than a mere agreement to give a further mortgage. It confers no specific lien on such after-acquired property,"—citing *Herm. Chat. Mortg.* § 46; *Anderson v. Howard*, 49 Ga. 313; *Otis v. Sill*, 8 Barb. 102; 2 Kent, Comm. 468.

It is evident, from the terms of the mortgage and the course and conduct of dealing between the claimant and the defendant mill company, that it was the intention and understanding of the parties to the mortgage that the mortgagor mill company should continue in the possession of the property mortgaged, manufacturing timber and lumber from logs, and selling the same for its (the said mill company's) account and benefit. Such was a reservation of benefit to the mortgagor, and it is immaterial whether it appeared on the face of the instrument, or was by a private understanding and agreement between the mortgagor and mortgagee, as to creditors of the mortgagor, the result would be the same. Such being true, the instrument was thereby rendered void, as against the existing or subsequent creditors of the defendant mill company, under the influence of section 2150 of the Code. *Pugh v. Harwell*, 108 Ala. 490, 18 South. 535; *O'Neil v. Brewing Co.*, 101 Ala. 388, 13 South. 576; *McDermott v. Eborn*, 90 Ala. 260, 7 South. 751; *Murray v. McNealy*, 86 Ala. 234, 5 South. 565; *Owens v. Hobbie*, 82 Ala. 466, 3 South. 145; *Benedict v. Renfro*, 75 Ala. 121. The fact that the execution was issued prematurely constitutes only an irregularity, and does not render the execution void. *Draper v. Nixon*, 93 Ala. 438, 8 South. 489; *Sandlin v. Anderson*, 76 Ala. 405; *Steele v. Tutwiler*, 68 Ala. 107; *Freem. Ex'ns*, 25. The irregularity of the execution was a matter of which the claimant could not complain. *Dollins v. Pollock*, 89 Ala. 356, 7 South. 904; *Sandlin v. Anderson*, *supra*. We find no reversible error in the record, and the judgment of the circuit court is affirmed.

(121 Ala. 437)

MORNINGSTAR v. STRATTON.

(Supreme Court of Alabama. April 4, 1899.)

BILL OF EXCEPTIONS—TIME OF SIGNING—DETINUE—PROPERTY OWNED IN PART BY THIRD PERSONS—CONTRACTS—CONSIDERATION.

1. Where the time for signing a bill of exceptions is extended for a stated time by the court in term time, the time allowed by the extension begins to run from the adjournment of the

term, under Code, § 617, requiring a bill of exceptions to be signed during the term at which the exceptions were taken, unless the court extends the time.

2. Detinue will lie, though a third person owned part of the article sought to be recovered, where defendant was not entitled to the possession of any part thereof.

3. An agreement by the owner of property to pay a mortgage thereon, executed, without his knowledge or consent, by a third person, not his agent, is without consideration, and does not ratify the mortgage.

Appeal from city court of Mobile; O. J. Semmes, Judge.

Detinue by R. D. Stratton against Henry Morningstar, for the recovery of a bicycle and damages for its detention. The facts of the case as disclosed by the evidence are sufficiently stated in the opinion. The two charges requested by the defendant, and to the refusal to give each of which the defendant separately excepted, are copied in the opinion. There were verdict and judgment for the plaintiff, and defendant appeals. Affirmed.

The cause was tried by the court on April 23, 1898. At the same term of the court, on April 30, 1898, the defendant moved the court to grant him a new trial, upon the grounds that the verdict was contrary to the law and the evidence in the case, and that the court erred in refusing the charges requested by the defendant. On that day, on April 30, 1898, on motion of the defendant, the motion for a new trial was specially continued to a special adjourned term of the city court, which was to commence on the 3d of May, 1898, during a regular day of the special adjourned May term, and the motion for the new trial was overruled, to which ruling the defendant separately excepted. On April 30, 1898, which was a regular day of the term at which the judgment in favor of the plaintiff was rendered, the court made an order granting the defendant 30 days within which to present and have signed a bill of exceptions. On May 3, 1898, the day of the adjourned term on which the motion for a new trial was overruled, the court made an order granting to the defendant 28 days in which to file a bill of exceptions. On May 27, 1898, the court made an order as follows: "For good and sufficient reasons it is ordered that the time for filing the bill of exceptions in this case, both as to the trial and the motion for a new trial, be extended 20 days." An order signed by the judge and bearing date June 15, 1898, was made, extending the time for preparing and signing the bill of exceptions 60 days longer than that heretofore ordered. Attached to this order was a statement signed by the judge, that on June 15th the counsel for the defendant asked him to extend the time within which to present a bill of exceptions, and that he told him he would do so, but the written order was not presented until June 29th, when he signed it as of June 15th. On August 8, 1898, the judge made an order extending the time for the preparing and presenting of the bill of exceptions to the 1st

day of October, 1898. The bill of exceptions was presented to and signed by the judge on September 13, 1898. In this court the appellees made a motion to disallow and strike from the record the bill of exceptions in the cause, upon the ground that the order of the judge of the said court, signed on June 29, 1898, was signed after the expiration of the time for signing said bill as allowed by the next preceding order; and that, therefore, all subsequent orders were void and of no effect.

Chas. L. Bromberg, Jr., for appellant. McIntosh & Rich, for appellee.

HARALSON, J. Action in detinue by R. D. Stratton, the appellee, against Henry Morningstar, the appellant; commenced before a justice of the peace for the recovery of a bicycle with damages for its detention. Judgment having been rendered against the defendant, the cause was appealed by him to the city court of Mobile, where it was tried *de novo*, with similar result, and from the judgment of that court defendant appeals to this court.

1. The extension of time beyond the term at which a case is tried, for the signing of a bill of exceptions—whether by agreement of the parties under section 616 of the Code; or, by the court in term time, under section 617; or, when signed in vacation by agreement of parties under section 618; or by the judge in vacation for further extension under section 619,—must be evidenced by writing, and never allowed to rest in parol.

When the court under section 617, in term time fixes a time within which a bill of exceptions may be signed—nothing appearing in the order to the contrary—the time fixed begins to run from the adjournment of the term.

When further extension is made under the provisions of section 619, and nothing appears in the agreement of the parties or the order of the judge therefor, to the contrary, the extended time begins to run from the expiration of the time fixed by the previous agreement or order for extension of time.

All orders by the judge, and agreements of parties or their counsel for extension of time under the provisions of either of said sections of the Code, should bear their true date, and never be antedated.

By calculation of time under the above rules, the bill of exceptions signed in this case, was signed in time, and the motion to strike it is denied.

2. It is undisputed that the plaintiff was the owner of the bicycle; that he left Mobile about a year before the trial of this cause, and left the wheel with H. H. Lane, who testified that having it in his possession he loaned it to a man by the name of Quinn, who came to him and said that the plaintiff had offered to lend it to him to ride in a bicycle race, and he let him take it, to be returned after he rode the race; that he, Lane, had no

authority from plaintiff to lend the wheel to Quinn, and that plaintiff had moved permanently to New York, after the trial in the justice's court. The evidence also showed, that defendant did not defend the suit in the justice's court, and that plaintiff was present at that trial, and testified that he demanded the wheel of defendant before he instituted the suit.

One Patterson testified for plaintiff, that he knew the wheel and proved its value and the value of it for use or hire; that he heard plaintiff demand it of defendant, and that witness demanded it of defendant for plaintiff before suit, and defendant declined to surrender it, claiming that he had loaned money on it, and would not give it up until the money he had loaned on it was paid. Witness further stated that the tires on the wheel belonged to him and the wheel itself to plaintiff, and he asked defendant for them, but whether they were delivered to him or not does not clearly appear.

The evidence of the defendant tended to show, that a man by the name of Parquette, on the 11th February, 1897, mortgaged the wheel to the defendant for the sum of \$12. Who Parquette was, and how he came to have the wheel, or what connection he had with it, otherwise than that he mortgaged it to defendant, was not shown. It also tended to show, that plaintiff knew the wheel was in defendant's possession, and that he told defendant, if Parquette did not pay the money and redeem the wheel, he would. The suit was begun before the justice to recover the bicycle on the 3d April, 1897.

The defendant asked the general charge which was refused, and also a second charge, that "if the plaintiff with knowledge of the facts agreed to pay the defendant, at any time before the commencement of the suit, the amount for which the bicycle was mortgaged or pawned to defendant, then the jury must find for defendant."

3. The first charge for defendant was asked on the theory, that if Patterson owned the tires on the wheel, and plaintiff was the owner of the balance of it, he could not maintain the action. It is not shown as to this matter, that the tires were on the wheel when this suit was instituted, but if they had been on it, they were there, under the evidence, presumably by the consent of Patterson. But again, whether that was so or not, and they were on the wheel, their presence on it did not disentitle the plaintiff who owned it, from suing this defendant,—who owned no interest in it, and who claimed none except through the unauthorized mortgage of Parquette,—to recover it. 11 Am. & Eng. Enc. Law, 1089.

4. The second charge was equally without merit. The wheel was mortgaged to defendant by a party who had gotten unwarranted possession of it and mortgaged it to defendant without the knowledge or consent of plaintiff. The defendant did not thereby acquire plaintiff's title to the property, and the

mere unauthorized mortgage of it by a stranger is no legal obstacle to plaintiff's right of possession. What was done by the stranger, Parquette, in mortgaging the property was in no sense in representation, or for the benefit of plaintiff; and the fact that plaintiff, after he learned that defendant had his wheel and held it under mortgage from Parquette, promised defendant that if the latter did not pay the mortgage, he would, did not bind him to do so, either as a promise to pay,—for as such the promise was a mere nudum pactum,—nor, as between plaintiff and defendant, as a ratification or adoption of the mortgage, for there was no relation, actual or assumed, so far as is shown, as between plaintiff and the mortgagor, of principal and agent, or that the transaction had in it any element of benefit to plaintiff, but, on the other hand, was one entirely of detriment to him. 3 Brick. Dig. p. 143, §§ 18, 20; 1 Am. & Eng. Enc. Law, 429, 431; 19 Am. & Eng. Enc. Law, 970; Ellison v. Water Co., 12 Cal. 542; 1 Greenl. Ev. § 66; Chapman v. Lee's Adm'r, 47 Ala. 143.

There was nothing shown in the motion therefore, for a new trial.

Affirmed.

(121 Ala. 454)

SWEENEY v. BIENVILLE WATER-SUPPLY CO.

(Supreme Court of Alabama. April 5, 1899.)

MALICIOUS PROSECUTION—INSTRUCTIONS—PROBABLE CAUSE—EVIDENCE—APPEAL—HARMLESS ERROR—BILL OF EXCEPTIONS—PRESUMPTIONS—CONTRACTS.

1. In an action for malicious prosecution, where the court charges that there are two things for plaintiff to establish; that is, that there was no probable cause to believe that plaintiff committed the offense for which he was prosecuted, etc., the latter clause does not invade the province of the jury.

2. In an action for malicious prosecution, error in charging that there was no probable cause to believe that plaintiff committed the offense for which he was prosecuted is not prejudicial to plaintiff.

3. Where the bill of exceptions does not purport to contain all the evidence, it will be presumed that there was evidence to support the instructions given and to justify the refusal of others requested.

4. Where a water company by mistake sends a customer a bill for water rent in advance, according to certain rates, and the customer offers to pay it, but the company refuses to accept payment, there is no binding contract to furnish water at the rates designated in the bill.

5. In an action for malicious prosecution, a charge that if defendant swore out a warrant so as to imprison plaintiff while defendant accomplished a certain act, and not because of what plaintiff had done, it was malicious, is bad, as ignoring the element of probable cause.

6. Though one's affidavit before a justice of the peace, on which a warrant for another's arrest on a criminal charge was made, was defective, the former is not precluded from setting up the defense of probable cause in an action by the other for malicious prosecution.

7. Employés of a water company, while attempting to turn off water from a customer's premises, were threatened by the latter with

personal violence, whereupon the customer was prosecuted for disorderly conduct. He thereafter sued the company for malicious prosecution. *Held*, that rules of the company, giving it exclusive control of the stopcock by which the water was shut off, were admissible, they having been furnished the customer several years before.

8. In an action for malicious prosecution under a city ordinance the ordinance is admissible.

9. Employés of a water company, while attempting to put in a meter or to turn off the water from a customer's premises, were threatened with violence by the customer, who was thereupon prosecuted for disorderly conduct. *Held*, in a suit by him for malicious prosecution, that evidence of the profits made by the company was irrelevant to the issue of probable cause or malice.

10. Employés of a water company, while attempting to turn off water from a customer's premises by means of a stopcock, were threatened by him with violence. He was prosecuted for disorderly conduct, and thereafter sued for malicious prosecution. The company had the right to the exclusive control of the stopcock. *Held*, that any error in permitting a witness to testify that a box was put on the stopcock to enable the company to shut off the water was harmless.

Appeal from circuit court, Mobile county; William S. Anderson, Judge.

Action for malicious prosecution by John P. Sweeney against the Bienville Water-Supply Company. From a judgment entered on a verdict for defendant, plaintiff appeals. Affirmed.

The following is a substantial statement of the facts as contained in the bill of exceptions: The plaintiff, Sweeney, had a water pipe from the defendant's main in the middle of the street to his sidewalk, which supplied water for sprinkling purposes, and also for a public watering trough for horses. The water that he used for domestic purposes was obtained from a pump in his back yard. Plaintiff had been taking water for his sprinkling and trough for a number of years, first paying at the rate of \$20 per annum, but this was afterwards changed to meter service, and he then paid according to the meter rates. This was afterwards changed back to the \$20 per annum rate from November 1st to November 1st, payable semiannually on November 1st and May 1st of each year. A short time before November 1, 1895, the defendant notified the plaintiff and others using public troughs that it desired to place a meter upon the service pipe to said troughs. When the bills were sent out on the 1st of November, 1895, plaintiff's bill for the six months' water rent from November 1, 1895, to May 1, 1896, was sent to him through the post office, and received by him on November 1st, and he at once sent his son, with a check, to pay the bill. The son testified that when he got to the defendant's office one of the defendant's agents referred to plaintiff as "that damn man Sweeney," but this was denied by defendant's employés. Pooley, the superintendent of the defendant company, told the boy that a mistake had been made in sending his father the bill, and returned the check to the boy, and tore

up the bill. The boy reported to his father what had occurred at the defendant's office. Then the superintendent tried to explain to him that there had been a mistake in sending out the bill. Sweeny, however, demanded that the bill should be returned, saying that it was his property, and that he had tendered the check in payment for the next six months' water rent. The superintendent, at this conversation, told Sweeny, the plaintiff, that they would have to put in a meter, or cut off the water. A few days after November 1, 1895, the superintendent of the defendant sent its workmen to Sweeny's place of business, where they found him. He refused to allow the meter to be put in, and, when defendant's employes attempted to shut the water off at the stopcock box at the edge of the sidewalk, Sweeny came out of his store in an angry manner, and pushed the workmen aside, saying that they should not shut the water off except over his dead body, at the same time using blasphemous language. When the defendant's workmen started towards the middle of the street, to cut the water off at the main, Sweeny told them in an angry manner that they dare not touch that ground, and if they did not get away from there he would have them arrested for trespassing. The stopcock box referred to was a hollow cylindrical piece of iron, which fitted over the stopcock at the curb, and which box was provided with a lid, which could be raised, and then a long key could be inserted in the box, which would turn the stopcock, and thus cut off the water. The top or lid of the box was about one inch beneath the surface of the sidewalk. The employes of the defendant reported to Mr. Pooley, the superintendent, what had occurred when they attempted to shut off the water at the curb and at the main. The superintendent then requested the chief of police to protect the company's men in cutting off the water, and a policeman was sent down to see Sweeny. The employes of defendant again reported that Sweeny would not have the water turned off, either at the curb or in the street. Defendant's superintendent had instructed its employes that if they could not turn the water off peaceably at the curb to shut it off at the main, but they reported that the plaintiff threatened them with personal violence if they touched the street, claiming that he controlled the frontage of his building. After this the superintendent swore out the warrant under which the plaintiff was arrested, but the defendant did not employ any counsel to prosecute, either in the mayor's court or in the city court, to which latter court plaintiff had taken an appeal after conviction before the mayor. When the officer with the warrant arrived at Sweeny's place of business, which was also his residence, Sweeny requested that the officer should wait until after he had finished his dinner, which the officer consented to do, and Sweeny and the officer drove down in Sweeny's wagon to the chief of police's office,

and the chief of police offered to let Sweeny go on his own recognizance, but this Sweeny declined to do, saying that he did not want to be treated differently from any other prisoner. He was then sent to the police station, but was not locked up, and, after remaining there two or three hours, he gave an appearance bond, and was released. The next day he was tried by the mayor, and fined one dollar. He appealed from the mayor's decision to the city court, and the case was afterwards dismissed in that court. The affidavit or complaint upon which the warrant of arrest was issued for John P. Sweeny, the plaintiff in the present suit, omitting the signature and merely formal parts, was as follows: "Personally appeared before me, C. Lawrence Lavretta, mayor and ex officio justice of the peace in and for said city, William C. Pooley, who, on being sworn, deposes and says that John P. Sweeny interferes with the workmen of the Bienville Water-Supply Company, and prevents the said workmen from cutting off the supply of water furnished to said Sweeny, either at the curb or at the company's main, and by his action provokes and disturbs the said workmen in the performance of their duties, and threatens the said workmen with personal violence if they proceed to cut off said supply of water, within the last 10 days past, and prays for a warrant for the arrest of said John P. Sweeny." The defendant produced a book of rules, and offered evidence tending to show that it was a copy of the rules and regulations of the defendant company, in force since 1888, and that the plaintiff had gotten a copy of them from the defendant in 1892, and that they had been shown to the plaintiff since then. The defendant then offered in evidence of these rules Nos. 11 and 25, No. 10 of the company's general rules, and No. 16 of the plumbers' rules, which read as follows: "(11) Consumers will not be allowed to make use of the stopcocks on service pipes, which are placed at the curb in front of their premises. These cocks are for the exclusive use of the company in their control of the water supply." "(25) The company reserves the right to apply a meter to any service pipe whenever, in their judgment, the water consumer is abusing his privileges, and using more water than his assessment pays for." "(10) No person shall open any fire hydrant, or remove or obstruct any stopcock cover, either public or private, or deposit any dirt or other material in such stopcock box, or do anything to obstruct the use thereof." "(16) Consumers are not permitted to use stopcocks on the sidewalks; and there shall be a stop and waste cock located on the premises at the first suitable point beyond the street limits, to enable the consumer to turn off the water in case of accident." As each rule was offered, the plaintiff objected to it, because it was irrelevant and immaterial, and because the rule had not been properly promulgated, because it had not been brought home to the plaintiff,

and because it was in conflict with the provisions of the company's charter. The court overruled each of these objections as interposed by the plaintiff, and to each of these rulings the plaintiff separately excepted. The defendant asked a witness what the stopcock box was for. The plaintiff objected to the question because it was irrelevant and immaterial. The court overruled the objection, and the plaintiff excepted, and the witness answered that it was to protect the stopcock so that the defendant could shut off the water. The defendant asked a witness what the plaintiff's manner was when he spoke to defendant's employes about cutting off the water in the street. The plaintiff objected to the question because the witness cannot testify to the manner, as same is incompetent. The court overruled the objection, and the plaintiff excepted, and the witness testified that he looked very excitable, and looked as if he was very angry about it. The plaintiff's counsel, on cross-examination of defendant's superintendent, asked him what it costs the defendant to supply water. The defendant objected because it was irrelevant and immaterial, and plaintiff stated to the court that they expected to show that defendant's superintendent told the plaintiff that the minimum rate would be \$37.50 per annum, but that the rate would be 50 cents a thousand gallons for the water; and that the plaintiff further expected to show that the costs of furnishing water was not 4 cents a thousand, and the rate of profits under the charge made against Sweeney was more than 1,000 per cent. The court sustained the objection, and plaintiff excepted. The plaintiff's attorney then asked the superintendent of the defendant, while he was a witness, if 50 cents a thousand gallons was not a profit of 1,000 per cent. on the cost of production. The defendant objected to the question as irrelevant and immaterial. The court sustained the objection, and the plaintiff excepted. The defendant then offered in evidence section 258 of the city ordinance, which reads as follows: "Section 258. Be it ordained by the mayor and general council of the city of Mobile, that no person shall be guilty of fighting, quarreling, or any riotous, indecent, blasphemous language, or disorderly conduct in the streets, houses, or anywhere else in the city, nor of abusing, provoking, or disturbing, either by word or action, any person in, or walking in, any street, road, or public way." The plaintiff objected to this evidence because it was irrelevant and immaterial. The court overruled the plaintiff, and the plaintiff excepted. The bill of exceptions does not purport to set out all the evidence adduced on the trial of the cause. It is not necessary to set out at length the charge of the court given ex mero motu. The plaintiff requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "If the jury believe from the evidence that under the rules

of defendant all water contracts are by the year, payable semiannually, and that plaintiff had been taking water from defendant by the year since 1890, and that on November 1, 1895, defendant sent plaintiff a bill at the former rate, and plaintiff accepted it, and offered to pay it, defendant could not afterwards withdraw the bill, and refuse to furnish the water except at meter rates." (2) "If the jury believe from the evidence that the pipe from the water main to the sprinkler and trough belonged to the plaintiff, then defendant had no right to discontinue to furnish plaintiff water and use his pipes or stopcock to shut off the water, and, if defendant's employes attempted to do so, plaintiff had the right to use such reasonable force as was necessary to prevent their doing it, provided he did them no serious injury." (3) "The court charges the jury that the defendant had no right to require plaintiff to pay for the water used by him at meter rates, and had no right to cut off the water unless plaintiff would agree to pay by meter rates." (4) "The court charges the jury that under the evidence in this case defendant's employes had no right to use the stopcock upon plaintiff's pipe to shut off the water, and that plaintiff had a right to use reasonable force to prevent their doing so." (5) "The court charges the jury that if Pooley swore out the warrant so as to imprison Sweeney while he cut off the water, and not because of what he had already done, then the act of swearing it out was malicious." (6) "The court charges the jury that if they believe, from the evidence, that plaintiff paid for the service pipe from the defendant's main to and under plaintiff's sidewalk, and owned the same, the defendant had no right to disturb the portion of said pipe at the sidewalk after he had ceased to furnish him with water without plaintiff's consent; and that, if defendant had any rule or regulation authorizing it to do this without plaintiff's consent, such rule or regulation was unreasonable, and was not binding upon plaintiff, and the plaintiff had the right to forbid the defendant's servants from interfering with the portion of the pipe at the sidewalk." (7) "The court charges the jury that the affidavit upon which plaintiff was arrested did not charge him with any offense known to the law, and that defendant cannot justify the arrest upon the ground that plaintiff was guilty of some other offense not charged in the affidavit." At the request of the defendant, the court gave to the jury the following written charges, to the giving of each of which the plaintiff separately excepted: (a) "The court charges the jury that, if there was no contract in existence between the Bienville Water-Supply Company and Sweeney by which the company was to furnish water to any fixed time in the future, then the company had the right, in November, 1895, to cut off the water at stopcock at the curb; and if the jury believe, from the evidence, that the plaintiff illegally interfered with defendant's

employees when they attempted to so cut off said water, then he was guilty of disorderly conduct, and they must find for the defendant." (b) "The court charges the jury that, although the case against Sweeny was dismissed in the city court, it does not necessarily follow that the prosecution was malicious, nor that it was instituted without probable cause for believing that plaintiff was guilty of disorderly conduct." (c) "The court charges the jury that the defendant in this cause, the Blenville Water-Supply Company, is not responsible for the acts of its agent, W. C. Pooley, willfully and intentionally done, and done beyond the range of his employment or duty, and without the command or authorization of the defendant." There were verdict and judgment for the defendant. The plaintiff appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Gregory L. & H. T. Smith, for appellant.
Bestor & Gray, for appellee.

DOWDELL, J. The appellant, plaintiff in the circuit court, sued defendant for damages for malicious prosecution. There was a jury trial, and verdict for the defendant. Certain exceptions were reserved to the court's rulings on the trial. The bill of exceptions does not purport to set out all of the evidence. The plaintiff on the trial below reserved exceptions to certain parts of the oral charge of the court. These particular portions so excepted to by the plaintiff are pointed out in the bill of exceptions. The bill also sets out in full the oral charge as given by the court. The rule now seems to be well settled that, when exceptions are taken to isolated portions of the oral charge of the court, such isolated parts should be taken and construed in connection with the charge as a whole; and when so taken and construed, if the parts excepted to, though positively erroneous when standing alone, are so explained and modified by the context as that the law is truly stated, there is no ground for reversal. *Railroad Co. v. Weems*, 97 Ala. 270, 12 South. 186; *Same v. Farmer*, 97 Ala. 141, 12 South. 86; *Hawkins v. Hudson*, 45 Ala. 482; *Railroad Co. v. Hill*, 93 Ala. 514, 9 South. 722; *Rogers v. State*, 117 Ala. 9, 22 South. 666; *Simpson v. State*, 111 Ala. 6, 20 South. 572; *Jackson v. State*, 106 Ala. 12, 7 South. 333. The bill of exceptions recites that the plaintiff excepted to that portion of the court's general charge to the jury which states, "that there was no probable cause to believe that the offense of disorderly conduct had been committed by John P. Sweeny." This, standing alone, would have been erroneous, as clearly invading the province of the jury. But take the connection in which it was said by the court, to wit, "The burden is on the plaintiff to make out his case, and there are two things that he has undertaken to establish, and he says that he has established them by the evidence in this case; that is, that there was no probable cause to

believe that the offense of disorderly conduct had been committed by John P. Sweeny,"—and it is evident that the above criticism is not warranted. Besides, if there was error, it was in favor of the plaintiff, and not prejudicial to him. We have carefully examined the other isolated parts excepted to in connection with that portion of the general charge with which they are connected, and we fail to find any reversible error.

It is also a well-established rule that, where the bill of exceptions does not purport to set out all of the evidence in the case, it will be presumed that a charge given was not abstract. 1 Brick. Dig. p. 336, § 12. It cannot be said that the written charges designated as "(a)", "(b)", and "(c)," given at the instance of the defendant, do not contain correct propositions of law, and were properly given by the court, if there was evidence to support these charges, and to which they might be referred; and it will be presumed that there was such evidence when the bill of exceptions does not purport to contain all the evidence introduced on the trial, or some statement equivalent in effect to setting out the whole evidence in the bill.

There was evidence tending to show that the bill sent by defendant to plaintiff on November 1, 1895, was sent through mistake, and when the plaintiff offered his check in payment of the same the defendant declined the check, and took up the bill, explaining to plaintiff that the same had been sent him through mistake. There had been no payment of the money by the plaintiff, or acceptance of the same by the defendant, and, under the particular facts in this case, no binding contract had been executed by the parties, such as would prevent the defendant from declining and refusing to supply the water according to rates expressed in the bill which had been sent the plaintiff by mistake. It would be a strange doctrine to hold that a party cannot withdraw a proposition of contract made through an innocent mistake, where no rights have arisen, or injury resulted, under the proposition. The written charge requested by the plaintiff numbered 1 invoked such a doctrine, and was properly refused by the court.

The plaintiff might have owned the pipe from the main to the sprinkler and the trough, and still, under the contract for the supply of water, the defendant might have had the right of exclusive use of the stopcock at the curb; and, as the bill of exceptions does not set out all the evidence, we cannot presume that such a state of facts did not exist. Charges 2, 3, 4, and 6 requested by the plaintiff are opposed to this view, and were properly refused. Charge 5 requested by plaintiff ignores the proposition of probable cause for suing out the warrant, and is, for that reason, bad. A charge substantially the same as this one was held bad in the case of *Jordan v. Railroad Co.*, 81 Ala. 220, 8 South. 191.

The affidavit sets out a statement of facts

upon which the officer issued a warrant of arrest for disorderly conduct, and for this offense he was prosecuted. The fact that the affidavit was defective would not preclude the defendant, when sued for malicious prosecution, from his defense of probable cause, as to the offense for which the plaintiff was in fact prosecuted under the affidavit and warrant. Affidavits sued out before justices of the peace are not required to be as accurate and precise as an indictment. *Rhodes v. King*, 52 Ala. 272.

There was evidence tending to show that the plaintiff had been furnished with the rules of the defendant company as far back as 1892. This rendered the rules of the company offered in evidence admissible.

This action was based on an alleged malicious prosecution had under a city ordinance of the city of Mobile, and we are unable to see why the ordinance is not relevant and competent under the issues involved in the suit.

As to what it cost the defendant company to supply water, or the per cent. made on the cost of production, we think was foreign to the issue. It in no manner elucidated the question as to whether the defendant's prosecution of the plaintiff was without probable cause, and malicious.

The action of the court in overruling plaintiff's objection to the question asked the witness by defendant, "What was the stopcock box for?" if error, was without injury. We find no error in the record, and the judgment of the circuit court is affirmed.

(121 Ala. 621)

GULF CITY CONST. CO. v. LOUISVILLE & N. R. CO.

(Supreme Court of Alabama. April 5, 1899.)

PRINCIPAL AND AGENT—RECOVERY OF PAYMENTS—CARRIERS—DEMURRAGE—REGULATIONS—TRIAL—TAKING CASE FROM JURY.

1. A consignee of freight paid demurrage charges for car service, knowing that they could not be refunded by the railroad company without the consent of an association to which the money belonged, the railroad company's agent stating that the consignee would have no trouble in getting the charges back. *Held*, that such statement was not binding on the association, the agent not being shown to have had authority to make it.

2. A consignee, having received notice of arrival of the goods, and knowing that, if left in the cars after a certain time, demurrage charges would accrue, did not tender the freight charges due nor demand the goods until some time thereafter, when it paid the demurrage charges to the railroad company, knowing that such payment was subject to the action of a certain association, to which the money belonged, to refund. *Held*, that the payment was voluntary, and could not be recovered back, though the notice of arrival stated excessive freight charges.

3. Charges for car service where goods are left in the car by the consignee after a reasonable time subsequent to their arrival, of which the consignee has notice, are legal.

4. A rule requiring a consignee to receive the freight within 48 hours after notice of its arrival is not unreasonable.

5. One receiving money as agent for another, who is known to the person paying, is not liable to the payor in an action to recover back the payment, in the absence of fraud or want of authority.

6. Where plaintiff's evidence fails to make out a prima facie case, it is proper for the court to exclude it, on motion of defendant, and give the affirmative charge.

Appeal from circuit court, Mobile county; William S. Anderson, Judge.

Action by the Gulf City Construction Company against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

This was a suit in assumpsit, with two counts in the complaint,—one for \$380, money had and received, and the other to recover \$380, "improper and illegal freights" upon 34 cars of steel rails, 2 cars loaded with angle bars, 2 cars loaded with spikes, and 1 car loaded with bolts, belonging to the plaintiff. The only facts set out in the bill of exceptions is the testimony of the secretary of the plaintiff company, and he stated that the freight mentioned in the second count of the complaint arrived in Mobile between the middle of June and the 10th day of July, 1897; that upon the arrival of the first few cars notice of their arrival was sent to him by the appellee, and that such notice purported to show what freights were due, and the freights shown were in excess of the amount of freight stipulated in the bill of lading; that he immediately gave notice thereof to the appellee's agent, with the request that the amount of freight be corrected; that, as the remaining cars arrived, he received similar notices, upon all of which the freight was erroneously stated, but that he did not call attention to this; that prior to the 17th day of July, 1897, he wanted some of the rails, and paid \$1,250 upon account of freight generally, and asked for a certain amount of rails, which was furnished to him, and that on the 17th day of July, the freight bills, properly corrected, were presented to him, including \$380 for car service for storage of the freight from the time of its arrival; that he paid the freight bills and received the freight, and that such payment aggregated about \$2,380,—making \$2,000 for the freight and \$380 for the car service; that he did not, at any time, tender to the company the correct freight money due it, or call for his freight, nor did he ask for the delivery of his freight in any way. The bill of exceptions does not show the form of the notice furnished to the appellant of the arrival of the goods, although it appears that such notices were produced, and the witness examined upon them. Prior to the time of this transaction, the appellant had received cars of freight from the appellee, and there was controversy over the correctness of the freight bills, but all corrections had been made at the freight office in the city of Mobile, without calling the attention of the company's general agent thereto, and were always made without controversy or delay, and without the appel-

lee's giving any special notice thereof. Appellant had paid car service on previous shipments at the same rate per day that was charged on this shipment, and, after doing so, made applications to the appellee to refund, but understood that any application that it made would have to be forwarded to the Alabama Car Association, and passed on by it, and the car service previously paid had been refunded by direction of the Car-Service Association. This is substantially all of the evidence set out in the bill of exceptions. At the conclusion of the appellant's testimony, appellee moved the court to rule out all of the evidence, because the same was immaterial and irrelevant, and did not make out the plaintiff's case. The motion was granted, and the evidence ruled out, and, no further evidence being introduced, the court, at the request of the appellee, gave the affirmative charge to find for it. A bill of exceptions was reserved, and the assignments of error are based upon the exclusion of the evidence and the giving of the general charge for appellee.

McIntosh & Rich, for appellant. Gregory L. Smith, for appellee.

TYSON, J. The appellant by this suit sought to recover of the defendant \$380, which it paid to defendant for car service. It appears without dispute that the plaintiff had notice of the arrival of the steel rails, bars, and spikes transported by the defendant, and knew of the rule of the Car-Service Association requiring the defendant to make a charge for this car service in the event the freight was not taken or received by plaintiff within 48 hours after such notice. It is also undisputed that these notices were copies of the freight bills, and there was an error in each of them in the amount of the freight charges; that plaintiff called the attention of the defendant's agent to these errors, and that he promised to examine into them, and have them corrected. The matter of error in these notices is the excuse which the plaintiff offers for not paying the bills and receiving the freight. It is not shown that it tendered the amount really due defendant, which was known to its agent having the matter in charge. But, knowing it was chargeable with this car service, if accrued, and the defendant would require its payment for the Alabama Car-Service Association before delivering the freight, it declined or failed to receive the freight and pay the charges, and permitted the demurrage charges to accrue. It was also known to plaintiff's agent, when it paid these charges, that defendant would not refund it without the consent of the Car-Service Association, to whom the money belonged. On this point we quote the language of the witness, plaintiff's agent, on cross-examination: "I had paid car service on [these] former shipments at the same rate per day that was charged us on this shipment, and when I did pay said car service I made application for a refund of it

to the L. & N. Railroad Co., the defendant. I understood, however, that my application would be forwarded to the Alabama Car-Service Association, and be passed on by it." To avoid the effect of this testimony, it is argued by appellant's counsel that, because the defendant's agent said on the day this payment was made by it that it "wouldn't have any trouble in getting the \$380 back," it was induced to make the payment. At best this was but an expression of the opinion of the agent as to what action the Car-Service Association would take upon the application to refund the money. Besides, it does not appear that the opinion was expressed before the plaintiff parted with the money, but, on the contrary, the verbiage of the bill of exceptions on this point clearly indicates that it was a statement made by him after its payment. But, whether made before or contemporaneously with the payment, if construed as a statement of a fact, it cannot bind the Alabama Car-Service Association, to whom the money belonged, in the absence of fraud; it not being shown that the agent making it had any authority to do so. In the absence of any proof of a tender of the amount admittedly due by it on these freight bills, or a refusal by defendant at any time after demand to deliver the freight, taken in connection with the affirmative proof that plaintiff did not make a request of the defendant to deliver it, and made this payment to the defendant as the agent of the Alabama Car-Service Association, subject to the action of said association to refund it, which the association declined to do, the payment was voluntary, and cannot be recovered back. *Ralsler v. Mayor, etc.*, 66 Ala. 194; *Town Council v. Burnett*, 34 Ala. 400; *Gachet v. McCall*, 50 Ala. 307. The charge was not an illegal one, nor shown to have been incorrect in amount; nor is the rule requiring the plaintiff to receive the freight within 48 hours after notice an unreasonable one, and therefore not within the influence of the principles announced in the case of *Railway Co. v. Steiner*, 61 Ala. 539, where the charges were not only excessive, but in plain violation of the provisions of a statute. Had the plaintiff desired to free itself of these demurrage charges, it could have tendered the amount known to it to be due defendant as freight charges, and demanded a delivery of the rails, etc. In such case, if defendant had declined to receive the amount tendered, and refused to deliver the rails, doubtless it would not have been entitled to collect for the Car-Service Association the demurrage charges; and, if plaintiff had then been compelled to pay these charges in order to get possession of the rails, the payment would have been compulsory. 18 Am. & Eng. Enc. Law, p. 222, and notes.

In addition to what we have already said, there is another reason, perhaps more conclusive against plaintiff's right to recover. It appears that the money in controversy was paid to the defendant as the agent of the Ala-

bama Car-Service Association, and this fact was known to the plaintiff when the payment was made. The defendant, being merely the agent for its collection, could not be made liable, its principal being known to plaintiff, in the absence of fraud or want of authority to bind his principal. There is not a single fact in the record from which either fraud or want of authority can be inferred in the remotest degree. *Comer v. Bankhead*, 70 Ala. 496; *Roney's Adm'r v. Winter*, 37 Ala. 278; *Bell v. Teague*, 85 Ala. 213, 3 South. 861; *Drake v. Flewellen*, 33 Ala. 106. The plaintiff failing to make out a prima facie case, there was no error in the action of the court, on motion of defendant, in excluding the testimony offered, and giving the affirmative charge requested in writing by the defendant. *Insurance Co. v. Peacock*, 67 Ala. 253. Judgment affirmed.

(121 Ala. 304)

GILREATH et al. v. UNION BANK & TRUST CO.

(Supreme Court of Alabama. April 18, 1899.)

RECEIVERS—APPOINTMENT—NOTICE—NECESSITY.

A bill by a judgment creditor of a husband to set aside as fraudulent a transfer to the wife of mineral lands, machinery, and personal property, and the transfer thereof by her to a corporation, did not allege the insolvency of either grantee, nor show that the realty was not sufficient to satisfy the judgment. It alleged that the company was constantly operating the mines, and appropriating the proceeds, and that, if notice of the appointment of a receiver were given, the husband, who controlled the company, would dispose of or manipulate the personality and the profits from the realty so as to defeat the creditor's rights. The husband and wife resided in the place where the corporation did business and where the bill was filed. *Held*, that the appointment of a receiver without notice was unauthorized.

Appeal from chancery court, Jefferson county; John C. Carmichael, Chancellor.

Bill by the Union Bank & Trust Company against Belton Gilreath and wife and the Gilreath Coal & Iron Company. From an order appointing a receiver for defendant company, defendants appeal. Reversed.

The averments of the bill are substantially as follows: That the complainant had recovered its judgment on the 18th day of January, 1898, in the city court of Birmingham, for the sum of \$7,838.50, against said respondent Belton Gilreath, on a bond or bill single owing by said Gilreath to said complainant, and which said indebtedness accrued some time in the year 1896; that a certain deed from A. C. Howze, assignee, had been executed to Belton Gilreath, trustee, on the 31st day of December, 1897, for certain real estate and personal property described therein, for a consideration of \$14,168.50, and that thereafter, on the 11th day of January, 1898, the said Belton Gilreath executed a deed to his wife, Julia M. Gilreath, of the same property. Both deeds are attached as exhibits to the bill, which show a conveyance of 400 acres of mineral

lands in Walker county, besides machinery suitable for the operation of the coal land; also a stock of goods, wares, and merchandise, and other specific items of personal property,—all of said property being in Walker county, Ala. The deed from Belton Gilreath, trustee, to Julia M. Gilreath, recites that the said Belton Gilreath, trustee, purchased the property with the funds of Julia M. Gilreath, with the understanding that he, as such trustee, should afterwards convey the property to the said Julia M. Gilreath. The bill also alleges that on the 22d day of January, 1898, the Gilreath Coal & Iron Company was incorporated under the laws of Alabama, with a capital stock of \$25,000, consisting of 250 shares of the par value of \$100 each, and that Julia M. Gilreath subscribed for 148 shares, Belton Gilreath 1 share, and E. H. Cabaniss 1 share; that the share subscribed for by Cabaniss was paid for by Belton Gilreath, and that this was done in order to procure the required number of persons under the law to perfect the organization; that Julia M. Gilreath paid her subscription in real estate and personal property described in the deed shown as exhibits to the bill, and which was at that time valued by all the stockholders at \$14,800; that there were only three stockholders in said corporation, to wit, Julia M. Gilreath, Belton Gilreath, and E. H. Cabaniss; that said stockholders met, and elected themselves a board of directors, and the board of directors elected Belton Gilreath president and general manager, which said office he is now filling, and is conducting the business of the corporation; that the said Gilreath Coal & Iron Company was never organized in good faith, and for an honest purpose, and that it was a fraud on the corporation laws of Alabama; that the said Belton Gilreath caused the same to be organized for the purpose of introducing a new person or entity as the owner of the property and business to be carried on, prompted by the conception that by this means he could cover up and hide out his property, and with the purpose to hinder, delay, or defraud his creditors, and the complainant in particular; that said Belton Gilreath is the real beneficial owner of the entire capital stock of the said Gilreath Coal & Iron Company. The bill acquits Cabaniss of any knowledge or participation in the fraudulent purpose of Belton Gilreath, and charges that the \$14,168.54 paid to A. C. Howze, assignee, by Belton Gilreath, for said property, was in fact the money of Belton Gilreath, and not of his wife, and that the taking of the deed to Belton Gilreath, trustee, was a scheme on his part to conceal and cover up his property, and to hinder, delay, and defraud his creditors, and the complainant in particular. The bill also avers "that the entire capital stock, and both the real and personal property of the Gilreath Coal & Iron Company, belong absolutely to Belton Gilreath, and he is hiding out said stock and property for the sole purpose of defeating your orator and other creditors in the collection of

their demands against him." The bill also avers that all the property which ostensibly belongs to the Gilreath Coal & Iron Company is being used for the purpose of mining, such as raising coal; that said company also runs a commissary, wherein is kept a stock of general merchandise, and that said company is constantly buying and selling goods and wares for and from said commissary; that the lands are daily having coal taken from them in large quantities, and being shipped and sold throughout the country, through the sole management and direction of Belton Gilreath; that said Gilreath Coal & Iron Company is absolutely under the sole control and management of Belton Gilreath; that he is taking in and receiving all cash money and funds that are being paid to said Gilreath Coal & Iron Company, and appropriating it for his own individual use and purpose, not accounting to any one for any of said funds; that by reason of the daily and constant mining of the coal on the said lands, which gives to said lands their real value, the said Belton Gilreath is working an irreparable injury to same, and, further, by his taking and appropriating all the receipts and funds of said Gilreath Coal & Iron Company, whether from the sale of the said coal or the commissary, he is defrauding his creditors, and the complainant in particular, in the enforcement of its just demands, and that it is necessary that a receiver be appointed to take charge of all the property, both real and personal, and particularly that property described in this bill; that the property described in this bill and the exhibits thereto is practically all the property that complainant can subject to the payment of its judgment and execution, and it is unable, after diligent search in all the avenues open to it, and which could be discovered by due and proper diligence, to make such discovery of property to subject it to the payment of its demands; and that said property is in great danger of being lost, destroyed, squandered, or so impaired or decreased in its value by the raising and selling of said coal, and the use of the machinery to carry on the mining business, and the operation of said commissary, and the collection and appropriating of all the moneys, funds, and profits arising from the operation of said mining business being appropriated by the said Belton Gilreath to his own and exclusive use, and not to the payment of any of his debts, and complainant's particularly, so that it will lose its debt, or a large portion thereof, unless all of said property is taken immediately and promptly into the custody of this court. And as a reason for the appointment of a receiver without notice the bill alleges "that from the facts herein set forth, which complainant alleges are true, if the notice embracing any practical period of time was given to either of said Gilreaths, or to the Gilreath Coal & Iron Company, which is under the control and management of said Belton Gilreath, the said Belton Gilreath would instantly take advantage of the time of notice required of the appoint-

ment of such receiver to dispose of or to so manage or manipulate all the personal property mentioned in this bill; and the rents and profits arising therefrom and from the said real estate, to defeat the rights of complainant in its purpose in filing this bill to procure the payment of its said judgment." The bill also avers that execution has issued on said judgment against said Belton Gilreath, and has been returned "No property found."

Cabaniss & Weakley, White & Howze, and Garrett, Underwood & Thoch, for appellants. Denson & Tanner, for appellee.

DOWDELL, J. The appeal in this case is taken from the order of the chancellor appointing a receiver of the Gilreath Coal & Iron Company, without notice to said defendant corporation, or any of the other defendants. The appointment was made upon the bill, which was sworn to by one of the solicitors for the complainant. No other affidavit was submitted in support of the application for a receiver. The bill was filed by the Union Bank & Trust Company as a judgment creditor of Belton Gilreath, one of the respondents. The manifest purpose of the bill is to have vacated and annulled the conveyance by said Belton Gilreath to his said wife, Julia M. Gilreath, who is also made a defendant to the bill, and the conveyance by said Julia M. Gilreath to the Gilreath Coal & Iron Company, made by her in payment of her subscription to the capital stock in said company, and to subject the property therein conveyed to the payment of complainant's judgment, and, pending the litigation, to have a receiver to take the custody, control, and management of the property. Under the averments of the bill, both Julia M. Gilreath and the Gilreath Coal & Iron Company occupy the attitude of fraudulent grantees. It is a well-settled proposition of law that a fraudulent grantee may, upon bill filed for that purpose, be held to an accounting for the property fraudulently conveyed and disposed of by such grantee, and a personal judgment or decree may be rendered against him. Such being true, it could hardly be said that in any case upon a bill filed to annul and vacate a fraudulent conveyance, where the grantee is solvent, and able to respond to a personal judgment rendered against him, a necessity could exist for the appointment of a receiver to take charge of the property. The bill does not aver the insolvency of either Julia M. Gilreath or the Gilreath Coal & Iron Company. So far as the allegations of the bill are concerned, these parties are amply able to respond to any decree that might be obtained against them on an order to account for the property fraudulently received or held by them. The appointment of a receiver calls for the exercise of an extraordinary jurisdiction, and an extreme and harsh remedy. Mr. High, in his work on Receivers, says: "Courts of equity are exceedingly averse to the exercise of their extraordinary

jurisdiction by the appointment of receivers upon ex parte applications, and this practice is never tolerated except in cases of the gravest emergency, demanding the immediate interference of the court for the prevention of irreparable injury, or in cases where defendant has absconded, and willfully put himself beyond the jurisdiction of the court. And it may be stated as the settled practice, both in England and America, to require the moving party to give due notice of the application to defendant, over whose effects he seeks the appointment of a receiver, in order that he may have an opportunity of being heard in defense, and that his property may not be summarily wrested from him upon an ex parte application. Even in exceptional cases of great emergency, when the relief is demanded for the prevention of irremediable injury, the courts are extremely averse to interference ex parte, and will ordinarily entertain the application only after notice to defendant, or a rule to show cause." High, Rec. § 111, citing, among many other cases, *Verplanck v. Insurance Co.*, 2 Paige, 438; *Crowder v. Moore*, 52 Ala. 220. The same author says: "To warrant a court in entertaining an application for a receiver without notice, it must be clearly shown that the delay which would result from giving notice would defeat the rights of plaintiff, or would result in great injury to him. And when the relief is sought upon an ex parte application, upon the ground of extreme necessity, the particular facts and circumstances rendering such summary proceeding necessary should be set forth in the application, and a mere statement of opinion as to such necessity, even though made under oath, will not justify a departure from the established rule requiring notice of the application." High, Rec. § 113.

The bill fails to aver the respective values of the real and personal property contained in the conveyances. For aught that appears from the averments of the bill, the lands in question may be more than sufficient to satisfy the demand of the complainant. Certainly this species of property could not be spirited away or put beyond the reach of the complaining creditor, nor do the averments of the bill sufficiently show that the manner in which it is being used would so rapidly depreciate the same in value as to afford an excuse or reason for not giving to the defendants notice of the application for receiver. It is a familiar principle that the power to appoint a receiver is one that must be exercised with great caution, and that it requires a strong case to dispense with notice. The bill shows that the individual respondents were residents of the city of Birmingham, where the bill was filed, and the Gilreath Coal & Iron Company had its principal place of business in the same city. With all the defendants residing in the same place where the bill was filed, considering the nature and description of the property in question, it is hardly reasonable to conclude that any serious injury

could result from the delay in giving notice of the intended application for a receiver. Nor do we think that the reason stated in the bill is sufficient to warrant the appointment of the receiver without notice. At most it is but the averment of an apprehension, a mere opinion or conclusion of the pleader. It matters not how honest may be the belief of a party as to the apprehended danger of loss of property. Such is not sufficient without a full and clear statement of the facts, clearly and satisfactorily showing such belief to be well grounded. As said by Brickell, C. J., in the case of *Bank of Florence v. United States Savings & Loan Co.*, 104 Ala. 297, 16 South. 110: "It is not on such vague and indefinite allegations, the opinions or conclusions of the pleader, not accompanied by a statement of the facts on which they are founded, that notice of the judicial proceeding can be dispensed with, and parties deprived of the possession or control of property." The following cases are in point, and sustain the views we have expressed: *Crowder v. Moore*, supra; *Moritz v. Miller*, 87 Ala. 331, 6 South. 269; *Thompson v. Manufacturing Co.*, 87 Ala. 733, 6 South. 928; *Dollins v. Lindsey*, 89 Ala. 217, 7 South. 234; *Lindsay v. Mortgage Co.*, 97 Ala. 411, 11 South. 770. In each of the following cases, cited in brief of appellee's counsel, to wit, *Micou v. Moses*, 72 Ala. 439; *Maxwell v. Shoe Co.*, 109 Ala. 371, 19 South. 412; *Ashurst v. Lehman*, 86 Ala. 370, 5 South. 731; *Hendrix v. Mortgage Co.*, 95 Ala. 313, 11 South. 213; *Heard v. Murray*, 98 Ala. 127, 9 South. 514; *Sims v. Adams*, 78 Ala. 395,—it will be found that there was a distinct averment in the bill of the insolvency of both the defendant debtor and his fraudulent grantee, and that the property in question was of such a nature and character as to be readily spirited away, and that the same was being disposed of, and that irreparable loss and injury would result from the delay that would follow in giving notice. For the reasons given above, we think the chancellor erred in the order appointing a receiver, and the order must be vacated, and set aside. Reversed and remanded.

(121 Ala. 303)

MALLON v. MOOG.

(Supreme Court of Alabama. April 6, 1899.)

FORCIBLE ENTRY AND DETAINER—REMOVAL TO CIRCUIT COURT—CLAIM OF TITLE—USE OF FORCE—REMOVING FENCE.

1. Under Acts 1896-97, p. 1125 (Code, §§ 2147-2149), authorizing the removal of suits of unlawful detainer from a justice to the circuit court, where the possession of defendant is not acquired by contract or agreement with plaintiff, or by force, and requiring a sworn petition that the entry was made peaceably and under claim of title, it is not sufficient if the claim set up is under an after-acquired title.

2. Code, § 2149, provides that on the trial of all unlawful detainer cases removed from a justice to the circuit court plaintiff must recover on the strength of his legal title as in ejectment, unless defendant entered, inter alia, "by use of force," in which case no inquiry can be

made as to the strength of the legal titles. Section 2126 provides that the force may be by "breaking open a door, window, or other part of a house, whether any person be within or not." *Held*, that the entry and removal of a wire fence inclosing a vacant lot, though done in a peaceable manner, and replacing it with another fence, is made by use of force.

Appeal from circuit court, Mobile county; William S. Anderson, Judge.

Forcible entry and detainer by Delphine Moog against Frank Mallon. From a judgment for plaintiff, defendant appeals. Affirmed.

This was an action of forcible entry and unlawful detainer, begun against appellant by appellee on March 11, 1897, before a justice of the peace, to recover possession of a vacant lot of land in the city of Mobile. Appellant was in possession of the land sued for at the commencement of this suit, claiming title to it, and had it inclosed with a fence. While the suit was pending and undetermined before the justice, the cause was removed to the circuit court by petition under the provisions of the act of the general assembly approved February 16, 1897, entitled an act "to provide for the removal of suits of unlawful detainer," etc. (Acts 1896-97, p. 1125; Code, §§ 2147-2149). The defendant pleaded not guilty, and the statutes of limitations of three and ten years. On the trial of the cause, the plaintiff introduced testimony tending to show that the lot of land described in the complaint was inclosed by the plaintiff, in the summer of 1896, with a wire fence, the wire being fastened to posts let into the ground. The said lot of land was vacant when the plaintiff's fence was erected, there being no evidence of possession at that time. The evidence for the plaintiff tended further to show that the wire fence inclosing said lot was of two or three strands fastened to the posts about two feet apart; that said fence was erected by workmen at the instance of plaintiff's husband, one B. Moog; that the said fence was removed by defendant, and a board fence erected in its stead. Plaintiff introduced the original papers from the justice, showing this action was commenced on March 19, 1897. The defendant admitted on the trial that the demand notice was served on him. While B. Moog, one of the plaintiff's witnesses, was being examined, he was asked by defendant's counsel if plaintiff had any paper title to the land in controversy. The question was objected to by plaintiff, and the court sustained the objection, and the defendant excepted. The defendant was introduced as a witness in his own behalf, and his testimony tended to show that he knew the location of the land in controversy, and that he previously claimed to own it, and that he had it inclosed with a fence about May, 1896; that the lot had been inclosed with a wire fence by Mr. Moog prior to that time; that he removed the wire fence which had been erected by plaintiff, and put his fence in its stead; that the defendant, in erecting his fence and

in removing plaintiff's fence, did it in a quiet, peaceable manner, and without creating any disturbance; that he pulled plaintiff's posts from the ground, and, together with the wire, deposited them on an adjoining lot; that no persons were present except defendant and the men whom he had employed to do the work; that he does not remember whether any of the wires were broken in removing the plaintiff's fence. The defendant offered documentary evidence to prove title in himself to the land in controversy, the date of the deed to himself being May 11, 1897. Plaintiff objected to this deed, because it was executed after this action was begun. The court sustained the objection, and the defendant excepted. Defendant offered further documentary evidence, in order to show title in himself to the land sued for through a series of conveyances from the United States to defendant. Plaintiff objected to this evidence, the deed to defendant bearing date May 11, 1897, being the same deed just offered and ruled out by the court; and the court sustained the objection, and the defendant excepted. Upon the introduction of all the evidence, the court, at the request of the plaintiff, gave the general affirmative charge in their behalf, to the giving of which charge the defendant duly excepted. There were verdict and judgment for the plaintiff. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

McCarron & Lewis, for appellant. R. T. Ervin, for appellee.

DOWDELL, J. This was an action of forcible entry and unlawful detainer, brought by the appellee, Delphine Moog, against the appellant, Frank Mallon, in the justice court in the city of Mobile. The cause was removed to the circuit court of Mobile on the petition of the defendant, Mallon, under the provisions of sections 2147-2149 of the Code of 1896. If the cause had been carried to the circuit court by appeal from the judgment of the justice of the peace, it would need no argument to demonstrate that the rulings of the circuit court on the trial in that court were free from error. But, as the removal of the cause was had under the provisions of the above sections, which were enacted into law by a recent act approved February 16, 1897, the case necessarily calls for a construction of those sections. The effect of the act in question is, in certain cases of forcible entry and unlawful detainer, where the possession of the defendant is not acquired by virtue of any contract or agreement with the plaintiff, or by force, to convert the proceedings into a statutory action of ejectment; the manifest purpose being, in such cases, to save a multiplicity of suits. Under the provisions of the statute the sworn petition of the defendant for removal, among other statements, must contain a statement that the entry was made peaceably and under claim of

title. Without this statement no authority is conferred on the judge to order the removal. To entitle the defendant to the benefits conferred by the statute, it is not enough that his entry was a peaceable one, but it must also have been made under a claim of title. It is not sufficient if the claim is set up under an after-acquired title. One who enters, though peaceably, without title or claim of title, is but a trespasser; and the statute was not enacted for the benefit of trespassers. The only evidence offered by the defendant of title or claim of title was the title which he acquired long after his entry, and even subsequent to the removal of the cause into the circuit court. The bill of exceptions recites that the defendant was introduced as a witness in his own behalf, and his testimony tended to show "that he knew the land in controversy, and that he had it inclosed with a fence about May, 1896; that the lot had been inclosed with a wire fence by Mr. Moog prior to that time; that he removed the wire fence which had been erected by plaintiff, and put his fence in its stead; that the defendant, in erecting his fence, and in removing plaintiff's fence, did it in a quiet, peaceable manner, and without creating any disturbance; that he pulled plaintiff's posts from the ground, and, together with the wire, deposited them on an adjoining lot; that no persons were present except defendant and the men whom he employed to do the work; that he does not remember whether any of the wires were broken in removing the plaintiff's fence." This was all of the evidence on the part of the defendant relating to manner of his entry upon the lot. That the defendant had "previously claimed to own the lot" does not show that he was claiming to own it at the time of his entry, and that he entered under claim of title.

Section 2149 of the Code, which corresponds with section 3 of the original act, provides: "On the trial of all cases removed under the provisions of the two preceding sections, to the circuit court, the plaintiff must recover on the strength of his legal title as in a statutory action in the nature of an action of ejectment, unless he can prove that the defendant, or those under whom he claims, entered on said lands under some contract or agreement between [with] plaintiff, or those under whom he claimed, or by use of force; in which latter case no inquiry can be had as to the respective strength of the legal title of the plaintiff or defendant." What is meant by the expression in the statute, "by use of force," becomes a pertinent question, and we may here observe that it does not necessarily involve a disturbance or breach of the peace. In section 2126, which forms a part of the chapter that embraces the sections under consideration, we find the legislative interpretation of what constitutes force in actions of this character. That section is as follows: "A forcible entry and detainer

is, where one, by force or strong hand, or by exciting fear or terror, enters upon and detains lands or tenements in the possession of another; as by breaking open doors, windows, or any other part of a house, whether any person be within or not; by threats of violence to the party in possession, or by such words or actions as have a tendency to excite fear or apprehension of danger; by putting out of doors, or removing the goods or chattels of the party in possession; or by entering peaceably, and then, by unlawful refusal, or by force or threats, turning or keeping the party out of possession." The forcible entry and detainer may be of lands or tenements. The force used may be by "breaking open a door, window, or other part of the house." The presence or absence of the party in the prior actual possession at the time of such entry is immaterial. We confess we can see no difference in principle between entering upon and breaking down and removing a fence inclosing a vacant lot and detaining the same and in breaking open a door of a vacant house and detaining the same. What would be termed "the use of force" in the latter would be the same in the former. If, in the present case, a house had been upon the lot in question, and in the absence of the plaintiff, the party in actual possession, the defendant had entered by "breaking open a door or window," it would hardly be contended that the entry was without the "use of force," though done "in a quiet and peaceable manner." The plaintiff had the actual possession of the lot; had inclosed the same with a wire fence. The law did not require her to remain in person upon it, and stand guard over it. The defendant, in her absence, entered, and removed said wire fence, though "in a quiet and peaceable manner," and replaced it with a fence of his own. We hold that such entry was made by use of force.

The case of *McGonegal v. Walker*, 23 Ala. 361, cited by counsel for appellant, is distinguishable from the present case. In that case *Walker*, as shown by the statement of the facts, the plaintiff in the forcible entry suit, had entered upon the land, which was then in the actual possession of the defendant, and was proceeding to construct a fence, which the defendant tore down, and removed back to near the old fence line between the parties. The defendant, *McGonegal*, being already in peaceable possession, the bare removal of the fence would not constitute forcible entry and detainer. This is as we understand that case. In the present case there is no pretense of prior possession on the part of the defendant, or possession at the time the plaintiff inclosed the lot with her own fence. Under the facts of this case, according to the construction we have given the statute, the legal title could not be inquired into. We find no reversible error in the record, and the judgment of the circuit court is affirmed.

(51 La. Ann. 548)

BYRNE v. HEBERT. (No. 12,858.)

(Supreme Court of Louisiana. March 21, 1898.)

PETITORY ACTION—JUDGMENT—APPEAL—REMAND.

1. To plaintiff's petitory action, defendant answered that he held the land under lease from the heirs of Bogart, but did not disclose their names or domicile. The heirs were not made parties. There was judgment awarding plaintiff, on his showing of title, possession as against the lessee, but rejecting his demand "in all other respects." Having prayed to be declared the owner, this judgment disallowed his demand of ownership. *Held*, as he sued for the ownership of the land, and for possession thereof as an accessory to such ownership, there is error in the judgment, which, while awarding him possession, rejects his claim of ownership.

2. The rejection of his plea of ownership left nothing to predicate the decree of possession upon.

3. The court will, in the exercise of a sound discretion, remand a case when, in its judgment, the ends of justice require it.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Iberville; E. B. Talbot, Judge.

Action by Joseph Byrne against Amedée N. Hébert. Judgment for plaintiff. Defendant appeals. Reversed.

Robert N. Sims (Fenner, Henderson & Fenner, of counsel), for appellant. Hébert & Hébert, for appellee.

NCHOLLS, C. J. The plaintiff, in his petition, filed March 4, 1897, alleged that he was the owner of lots 3, 4, 5, and 6 of section 4, in township 9 S., of range 1 E., S. D. E. Mississippi river, containing 149.64 acres, by virtue of an entry on said lots made under section 2290, Rev. St. U. S., on August 14, 1894, as would appear by the receiver's certificate of said entry, annexed to, and made part of, his petition; that immediately after his said entry he went upon the lands entered, and began to cultivate and improve them; that on the 15th day of June, 1895, in the suit of Edward Bryant, agent of the heirs of Wilhelmus Bogart, against Joseph Byrne et al., an injunction issued to him, commanding and restraining and prohibiting him from any further use or cultivation of said lands; that on the 8d of August, 1895, the said injunction was dissolved by a judgment of the district court for Iberville parish, as would appear from the proceedings in said suit, annexed to, and made part of, the petition; that from the date of the injunction above mentioned (June 15, 1895) up to the date of the filing of his petition, notwithstanding the dissolution of said injunction, defendant, claiming to be the lessee of the heirs of Bogart, had been in constant possession of his said property; that he had made demand for the possession of the same in vain; that he desired to be put in possession of his property, by judgment of the court, by the sheriff of the parish of Iberville, and to that end he brought suit against

the defendant, the lessee aforesaid; that the possession of defendant of his property had been in bad faith, and without color of authority or title; that he should be condemned to pay petitioner rent at the rate of five dollars an acre per annum for his property from June 15, 1895, until the termination of the suit, with legal interest from the date of judgment. The prayer of his petition was that there be judgment in his favor against defendant, decreeing him to be the owner of lots Nos. 3, 4, 5, and 6, aforesaid, and commanding the sheriff of the parish of Iberville to put petitioner in possession of said property; that he have further judgment against defendant for rent due him as alleged in the petition. Defendant filed several exceptions. One was that the allegations of plaintiff's petition did not disclose any cause of action against defendant; a second, that plaintiff was absolutely without right to prosecute this suit, or stand in judgment, for this: that the pretended certificate of entry declared on by plaintiff was the subject of contest and controversy in the land department of the United States, and said pretended entry had been suspended and was inoperative; that said contest was being prosecuted by the state of Louisiana, and plaintiff was a party thereto. Both of these exceptions were overruled. Defendant prayed over of the receiver's certificate of entry declared upon by plaintiff; alleging that it had not been filed, although averred to have been annexed to the petition. The certificate was produced and filed. It was as follows:

"Receiver's Receipt No. 15,864. Application No. 15,864. Homestead. Receiver's Office, New Orleans, August 14th, 1894. Received of Joseph Byrne the sum of thirteen dollars seventy-five cents, being the amount of fee and compensation of register and receiver for the entry of lots 3, 4, 5, and 6 of section 4, in township 9 south, of range 1 E., S. D. E. Mississippi river, under section No. 2290, Revised Statutes of the United States.

"[Signed] Charles P. Johnston, Receiver.

"\$13.75. 149⁶⁴/₁₀₀ acres.

"Note. It is required of the homestead settler that he shall reside upon and cultivate the land embraced in his homestead entry for a period of five years from the time of filing the affidavit, being also the date of entry. An abandonment of the land for more than six months works a forfeiture of the claim. Further, within two years from the expiration of the said five years he must file proof of his actual settlement and cultivation, failing to do which his entry will be canceled. If the settler does not wish to remain five years on his tract, he can at any time after fourteen months pay for it with cash or land warrants, upon making proof of settlement and of residence and cultivation from date of filing affidavit to the time of payment."

Defendant filed an answer under reservation of his exceptions. He first pleaded the general issue. Further answering, he denied

that plaintiff was the owner of the lands described in the petition; he averred that plaintiff had no title thereto of any kind whatsoever, and that the alleged certificate of entry was a mere receipt for fees and commissions, under section 2290 of the Revised Statutes of the United States. He denied that plaintiff was ever the bona fide possessor of said lands, which form, and have since 50 years or more formed, a part of the plantation now owned by the Bogart heirs, from whom respondent holds under a lease. He averred that said lands were, and had been since 50 years or more, within the inclosures and well-established boundaries of said plantation, and in the quiet, peaceable, and uninterrupted possession of respondent's lessees and their authors, as owners; that more than a year prior to the attempt of plaintiff to take unlawful possession of said lands, respondent had been in the quiet, peaceable, and uninterrupted possession thereof as lessee of said plantation, and that plaintiff's attempt to cross said boundaries and inclosures was an act of willful and malicious trespass; that the pretended receipt was not a "muniment of title," and conveyed no title sufficient to support a petitory action; that said pretended receipt was issued in violation of law, and that the same was obtained by plaintiff by means of false representations in his application for a homestead entry; that plaintiff was absolutely without any legal right or capacity to prosecute or maintain this suit, and that respondent was entitled to be quieted in his possession of said lands forming part of said plantation, as lessee of the same; that the land in controversy was worth more than \$2,000. He prayed that plaintiff's demand be rejected, and that there be judgment quieting him in his possession as lessee of said owners, with costs. The district court rendered judgment "in favor of the plaintiff and against the defendant, giving the plaintiff, Byrne, as against the defendant, Hébert, possession of lots 3, 4, 5, and 6 of section 4, in township 9 south, of range 1 E., S. D. E. Mississippi river," and commanding that "he be placed in possession of said property by the sheriff of this parish." It was further ordered that "in all other respects the demand of plaintiff be rejected." Defendant appealed. In the supreme court defendant pleaded as an exception the prescription of one year in bar of the action of the plaintiff for the possession of the property. He also contingently prayed for the remanding of the case. Plaintiff answered the appeal, praying that the judgment be amended so as to allow him the rents as prayed for in his petition. He prayed that in all other respects the judgment be affirmed. The plaintiff asks to be recognized and decreed to be the owner of the property described in his petition, and to be placed in possession of the same.

The evidence in this case shows that the property involved in this litigation has been continuously in the possession of the authors

of the heirs of Bogart, and of the heirs of Bogart and of their lessees, for over 40 years,—a period long antedating the homestead certificate of entry on which the plaintiff has declared,—with the exception of a slight disturbance of their possession by the plaintiff in this suit just after he received the certificate mentioned. As soon as this act of disturbance occurred, one Edward Bryant, claiming to be the agent of the heirs of Bogart, applied for, and on the 10th of June, 1895, obtained, an order for an injunction, which injunction issued on the 15th of that month, "commanding plaintiff to cease disturbing the heirs of Bogart in their real and actual possession of the land." This injunction was dissolved on the 31st of August, 1895, on motion of defendant in injunction; but solely on the ground that the agency of Bryant had not been established. Notwithstanding this dissolution, Byrne never attempted either to take or to claim possession of the property until the present suit was instituted, on March 4, 1897. The only evidence introduced by the plaintiff was the homestead certificate, of date of the 14th August, 1894; testimony going to show the entering upon the property by plaintiff shortly after he had obtained the same, which action was enjoined by Bryant; and the injunction proceedings themselves. The evidence shows that the defendant, Hébert, was in possession of the property as lessee of the heirs of Bogart at that time, and that he had been in possession as such anterior to the date of the homestead certificate. The court thought itself authorized, under this evidence, in decreeing that plaintiff should be placed in possession of the property; but, though sustaining his demand to that effect, it, "in other respects, rejected it." Plaintiff denies that by this decree his ownership of the property was negatived, and insists that the only reason why the judgment was framed as it was, was because the defendant had been shown to be the lessee of the heirs of Bogart; and by reason of that fact the court was of opinion that the question of title could not be passed upon contradictorily with the defendant, but that the question of possession could, under the decisions of this court in *Plummer v. Schlatre*, 4 Rob. 29; *Dreux v. Kennedy*, 12 Rob. 489; *Kling v. Fish*, 4 Mart. (N. S.) 391; *Fuslier v. Hennen*, 5 Mart. (N. S.) 71; *Bayoujon's Heirs v. Criswell*, Id. 232; *Young v. Chamberlin*, 15 La. Ann. 454. He contends that the judgment of the court on the question of the possession was correct; asserting that the evidence established that the defendant and his lessor were trespassers upon the public lands of the United States, and that, as against either the lessor or the lessee, plaintiff had the "right of possession" at any time under his homestead certificate.

Article 43 of the Revised Code of Practice declares that "the petitory action, or one by which real property, or any immovable right to such property, may be subjected, is claimed, must be brought against the person who

is in the actual possession of the immovable, even if the person having the possession be only the farmer or lessee. But, if the farmer or lessee of a real estate be sued for that cause of action, he must declare to the plaintiff the name and the residence of his lessor, who shall be made a party to the suit, if he reside in the state, or is represented therein, and who must defend it in the place of the tenant, who shall be discharged from the suit." Article 2704 of the Revised Civil Code, referring to acts by which the possession of a lessee is disturbed, says: "If the persons by whom those acts of disturbance have been committed, pretend to have a right to the thing leased, or if the lessee is cited to appear before a court of justice to answer to the complaint of the person thus claiming the whole or part of the thing leased, or claiming some servitude on the same, he shall call the lessor in warranty, and shall be dismissed from the suit if he wishes it, by naming the person under whose rights he possesses." Plaintiff maintains that, although the defendant mentioned the "Bogart heirs" as being his lessors, he did not give their names or residences, and did not ask that they be cited in warranty, or made parties to the suit; that, under such circumstances, defendant, in the actual possession of the property, was not entitled to be dismissed from the suit, but that plaintiff was entitled to carry it on to judgment contradictorily with him,—certainly, at least, as to the issue of the right of possession. Defendant did not mention the names of the different heirs of Bogart, nor did he give the place of their residences. Whether he knew himself who they were, or where they lived, does not appear. He certainly must have known the name or names of the person or persons who acted for the lessors with respect to the lease. Plaintiff, in his petition, refers to lessors himself as "heirs of Wilhelmus Bogart." Defendant did not ask to have his lessors made parties or cited in warranty, nor did he ask to be dismissed from the suit. We do not understand him to claim that the suit should be abated by reason of the present situation of affairs, but to contend that no judgment should or could be rendered against him, as matters now stand, and that, should he be wrong in that respect, the judgment as rendered was not warranted. Plaintiff claims to be the owner of the property described in his petition, and to be placed in possession thereof. The right of possession asserted is simply that which is the incident and accomplishment of a right of a claimed right of ownership. Plaintiff's pleadings contain none of the allegations which would authorize the right of possession to be taken up and disposed of as a substantive issue, independently of the question of title. The petition, viewed from the standpoint of the action being a possessory action, proper, under the Code of Practice, could not be made the basis of a judgment in a suit of that character, and would fall under an attack made

upon it through an exception of no cause of action.

The syllabus in *Plummer v. Schlatre*, 4 Rob. 29, cited by plaintiff, declares that article 43 of the Revised Code of Practice "applies only when the lessor or owner of the property sued for resides in the state, or, being absent, is represented therein. If the lessor reside out of the state, and is not represented therein, the lessee must defend the suit in his absence." There is nothing to show in the case at bar that the heirs of Bogart are absentees from the state. The particular state of facts under which a lessee is declared, by that decision, authorized to defend a petitory action on behalf of his lessor, does not appear. In *Plummer v. Schlatre*, defendant's pleadings were of the vaguest character. Made defendant in a petitory action in which a decree for the ownership and possession of a slave in his possession was demanded, Schlatre, in his answer, declared that he was not her owner, but held her as the property of one Wilkinson, who was an absentee, and that he had her in trust for him; that Wilkinson was bound to defend him in the peaceable possession of the property; that it was necessary that an attorney be appointed to represent him in the defense of the suit. He prayed that Wilkinson be called in warranty; that an attorney be appointed to represent him; and, should a judgment be rendered against defendant for any damages or costs, that the same judgment be rendered in his favor against Wilkinson, etc. Plaintiff excepted to the call in warranty on the ground that defendant did not show himself entitled to it, and that such a call could not be made after a judgment by default had been taken. The court said that the only question before it resulted from plaintiff's exception to defendant's attempt to call in warranty the person whom he declared to be the owner of the slave sued for; that he did not show in his answer how, or under what precarious title, the slave was put in his possession, nor did he inform the court whether he held the slave as the lessee or as the agent of the owner; that that was undoubtedly insufficient; that were the provisions of article 43 of the Revised Code of Practice and article 2874 of the Revised Civil Code to be held applicable to the lessee of a slave, entitling him to be dismissed from the suit, if he wished it, by naming the person under whose right he possessed, the looseness of defendant's allegations, unsupported by his oath or any other evidence, would deprive him of the right of calling the owner in warranty. We think it evident that the court did not consider that the defense was made in good faith, or that defendant was not, as the party actually in possession, really the one against whom plaintiff could rightfully have directed his proceedings. It is true that the court, in the course of its opinion, stated that by reason of the terms of the law having declared that if the lessor resided in the state, or be represented therein, he should be made a party to

the suit, it resulted, by implication, that if the lessor resided out of the state, and was not represented therein, the lessee should take upon himself to defend the suit in the absence of the owner; but that statement was not called for by the necessities of the case, and was an obiter dictum, which has not since been followed. The court affirmed the judgment rendered in the case, which was for plaintiff, decreeing him to be the owner of the property. In *Young v. Chamberlin*, 15 La. Ann. 454, cited by plaintiff, in which the defendant was the lessee of one Hollister, who was a resident of the state of Michigan, the case was tried as between the plaintiff and the lessee alone, and the court expressly declared that the lessee was without capacity to stand the judgment as to the question of title. As a matter of course, a lessee may so frame his pleadings, and so control the evidence advanced under them, when called into a suit as defendant in a petitory action, as to warrant, in the particular case, a judgment for the property; but that is the result of a matter of fact, not of law. The argument a contrario is not a very safe one to be followed. We know of no law authorizing a lessee, as such, to stand in judgment on a question of title on behalf of his lessor, whether the latter be a resident of the state or an absentee. In either case, he should be made a party to the suit. If present or represented, he should be made a party, either personally or through his authorized representative; if absent, by a curator ad hoc, under articles 116 and 963 of the Revised Code of Practice.

Plaintiff contends that although the court, in *Young v. Chamberlin*, 15 La. Ann. 454, declares that the lessee cannot stand in judgment for his lessor on a question of title, it holds that the "right of possession" of the property can be passed on and determined between them, and that is all that is needed for the purposes of the present suit. The plaintiff in *Young v. Chamberlin* was nonsuited, so that that decision throws little light upon this subject. There may be cases so circumstanced as to facts as to authorize a decree as to the right of possession, but they should be exceptional. Viewed exclusively from the standpoint of matters between the plaintiff and a lessee, there might be no particular objection to be urged against the parties going to trial on that issue, if they thought proper so to do; but, when we come to consider the effect of such a course upon the rights of the lessor, things take on an entirely different form. A change of the possession of the property from a lessee to a plaintiff in such a suit, operated through the execution of a judgment to which the lessor was no party, carrying with it, as a result, the necessity of the lessor's being forced to resort to a petitory action to regain possession, would open wide the door to collusion, fraud, and injury. A lessor who had been in possession of property for years, as owner, and who would be entitled, as against any one advancing adverse claims,

to force and exact the clearest proof of the rightfulness of such claims, would find himself suddenly, without any fault of his, called upon to take the position of a plaintiff, instead of a defendant, in a petitory action, and the whole burden of proof required in such an action shifted onto him. On the other hand, a plaintiff claiming a legal right is entitled to find a defendant against whom he should proceed; and a defendant, by obstinately refusing to disclose the name or residence of his lessor, might place him at defiance, or throw unnecessary and unjustifiable obstacles and delays in the way of the enforcement of rights. Discussing the question of possession even simply as between a plaintiff and a lessee, the court, in *Young v. Chamberlin*, said: "The possession of a lessee is the possession of his lessor, and, before his possession can be disturbed in a petitory action, plaintiff must show a good and perfect title in himself, as required by article 44 of the Revised Code of Practice; for, if the lessor had been made a party to the suit, he might have shown a title in himself paramount to any title exhibited by the plaintiff, short of a good and perfect title against the whole world, and thereby have protected his possession through his lessee. * * *

The plaintiff in a petitory action is bound, even against a naked possessor, to produce a title anterior in date to the possession of the defendant, in order to establish ownership in himself, and to repel the ownership in the defendant resulting from his possession. Rev. Code Prac. art. 44; *Bedford v. Urquhart*, 8 La. 246. If the defendants be regarded as naked possessors, the plaintiff has failed, in his evidence, to make out his case against them, because the allegations of his petition, which, as judicial admissions, conclude him, establish the fact that his title was not anterior in date, but subsequent, to the possession of the defendants, because at the date of his title the defendants were in possession of the land, and there is no evidence of his vendor's title prior to that date which can be considered as affecting the lessor's right of possession through his lessee."

Applying the rule here announced, how does this case stand, as between plaintiff and defendant? Plaintiff starts out with the assumption that defendant and his lessors are naked trespassers upon the property, though the defendant himself was in possession long anterior to the date of the homestead entry relied on by the plaintiff, and the lessors of the defendant and their authors are shown by evidence to have been in the open possession of the property, as owners, as part of their plantation, for over 30 years before that date. Granting that plaintiff would have been entitled, under a homestead entry, to have taken possession of the property entered, even as against parties holding possession at that time and long before, the allegations of his petition show that he has not been in possession, nor has he claimed to have the right of possession, nor has he sought to be placed in possession, since

August 31, 1895, though he was perfectly free to act, and the very certificate on which he declares states that "an abandonment of the land for more than six months works a forfeiture of the claim."

Independently of this, we are by no means prepared to accept as true the proposition that the mere permission given by ministerial officers of the land department to some particular person to make a homestead entry of certain lands carries with it, as a consequence, that parties who are at the date of the entry in possession of that property as owners, and had been in possession of the same for years before, should be held, by that fact, to be trespassers. It was stated in argument in this case, and we can make use of the statement by way of illustration, though not for action, that the land which forms the subject of this litigation was entered many years ago by the owners of the front or first concession, under the law authorizing them so to do; that subsequent to this entry the same was canceled, not absolutely, but because it was supposed to conflict with the Houmas grant; that plaintiff, finding the entry canceled, applied to the ministerial officers of the government to have the land entered under the homestead laws of the United States, and was permitted to do so; that plaintiff found himself confronted with a claim made on the part of the state of Louisiana, and the Pontchartrain levee district holding under the state, that the latter had become the owner of the property under the swamp-land act; that thereupon plaintiff instituted proceedings before the local land officers in New Orleans to have the land declared contradictorily with the state, and the land district declared to have been properly entered by him under the homestead law; that, being unsuccessful before them, he appealed to the commissioner of the land office at Washington, by whom the decision appealed from was reversed; that from that decision the state and the land district appealed to the secretary of the interior, and that the whole matter rests in suspense in the interior department at the present time; that throughout all this period the front owners who entered the land originally, and their assigns, have remained constantly in possession. Under this condition of affairs, can it be said that either as to the United States, or as to the plaintiff, or as to the state, the parties in possession are to be considered as naked trespassers? We think not. In the first place, it by no means follows that, because an entry of public land was canceled by reason of its supposed conflict with some particular grant, the entry was to stand canceled absolutely and generally as to the world. It might well be that the entry should stand canceled in so far as it really conflicted with the grant, and yet hold good if it did not so conflict. The cancellation might be held to extend no further than for the benefit of the parties holding the Houmas grant, and the permission granted to homestead entrymen by reason of the cancellation

might be wholly unauthorized and illegal. *Marsh v. Gonsoulin*, 16 La. 84; *Beridon v. Barbin*, 18 La. Ann. 458. If, in point of fact, the cancellation of the entry caused the property to fall legally into the ownership of the state, under the swamp-land act, the United States and its officials would have had no power to permit the land to be homesteaded to the prejudice of the rights of the state, and plaintiff would take nothing by his entry. That being true, defendant's possession might be subject to attack from the state, but not from the plaintiff. Again, in a suit between the state and the heirs of Bogart, the latter might be able to successfully hold that their original entry would stand good as against all parties other than the Houmas grantees, under whom the state does not pretend to hold. We mention these various pretensions simply to show that it by no manner of means follows that, because the plaintiff was authorized by ministerial officers of the government to enter upon certain property for the purpose of ultimate acquisition of the same, parties who were in actual possession of the property at that time should be taken to be trespassers, either as against the government, or as against the homestead entryman or the state. We do not understand that the United States transfers property, *ipso facto*, by and through a mere homestead entry. The entry is merely, as we understand, permissive of occupancy of unappropriated land, under a pledge or promise to convey the property on the later fulfillment of certain fixed conditions. We do not feel called on to discuss its character, or the results flowing from the same, at the present time. As matters stand, we do not think defendant was called upon to ascertain or advance the title of his lessors under penalty of eviction, but that he is authorized, under the state of facts disclosed by the pleadings and the evidence, to stand for the time being upon his possession and that of his lessor. We do not think the evidence in the case justifies the judgment appealed from. Matters should be made to appear more certain and definite. We find ourselves in presence of a case where there is reason to believe, or where, at least, we are compelled to assume, that the lessors of the defendant have a claim of some kind upon the property, not inferior to that which the plaintiff advances, and where a decision adverse to the defendant would seriously and vitally affect the rights of parties not before the court, and whose rights should be protected. *Bludworth v. Hunter*, 9 Rob. 257-262. We think, besides, that the defendant has an independent right of self-protection to maintain him in his acquired possession. We are of the opinion that the judgment appealed from should be, and it is hereby, annulled, avoided, and reversed, and it is now ordered, adjudged, and decreed that the cause be remanded to the district court, and reinstated on its docket, and proceeded with according to law, with leave to the plaintiff to make the heirs of Wilhelmus Bogart parties defendant.

BREAUX, J., concurs in the decree. MILLER and BLANCHARD, JJ., dissent.

On Rehearing.

(March 7, 1899.)

BLANCHARD, J. The judgment appealed from decreed to plaintiff the right of possession of the premises sued for, as against defendant lessee, who alone was cited, and directed that he be placed in possession. As to all of the other demands of plaintiff, the same were rejected. These other demands were, to be decreed the owner of the property, and to recover rent for the land at the rate of five dollars per acre per annum from June 15, 1895, until given possession. In the view we take of the case as the same is now before us, we pass no opinion upon the sufficiency or insufficiency of the showing of title made by plaintiff. But, even upon the hypothesis of the sufficiency of this showing, the judgment of the lower court cannot stand. How can plaintiff, suing for the ownership of land, and for possession thereof as an accessory to such ownership, be awarded the possession, while in the same decree his demand of ownership is rejected outright? He is not entitled to possession unless his claim of ownership be recognized, and, since the judgment under consideration rejected his plea of ownership, nothing was left to predicate the decree of possession upon. Had the judgment, upon the assumption that plaintiff had made out his title, decreed him the ownership of the land, so far as it could be done as against the lessee, who alone is a party defendant, and followed this up by decreeing him the right of possession as against such lessee, with reservation of the rights of the lessors and owners, whose names had not been disclosed, and who were not parties to the suit, a different case would be presented, as to which plaintiff would, at least, be on firmer ground than he now is. Plaintiff did not appeal from the judgment rejecting his demand of ownership. Neither has he seasonably filed in this court an answer to the appeal of defendant, praying amendment of the judgment in that respect. The only answer seasonably filed here was one praying that the judgment appealed from be so amended as to allow him the rents claimed in his petition; and this answer concludes with the prayer that "in all other respects the judgment of the lower court be affirmed, with costs." We thus find plaintiff in the attitude of asking that the judgment of the court a quo, rejecting his demand of ownership, be affirmed; and, were we to grant this prayer, it must necessarily and logically carry with it the reversal of that part of the judgment decreeing him the possession. Rejecting his claim of ownership, and withdrawing the possession awarded him by the court below, would be the loss of the case, as it now stands, entirely to him; and surely this is not what he would have us do. It is thus apparent that

he is in no position to resist, as he has done on this rehearing, the reversal of the judgment appealed from, and the remanding of the case. This court will, in the exercise of a sound discretion, remand a case, when, in its judgment, the ends of justice require it. We think this such a case. On behalf of defendant it should be remanded, to enable the heirs of Bogart to be made parties defendant, and contradictorily with whom plaintiff may litigate the questions herein raised. On behalf of plaintiff it needs to be remanded on the grounds hereinbefore pointed out. If the heirs of Bogart are present or legally represented in the state, they should, by supplemental petition, be made parties defendant, and cited to answer plaintiff's demand. If they be nonresidents of the state, and not properly represented here, then they should be cited through a curator ad hoc. If the records of the parish of Iberville do not disclose who these heirs are, and their places of residence, and do not disclose whether they are represented in the state or not, and, if represented, by whom, and plaintiff has not this information otherwise, it would be competent for him to rule defendant to declare the names and places of residence of those under whom he claims to hold; and, should this proceeding fail to obtain the information necessary to make the Bogart heirs parties, then plaintiff would be in a much better position to litigate with defendant lessee the question of ownership resulting from his showing of title, as determinative vel non of his right of possession as against the said lessee, than he is now. It is therefore ordered that the former decree of this court remain undisturbed; costs of this appeal to be borne by plaintiff and appellee, and those of the lower court to abide the final result of the suit.

(51 La. Ann. 645)

COMPAGNIE FRANCAISE DE NAVIGATION A VAPEUR v. STATE BOARD OF HEALTH et al. (No. 13,076.)

(Supreme Court of Louisiana. March 23, 1899.)

STATUTES—TITLE—STATE BOARD OF HEALTH—AUTHORITY—QUARANTINE—LIABILITY FOR DAMAGES—CONSTITUTIONAL LAW—POLICE POWER—FOREIGN COMMERCE—DUE PROCESS OF LAW—EQUAL PROTECTION OF LAWS.

1. Acts 1898, No. 192, entitled "An act to carry into effect article 296 of the constitution of the state of Louisiana in relation to boards of health; to protect and preserve the public health; to provide for the establishment and organization of a state board of health," and to define its powers, and to authorize the regulation of contagious and infectious diseases, under which act the board has authority to prohibit the introduction into an infected locality of persons coming from any place, whether or not such persons or place are infected, sufficiently expresses its object in the title, though the title also states that it is an act to authorize the regulation of a maritime and land quarantine against infected places.

2. Under Acts 1898, No. 192, entitled "An act to establish a state board of health, and to authorize the regulation of the isolation of in-

fections and contagious diseases," which confers on the board general supervisory power for the control of such diseases, in order to accomplish the subsidence and prevent the spread thereof, and gives the board the right to regulate intercourse with infected localities, and, at its discretion, to prohibit the introduction of any person into an infected locality, the board is authorized to prohibit the introduction of persons from another country, whether such persons, or the place from which they come, are infected with such diseases or not, though the act is also entitled "An act to authorize a maritime and land quarantine against places infected."

3. Acts 1898, No. 192, § 3, which grants to the state board of health thereby created all the powers then possessed by the existing board, except so far as modified and changed by the new law, does not limit the new board to the powers possessed by its predecessors.

4. Acts 1898, No. 192, authorizing the state board of health to prohibit the introduction of any person coming from foreign countries into any locality of the state infected with an infectious or contagious disease, is a valid exercise of police power.

5. Nor does such act violate the provision of the federal constitution giving congress exclusive power to regulate commerce with foreign nations.

6. Nor does it violate the immigration laws of congress, as such laws must be deemed to have been passed with reference to the rightful exercise by the states of their police power.

7. Nor does it violate the treaties of the United States with France and Italy, granting to the citizens of the latter countries the right of free visitation and trade, as such treaties must also be deemed to have been so made.

8. Acts 1898, No. 192, under which the state board of health has authority to prevent the landing by a ship of its passengers and goods within a locality infected by an infectious or contagious disease, does not deprive the owners of the ship of their liberty without due process of law.

9. Nor does it deprive such owners of their property without due process of law.

10. Nor does it deny to such owners the equal protection of the laws.

11. A state board of health, being an agency of a state, is not liable for damages sustained by a ship which had been lawfully prevented by the board's order from landing its goods or passengers within a locality infected by an infectious or contagious disease.

12. The fact that a resolution of the state board of health, that no persons should be allowed to enter any infected locality previously placed by it in quarantine, was intended specially to prevent a certain ship from landing its passengers, does not make their action illegal, or render members of the board liable for damages resulting therefrom.

Appeal from civil district court, parish of Orleans; Frank A. Monroe, Judge.

Action by the Compagnie Française de Navigation à Vapeur against the state board of health and others. From a judgment for defendants, sustaining a general exception to the petition, plaintiff appeals. Affirmed.

This case is before us on an appeal by the plaintiffs from a judgment of the civil district court sustaining an exception of no cause of action filed by the defendants, and dismissing their suit. Plaintiffs' demand is set out in two petitions. In the first of these petitions they alleged: That they were a corporation created by, and existing under, the laws

of the republic of France, and the owners of a large number of steamships, and were engaged in the business of transportation of freight and passengers for hire from various ports on the Mediterranean Sea to various ports in the United States, and more particularly to the port of New Orleans. That petitioners were more particularly the owners of the steamship Britannia, which was engaged in the transportation of freight and passengers between the ports of Palermo and Messina, Italy, and the port of New Orleans, in the state of Louisiana. That the defendant the state board of health was a body created by Act No. 192 of the general assembly of the state of Louisiana of the year 1898, with power to sue and be sued, domiciled in this city, and composed of seven members, whose duty it was, by the provisions of said act, to protect and preserve the public health by preparing and promulgating a sanitary code for the state of Louisiana, by providing for the general sanitation of the state, and with authority to regulate infectious and contagious diseases, and to prescribe a maritime and land quarantine against places infected with such diseases. That the other defendants to their suit, to wit, Edmond Souchon, Hampden S. Lewis, and Charles A. Gaudet, were members of said board, and residents and citizens of the parish of Orleans. That, in the course of petitioners' said business of transporting freight and passengers from ports on the Mediterranean Sea to ports in the United States, petitioners caused their steamship Britannia, on or about the 2d day of September, 1898, to be cleared from the ports of Palermo, Italy, and Marseilles, France, for the port of New Orleans, with a cargo of about 100 tons of general merchandise, and with about 408 passengers,—said freight being destined for the port of New Orleans, state of Louisiana; and some of said passengers were persons designing and intending to enter the United States through the port of New Orleans, for the purpose of settling in the state of Louisiana and adjoining states, and some were citizens of the United States, and residents of the state of Louisiana, who were returning to their homes. That said passengers were in all respects at said time, and ever since, free from infectious or contagious diseases of any kind, and were so free from any such diseases at the time of the arrival of said steamship at the quarantine station established by the defendant the state board of health some distance below the city of New Orleans, on the Mississippi river, about 8 o'clock a. m. on the 29th day of September, 1898. That on the same day, in accordance with the regulations of said defendant the state board of health, said vessel was regularly inspected, and her freight and passengers examined, by the officers of the said board of health; and it was found that her passengers and cargo were entirely free from any infectious or contagious disease, or from any disease which was likely to affect the health of

the people of New Orleans or the state of Louisiana, and accordingly she was given a clean bill of health. That notwithstanding this fact, and although, under the rules and regulations of said defendant the state board of health, said vessel should have been permitted to at once proceed to her destination, at the port of New Orleans, and there to discharge her cargo and passengers, and notwithstanding that her said cargo and passengers continued free of all infections or contagious diseases, or any disease likely to affect the health of the people of said city or state, and although said vessel had complied with all the regulations of said board, said state board of health on the 29th day of September, 1898, at a session convened at its office in the city of New Orleans, whereat the following members were present, voting affirmatively and assenting to it: Edmond Souchon, Charles A. Gaudet, and Hampden S. Lewis,—passed a resolution prohibiting, in effect, the said vessel from coming into the port of New Orleans and there discharging its passengers, a certified copy of which resolution they annexed, and made part of their petition. That, in pursuance of this resolution, Dr. Edmond Souchon, president of the state board of health, served a notice on the agents of petitioners (James Sawers & Son) prohibiting the landing of said steamship at the port of New Orleans, and at the various other places mentioned therein, for the purpose of discharging said passengers; and subsequently the president of said state board of health notified the agents of petitioners that if they attempted to land said passengers at any place, contiguous to the port of New Orleans, not at that time quarantined, quarantine would at once be established at such place, and said passengers would not be allowed to land there. That said prohibition virtually applied to all the territory within 100 miles of the port of New Orleans, and, in effect, debarred said steamship from landing at any place in the state of Louisiana for the purpose of discharging said passengers. And petitioners annexed, and made a part of their petition, the notice so received from said state board of health. They averred: That, while said resolution, on its face, purported to be general in its character, as a matter of fact same was passed for the specific purpose of prohibiting and preventing said steamship Britannia from landing in the state of Louisiana and discharging said passengers therein, inasmuch as for some time prior thereto, and even subsequent to the passage of said ordinance, said board of health had permitted large bodies of persons coming directly from the same ports in Italy and Sicily via the port of New York to be brought into the city of New Orleans by various railroad companies, and ever since the promulgation of said ordinance more than 200 such persons, varying in groups of 30 to 100 in number, had from time to time been permitted to enter said city. That said state board of health pretended to base its right to

thus exclude persons in good health, and not affected with any contagious or infectious disease, from the port of New Orleans and neighboring territory, upon the authority of said Act No. 192 of 1898, and especially under the following portion of section 8 of said act, to wit: "The state board of health, in its discretion, may prohibit the introduction into any infected portion of the state, persons acclimated, unacclimated or said to be immune, when in its judgment the introduction of such persons would add to or increase the prevalence of the disease." That said portion of said section 8 of said Act No. 192 of 1898 did not confer upon the state board of health the right to exclude healthy persons from coming from various foreign ports into the port of New Orleans, as pretended by them, and, if said section did so confer upon said board said pretended right and authority, same was in violation of the constitution of the United States, inasmuch as it was an attempt on the part of the state of Louisiana to regulate or prohibit commerce from foreign countries into the United States, or to authorize the regulation or prohibition thereof by said board, and was especially in contravention of article 1, § 8, par. 3, thereof, which provided that congress shall have exclusive power to regulate commerce with foreign nations and among the several states; and petitioners specially pleaded and claimed the benefit and protection of said provision of the constitution. Petitioner averred that this arbitrary and illegal action of the state board of health, and the individual members thereof, by detaining said vessel at the quarantine station, and preventing her from proceeding to the city of New Orleans and there discharging her passengers and cargo, had caused great damage, and was causing and would continue to cause petitioners further damage to an amount of more than \$500, and for every day that said vessel was prohibited from discharging said passengers, for the reason that, by law and by contract, petitioners were compelled to furnish said passengers with lodging and with food, and, besides, were subjected to a heavy expense in the way of wages for its crew and officers, and various other and sundry expenses which they would not be compelled to suffer, were they permitted to land said vessel and discharge its passengers and cargo, as they had a right to do. That said arbitrary and illegal action of said board and the members thereof would cause petitioners to suffer heavy damages in the way of loss of business, for the reason that the agents of said steamship in the city of New Orleans had procured, and bound said ship to receive, a large and complete cargo of freight, destined for ports in Europe, for all of which damage the defendants were liable in solido to petitioners. That, by reason of said arbitrary and illegal action of said board and the members thereof, petitioners had already suffered damages from the cause aforesaid in the sum of \$2,500; and they reserved their

right to amend their petition, and claim of said board and the members thereof in solido any further damage which they might suffer in the premises. That, unless said state board of health be restrained by the court, it would persist in its illegal and arbitrary refusal to permit said steamer to land said passengers in the city of New Orleans, to the great and irreparable injury of petitioners; and petitioners averred that, for the protection of their rights in the premises, they were entitled to, and desired, a writ of injunction, directed against the said board of health, its officers and agents, prohibiting and enjoining them, and each of them, from interfering with or preventing the landing of said steamship at the port of New Orleans, and from unloading and discharging its passengers. In view of the premises, petitioners prayed that said state board of health, its president, and said Edmond Souchon, Hampden S. Lewis, and Charles A. Gaudet, be cited; that a writ of injunction issue, directed to said board of health, enjoining and prohibiting it, and its officers, agents, and employes, and each of them, from enforcing said resolution or ordinance of said board of date 29th September, 1898, or from prohibiting or interfering in any manner with petitioners' bringing their said steamship Britannia to the port of New Orleans, and there discharging its passengers and cargo; that there be judgment in favor of petitioners, and against said state board of health and Edmond Souchon, Hampden S. Lewis, and Charles A. Gaudet, in solido, in the full sum of \$2,500 damages, with legal interest from judicial demand, and reserving unto petitioners the right to claim from said defendants any further damages which they might thereafter be caused by their said illegal acts; that said portion of section 8 of said Act No. 192 of 1898, set forth, be declared null and void, as being in contravention of the constitution of the United States; and that said writ of injunction be made perpetual.

In the second of these petitions, they alleged: That since the filing of the original petition they had suffered additional damages, as thereafter set forth, in a sum exceeding \$8,500, for which, for the reasons set forth in their original petition and in said second petition, the defendants were liable to them in solido. That said damage was occasioned by reason of the illegal, unjust, and arbitrary action aforesaid of said state board of health, and said individual members thereof, in the exclusion from the city and port of New Orleans of said vessel and passengers, some of whom were subjects of the king of Italy, entitled to the protection of the treaties between said sovereign and the United States, and who intended to avail themselves of the laws of the United States regulating immigration, by entering the state of Louisiana to establish residence in said state or adjoining states. That said immigrants and other passengers were so excluded and prevented from landing

notwithstanding the fact that said steamer Britannia had complied with all the laws of the United States regulating commerce with foreign nations, quarantine, and immigration into the United States, and notwithstanding that said immigrants were coming from ports which were not infected with any contagious or infectious disease, and were not themselves infected with any such disease, but were at the time of their departure, and at all times thereafter, free from any infectious or contagious diseases or diseases that were likely to affect the public health of the citizens of New Orleans or state of Louisiana, and were, under the immigration laws, entitled to enter. That petitioners had no notice of the intended action of the defendant in so prohibiting the landing of said passengers and immigrants until the arrival of their steamer Britannia at the port of New Orleans; said steamer having sailed prior to the declaration by said board of the existence of an infectious disease in the city of New Orleans. That, by reason of the illegal and arbitrary conduct of the defendants, petitioners were compelled for many days to keep said vessel moored in the river below the city of New Orleans, with all of its said passengers, crew, and cargo aboard. That, as said defendants persisted in their said illegal and arbitrary refusal to permit the landing of said immigrants and passengers, in order to minimize as much as possible its damages, petitioners were compelled to send their said steamer to the port of Pensacola, Fla., which was the nearest available port to the port of New Orleans, and there disembark said immigrants and passengers, and thereafter to cause their said steamer to return to the port of New Orleans to discharge its cargo. That said voyage to and from Pensacola, from and to New Orleans, so occasioned, caused a loss of time to said vessel, even with the utmost dispatch, of more than three weeks. That during the illegal detention of said vessel in the Mississippi river, and during the voyage to Pensacola, and while in said port, petitioners were at great expense in the maintenance and care of said immigrants, passengers, and crew of said vessel. Moreover, petitioners suffered great damages, as would be shown on the trial of the case, in the way of extra wages of officers and crew, extra fuel and supplies consumed on said voyage between New Orleans and Pensacola, as well as during the said illegal detention, extra compensation to its agents in this city of New Orleans and at Pensacola, cablegrams, and other expenses. Furthermore, petitioners had suffered large damages by reason of the fact that said vessel thus lost more than 21 days on the voyage from her home port and return, which delay occasioned petitioners a large loss both of business and profits, and the damages thus occasioned to petitioners by said illegal and arbitrary action of said defendants exceeded in the aggregate the sum of \$11,000, and said damages were caused solely by said illegal and arbitrary action of said board, and not otherwise. That

said action of said defendants in prohibiting the entrance and landing of said passengers and immigrants in the port of New Orleans and the state of Louisiana was, moreover, in violation of the laws of the United States, and the rules and regulations made in pursuance thereof relating to quarantine at and immigration from foreign countries into ports of the United States, and especially acts of congress approved February 15, 1893, and the rules and regulations made in pursuance thereof, and acts of congress of March 3, 1892, and June 26, 1894, and the rules and regulations made in pursuance thereof, and of the treaties existing between the United States, on the one part, and the kingdom of Italy and the republic of France, on the other part; and petitioners specially pleaded and claimed the benefit of said acts and treaties. The premises considered, petitioners prayed that defendants be cited, that there be judgment in favor of petitioners and against the said defendants as in their original petition prayed for, and, further, that there be judgment in favor of petitioners and against the defendants in solido in the full sum of \$11,000, with legal interest from judicial demand.

Annexed by plaintiffs to their petition was a copy of the resolution of the board of health, and of the notice served upon plaintiffs, which they had referred to in their pleadings. The notice reads as follows: "Louisiana State Board of Health. September 29th, 1898. Messrs. Jas. Sawers & Son, Agent S. S. Britannia, New Orleans, La.—Gentlemen: Referring to the detention of the S. S. Britannia at the Miss. river quarantine station, with 406 Italian immigrants on board, I have to inform you that under the provisions of the new state board of health law, section 8, of which I inclose a marked copy, this board has adopted a resolution forbidding the landing of any body of people in any town, city, or parish in quarantine. Under this resolution the immigrants now on board the Britannia cannot be landed in any of the following parishes of Louisiana, namely: Orleans, St. Bernard, Jefferson (right bank), St. Tammany, Plaquemine, St. Charles, or St. John. You will therefore govern yourself accordingly. Respectfully, [Signed] Edmond Souchon, M. D., President Louisiana State Board of Health." The resolution read as follows: "Resolved, that hereafter, in the case of any town, city, or parish of Louisiana being declared in quarantine, no body or bodies of people, immigrants, soldiers, or others, shall be allowed to enter said town, city, or parish so long as said quarantine shall exist, and that the president of the board shall enforce this resolution."

Howe, Spencer & Cocke, for appellant.
Francis O. Zacharie, for appellees.

NICHOLLS, C. J. (after stating the facts). At the time of the adoption of the constitution of 1898, there existed in the state of Louisiana a state board of health, with powers and du-

ties defined and fixed by law. Article 296 of that constitution directed that the general assembly should create for the state, and for each parish and municipality therein, boards of health, and should define their duties and prescribe the powers thereof. On the 14th of July, 1898, the governor of the state approved Act No. 192 enacted by the general assembly at the session of 1898. The act was entitled "An act to carry into effect article 296 of the constitution of the state of Louisiana in relation to boards of health; to protect and preserve the public health; to provide for the establishment and organization of a state board of health and parish and municipal boards of health; to define the powers, duty and authority of said boards; to provide for the appointment and election of officers and employees of said board; to authorize the state board to prepare and promulgate a sanitary code for the state of Louisiana, and fixing penalties for the violation thereof; to provide for the general sanitation of the state, and a local sanitation of the parishes and municipalities; to authorize the regulation of the isolation of cases of infectious and contagious diseases and a maritime and land quarantine against places infected with such diseases; to repeal all laws and parts of laws, special and general, in conflict with the provisions of this act; and to provide for the succession of the boards created by this act to all powers, authority, rights, claims and property of the present boards." By the second section of the act the duties and powers of the president and secretary and treasurer of the state board were declared to be those incident to like officers in similar corporations, and also such other powers and duties then devolved by law upon their predecessors in the existing board, as well as those additionally prescribed by the provisions of the act. In addition to said powers and duties already prescribed by existing laws, the president was granted the power, after the adjournment of the board, and during the interval of time between the meetings of the board and when the board was not in session, to issue all orders and warrants, and to take all necessary steps to execute the sanitary laws of the state, and to carry out the rules, ordinances, and regulations of the board made therein, and, in his discretion, to call special meetings of the board whenever, in his opinion, an emergency should require it. By the third section the board was granted all the powers, authority, and jurisdiction then possessed by the existing board of health under the laws then in force, except in so far as modified and changed by the provisions of the new law. It was given exclusive jurisdiction, control, and authority over maritime quarantine within the state, as then provided by existing laws. It was also given supervisory power over land quarantine, and over the care and control of infectious and contagious diseases within the state, in order to accomplish the subsidence and suppression thereof, and to prevent the spread of the

same. Such supervision and control was directed to be exercised in the manner and to the extent laid down in the act. By the eighth section it was enacted that in case any parish, town, or city should become infected with any contagious or infectious disease to such an extent as to threaten the spread of such disease to other portions of the state, the state board of health was directed to issue its proclamation declaring the facts, and ordering it in quarantine, and to order the local boards of health in other parishes, towns, and cities to quarantine against said locality; and it was further directed to establish and promulgate the rules and regulations, terms and conditions, on which intercourse with said infected locality should be permitted. The state board of health was authorized, at its discretion, to prohibit the introduction into any infected portions of the state of persons acclimated, unacclimated, or said to be immune, when, in its judgment, the introduction of such persons would add to or increase the prevalence of the disease.

Plaintiffs contend that the state board of health requires that the court should read in the eighth section of Act No. 192 of 1898 a grant of authority to prohibit the introduction into the state of healthy persons coming from places not infected with infectious or contagious diseases. In their brief they say: "If this was the intention of the legislature, why did it express its objects to be 'to authorize a maritime and land quarantine' against places 'infected' with contagious or infectious diseases? If an authority was intended to be given to establish maritime quarantine against any place whatsoever, without reference to the existence of disease there, the legislature would certainly not have qualified the noun 'places' by the adjective 'infected.' It is clear that the effect of that adjective is to qualify and make special what was before general; to limit the number, and, as it were, to put a badge upon, the places against which maritime quarantine can be declared, and hence to put a restriction upon the power of the board. If the existence of disease at some place, or in relation to some individual, was not a condition upon the board's power to quarantine, it inevitably follows that the act contains something supremely important, not expressed in its title, namely, a power to quarantine against any place, and exclude from the state any people whatsoever, totally irrespective of the existence of infectious or contagious disease in relation to such person or place. We submit that the court will not adopt a course of reasoning which leads to this result. It must presume that the legislature intended to obey article 31 of the constitution, and to sanction no object in the act not expressed in the title. A fortiori will the court indulge the presumption when it finds that the title of the act declares the intention of conferring a limited and defined, as opposed to a general, power, as the legislature was bound by the constitutional mandate to do; that the measure of the

power granted in relation to maritime quarantine is declared by the act to be fixed by existing laws in force, which laws are conceded, by the contention of the defendants in this case, to confer only a limited power. And plaintiffs urge: That, if the statute of 1898 did authorize the state board of health to exclude from this state healthy persons coming from other states or from foreign countries, it was not a lawful exercise of the legislative power by the state of Louisiana. That the statute, on its face, and as applied, is void for the reason that it is in violation of article 1, § 8, of the constitution of the United States, because it vests authority in the state board of health, in its discretion, to interfere with or prohibit foreign commerce; because it deprives the plaintiff of its liberty and property without due process of law, and denies it the equal protection of the law, in violation of section 1 of the fourteenth article of amendment of the constitution of the United States; because it denies rights, privileges, and immunities secured to subjects of the king of Italy and to the citizens of the republic of France by treaties between the United States and said countries, in that it vests the board of health with power to deny the right of free visitation and trade to Italian subjects and French citizens, as granted by said treaties; because it is in conflict with the immigration laws of the United States made in pursuance of the constitution of the United States." We would not render Act No. 192 of 1898 unconstitutional, as violative of article 31 of the constitution of 1898, which declares that "every law enacted by the general assembly shall embrace but one object and that shall be expressed by its title," by holding that that act conferred authority upon the state board of health to prohibit the introduction into any infected portion of the state of persons acclimated, unacclimated, or said to be immune, coming on shipboard from foreign countries and ports, whether infected or not, when, in its judgment, the introduction of such persons would add to or increase the prevalence of the disease. Were we to hold that the act conferred such power, the granting of the power in the body of the act could be very legitimately referred to several different clauses of the title. It would be very properly covered either by its declared object of "carrying into effect article 296 of the constitution of the state in relation to boards of health; providing for the establishment and organization of a state board of health and of defining the power, duty and authority of said board," or its object "of protecting and preserving the public health," or "of authorizing the regulation of the isolation of infectious and contagious diseases." We have ourselves recently held, in the case of *Board v. Fowler*, 50 La. Ann. 1358, 24 South. 809, that it is a sufficient compliance with the constitutional requirement of the title, if the title indicates the general purposes of the law, without specifying in detail each particular provision of the law. See, on

this subject, 23 Am. & Eng. Enc. Law, p. 229 et seq.; Cooley, Const. Lim. p. 173; State v. Crowley, 33 La. Ann. 783; State v. Dalon, 35 La. Ann. 1141; Board v. Dupuy, 37 La. Ann. 188.

Appellants urge upon us that the general assembly did not intend, by and through Act No. 192 of 1898, to confer upon the state board of health the power which it exercised, of preventing them from landing the *Britannia* and its passengers, as stated in their petition, nor did it do so. We do not think this proposition well founded. There is nothing in the terms of the statute which would justify us in giving to it the narrow construction for which plaintiffs contend. The fact that the title contains a clause to authorize a "maritime and land quarantine against places infected with infectious and contagious diseases" is not inconsistent with, nor does it control or circumscribe, the broad and general terms of other clauses. Appellee properly claims that it in no wise affects the "power," "duty," and "authority" of the board to prevent the spread of the disease, when once introduced, by quarantining against persons coming into an infected district. The act, in its title, authorizes the state board to regulate the isolation of cases of infectious and contagious diseases, leaving it to adopt the method to be pursued for bringing about this isolation. In its body, it confers, in very broad terms, a supervisory power over the care and control of infectious diseases within the state, "in order to accomplish the subsidence and suppression thereof and to prevent the spread of the same." That no doubt could exist as to the scope of the power, it conferred upon the board "the right to regulate the terms and conditions on which intercourse with infected localities should be permitted," and, in clear, unambiguous language, authorized it, at its discretion, to prohibit the introduction into any infected portion of the state of persons acclimated, unacclimated, or said to be immune, when, in its judgment, the introduction of such persons would add to or increase the prevalence of the disease. The law does not limit the board to prohibiting the introduction of persons from one portion of the state to another and an infected portion of the state, but evidently looks as well to the prohibition of the introduction of persons from points outside of the state into any infected portion of the state. As the object in view would be "to accomplish the subsidence and suppression of the infectious and contagious diseases, and to prevent the spread of the same," it would be difficult to see why parties from outside of the state should be permitted to enter into infected places, while those from the different parishes should be prevented from holding intercourse with each other. The object in view was to keep down, as far as possible, the number of persons to be brought within danger of contagion or infection, and by means of this reduction to accomplish the subsidence and suppression of the disease and

the spread of the same. The particular places from which the parties who were to be prohibited from entering the infected district or districts came, could have no possible influence upon the attainment of the result sought to be attained. It would make no possible difference whether this "added fuel" sought to be excluded should come from Louisiana, New York, or Europe.

We see nothing in the particular place in the act in which this power is conferred to cause us to suppose that the legislature intended to place upon it the limitations which appellants contend for. They claim that the powers of the present board were those of its predecessor, but this is obviously not the case. The new board was given, by the third section of the act, the powers of the old, but with such modifications as would be operated under the provisions of the article of 1898. It is very clear that the general assembly intended to grant additional powers to the board, and this very power was, beyond question, one of them. During the fall of 1897, and during the existence of an epidemic, a vessel arrived in the Mississippi river, with emigrants aboard, under conditions similar to those under which the *Britannia* reached the same stream in 1898. The excited public discussions at the time as to the right of the state board, under the then existing law, to prevent the landing of the emigrants, and as to its duty in the premises, were so extended as to authorize us to take judicial notice of the fact; and, in our opinion, the clause in the present act which covers that precise matter was inserted therein for the express purpose of placing the particular question outside of the range of controversy. For a number of years past, emigrants have been coming into New Orleans, in the autumn, from Italy. There was a probability, when the general assembly met in 1898, that the epidemic of 1897 might be repeated, and a great probability that emigrants would seek to enter as they had done the year before, to the great danger, not only of the people of Louisiana, but of the emigrants themselves. Independently of this there was great danger to be apprehended from the increasing intercourse between New Orleans and the West India Islands in consequence of a war with Spain. It was to ward off these dangers that this particular provision was inserted in the act of 1898.

Appellants maintain that the act of the general assembly is violative of the constitution of the United States and in contravention of its treaties with France and Italy and its immigration laws. We are not of that opinion. It is the right and duty of the different states to protect and preserve the public health. This right is not held by the states by permission of the federal government nor is its legitimate and proper exercise controlled by that government simply by reason of the existence of a power in the latter "to regulate commerce." As a matter of course state leg-

islation which would cross the boundary line which separates the state's police power of protecting the public health to really interfere with and invade the right and power of the general government to regulate commerce, would be set aside; but it is not every restriction upon commercial operations, remotely and incidentally brought about by the passage of state health laws, which can properly be designated as such interference or invasion. In *Re Rahrer*, 140 U. S. 554, 11 Sup. Ct. 866, the supreme court of the United States, speaking through Chief Justice Fuller, made use of the following language: "The power of the state to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity, is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the constitution of the United States, and essentially exclusive. And this court has uniformly recognized state legislation, legitimately for police purposes, as not, in the sense of the constitution, infringing upon any right which has been confided, expressly or by implication, to the general government. The fourteenth amendment, in forbidding a state to make or to enforce any law abridging the privileges and immunities of citizens of the United States, or to deprive any person of life, liberty, or property without due process of law, or to deny to any person the equal protection of the laws, did not invest, nor attempt to invest, congress with power to legislate upon subjects which are within the domain of state legislation. It is not to be doubted that the power to make ordinary regulations of police remains with the individual states, and cannot be assumed by the national government, and that in this respect it is not interfered with by the fourteenth amendment." In *Gibbons v. Ogden*, 9 Wheat. 203, Chief Justice Marshall, referring to state inspection laws, said that "they were certainly recognized in the constitution as being passed in the exercise of a power remaining with the states; that inspection laws might have a remote and considerable influence upon commerce could not be denied, but that a power to regulate commerce could not be admitted as the source from which the right to pass them was derived; that they formed a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government, all of which could be most advantageously exercised by the states themselves; that inspection laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., were component parts of this mass; that no direct, general power over those objects was granted to congress, and consequently they remained subject to state legislation." The general assembly of this state, in enacting Act No. 192 of 1898, was not

acting or claiming to act under "a power to regulate commerce," as the source from which it derived the right to pass the act. Its source was the police power of the state, exercised for the protection and preservation of the public health. No one who reads the act, or who knows and appreciates the circumstances under which it was enacted, can for a moment doubt the perfect sincerity of the general assembly in dealing with this matter. It was futile to say that there was any other purpose in view than that which appears on the face of the act. There could exist no other possible motive than that announced. None other can be plausibly suggested. We not only think the legislature acted in absolute good faith, and under no disguisement, but are of the opinion that the legislation was timely and judicious, well calculated to assist "in accomplishing the subsidence and suppression of infectious and contagious diseases and preventing the spreading of the same"; and we are further of the opinion that the action of the state board was legally taken, under the provisions of the act, and not arbitrary and unjustifiable, as claimed.

The conclusion we have reached as to the provisions of Act No. 192 not being unconstitutional as infringing upon the right and power of congress to regulate commerce carries with it, as a result, the holding by this court that the act was not in contravention of the treaties of the United States with France or Italy, or of the immigration laws of the general government, or of any rights secured by the fourteenth amendment of the constitution of the United States. The treaties and laws of the United States must be held to have been passed with reference to, and subsidiary to, the rightful exercise of the police power by the different states in aid of the protection and preservation of the public health within their respective borders. We scarcely think it could be pretended that an act of the general assembly of Louisiana, under the provisions of which a shipload of citizens of the state of New York could be legally prevented from being landed in the city of New Orleans during an epidemic, could, by reason of a treaty, be held, as against foreigners coming to our shores, to be inoperative, null, and void. They could have no broader rights than our own citizens in this matter, and should be subjected to the same restrictions and inconveniences which they are, when these are demanded at their hands for the preservation and protection of the public health.

The claim of the plaintiffs that they have been deprived, in the premises, of their liberty and property without due process of law, is utterly untenable. They have not been deprived of liberty or of property, but simply prevented from doing an act which, if permitted to be done, would not only be to the great injury and damage of the people of Louisiana, but, in all likelihood, to the great damage and injury of the passengers upon

their ship. We do not see "what process of law," beyond that taken, could have been taken by the health authorities. It is very unfortunate that plaintiffs' ship and her passengers should have been detained as they were, but, if loss has been suffered, it is *damnum absque injuria*. The defendant board is not an ordinary corporation. It is a "body politic," with corporate powers, with the right to sue and be sued. It is a governmental, public agency, representing the state in respect to the matters with which it stands intrusted. Were this court to find plaintiffs entitled to a judgment, it would not be an ordinary judgment, susceptible of execution by *fi. fa.* The judgment would be, substantially, one against the state, and of the character of those referred to in article 192 of the present constitution.

Plaintiff charges that the resolution adopted by the board of health, though general in terms, was in reality directed specially against them. The arrival of plaintiff's ship, under the circumstances it did, may have given rise to the resolution, as evidencing a necessity for action under the power conferred on the board by the act of 1898; but the fact that it was the first party to whom the resolution was made to apply would not justify the charge that it was specially aimed, in an offensive sense, at the plaintiff. The resolution is general, and there is no reason to suppose that it would not have been executed against any other ship or ships which might fall under its terms. Be that as it may, if the board had the legal power and right to act as it did, the motive with which it may have been done is not a matter for our consideration. Our conclusions absolve, necessarily, the members of the board from legal liability for their course. For the reasons assigned, it is ordered and decreed that the judgment appealed from be, and the same is hereby, affirmed.

(121 Ala. 606)

LOVEJOY v. BEESON.

(Supreme Court of Alabama. April 12, 1899.)

CONSTITUTIONAL LAW—VESTED RIGHTS—RETROACTIVE ACT—IRREGULARITIES IN ELECTION.

1. After the institution of a contest of election of a probate judge on the ground that the election in a certain precinct was invalid for the reason that it was held in a place other than the court house, as required by law, and after appeal to the supreme court, the legislature, by Act Dec. 14, 1898, cured the irregularity, and confirmed the election as held. *Held*, that the act was not unconstitutional, as interfering with vested rights.

2. The legislature, where contract or property rights are not involved, can enact laws modifying or affecting the results of prior transactions in matters of public concern; so that Act Dec. 14, 1898, curing irregularities in a prior election, was not unconstitutional because retrospective.

3. Act Dec. 14, 1898, ratifying and affirming an election for probate judge held in a precinct other than that required by law, was not in violation of Const. art. 8, § 3, providing that

laws regulating elections shall be uniform throughout the state.

Appeal from circuit court, Etowah county; J. A. Bilbro, Judge.

This was a statutory contest of the election of the probate judge of Etowah county, which was instituted on the petition of William B. Beeson, the contestant of the election of John H. Lovejoy. From a judgment in favor of the petitioner, the respondent appeals, and assigns the rendition thereof as error. Reversed.

Dortch & Martin, for appellant. Denson & Tanner, for appellee.

DOWDELL, J. The appeal in this case is taken from the circuit court of Etowah county on a statutory contest of election of probate judge; the ground of contest being that the election held in Gadsden precinct, in said county, was invalid for the reason that it was held in a place other than the court house, as required by law. This is the sole ground, and there is no pretense that there was any fraud or unfairness in the holding of said election, or that any voter was prevented from voting, or failed to vote, by reason of the failure to hold the election in the court house. Since the institution of this contest, and the appeal to this court, the legislature has, by an act approved December 14, 1898, cured the irregularity, as it is termed, and ratified and confirmed the election as held on the first Monday in August, 1898, in said Gadsden precinct. This act of the legislature is assailed by the appellee as being unconstitutional, in that it disturbs vested rights, and also for that it is offensive to section 5, art. 8, of the constitution, which provides, "The general assembly shall pass laws, not inconsistent with this constitution, to regulate and govern elections in this state, and all such laws shall be uniform throughout the state." We think it a clear proposition that the act does not in any manner interfere with vested rights. The office of probate judge is a public office, created for governmental purposes, and not for the sole benefit of any single person. It cannot, in any sense or manner, ever be said to become the subject of property rights. "It has in it no element of property. It is not alienable or inheritable. It is a personal public trust, created for the benefit of the state, and not for the benefit of the individual who may happen to be its incumbent." *Ex parte Lambert*, 52 Ala. 82. For the same reasons it may be said it cannot be the subject of contract rights. Being, therefore, neither the subject of property nor contract rights, the suggestion that the act in question is an invasion of vested rights is unsupported by reason or argument. It is true, the act falls under the class of statutes denominated "retrospective laws." As to such, in the absence of any express constitutional inhibition, and where contract or property rights are not involved, and only public rights, as of public office, are involved, the power of the legislature is full and complete. In matters of public concern,

affecting governmental interests in carrying out the will of the people, legislative action becomes of the highest importance; and the courts should not by any narrow construction obstruct the attainment of the ends and purposes of the lawmaking power. There can be no doubt of the power of the legislature to enact laws which may modify or affect the results of prior transactions. It seems to be a well-settled rule, where contract or property rights are not involved, that what may be authorized by the legislature in the first instance may, after the thing done, be ratified by the legislature. Mr. Cooley, in his work on Constitutional Limitations, treating of the subject of retrospective laws, gives the following as the substantial rule applicable in such cases: "If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law." Cooley, Const. Lim. (6th Ed.) p. 457. Could the legislature, in the first instance, have designated another place than the court house for holding the election in Gadsden precinct? The power to have done so, we think, is beyond question. The power of designating the voting places in other precincts than the court-house precinct is by the statute conferred on the court of county commissioners. Could not the legislature by the same statute have conferred on the court of county commissioners the power to designate the voting place in the court-house precinct as well as in other precincts? This question can only be answered in the affirmative. And, if left with the commissioners, might they not designate another place within the precinct for voting, other than the court house? If this be true, it suffices also to show that the argument of counsel that fixing a different place than the court house in the court-house precinct would be offensive to the provisions of section 5, art. 8, of the constitution, as to uniformity of the election laws, is without merit. The commissioners' court of one county might designate the court house as the voting place in such precinct, while in another county the commissioners' court might well designate a different place than the court house; and no one could reasonably contend that such would be violative of the above-mentioned provision of the constitution. It is a logical conclusion that if it be competent for the legislature to confer upon the court of county commissioners the power to designate the voting places in the respective counties, and such voting places so designated may differ as to the precise locality or house appointed, without offending against the constitution, then it would cer-

tainly be competent for the legislature, in the first instance, to designate different places within the precincts in different counties. It also follows that things which can be authorized by the legislature in the first instance can, after they are done, be subsequently ratified by the legislature. We cite the following authorities as supporting the principles above laid down: *Williams v. Board*, 21 Fed. 99; *Erskine v. Steele Co.*, 87 Fed. 630; *Huff v. Cook*, 44 Iowa, 639; *Gardner v. Haney*, 86 Ind. 17; *Butler v. Palmer*, 1 Hill, 324; *McMillen v. Boyles*, 6 Iowa, 304.

It is therefore our conclusion that the act approved December 14, 1898, is not violative of any constitutional provision, and by it the irregularity attending the holding of the election in Gadsden precinct on the first Monday in August, 1898, was cured. This view of the case renders it unnecessary to consider the other questions raised by the appellant relating to matters prior to the enactment of the above healing statute, and which were so ably argued in briefs of counsel. The ground of contest having been cured by the statute, a reversal of the judgment of the circuit court must follow, and a judgment will be here rendered dismissing the contest.

(121 Ala. 393)

SULLIVAN v. VERNON et al.

(Supreme Court of Alabama. April 11, 1899.)
FOREIGN CORPORATIONS—OFFICE IN STATE—CONTRACTS—EXECUTION—HARMLESS ERROR.

1. Under Const. art. 14, § 4, and Act Feb. 28, 1887 (Pamph. Acts 1886-88, p. 102), prohibiting a foreign corporation from doing business in the state without a known place of business and an authorized agent therein, a bill in foreclosure by such corporation is insufficient which fails to state that it had such place and agent.

2. A mortgage is presumed to be executed in the state in which the certificate that it was "signed, sealed, and delivered" by the grantors is made.

3. Error in sustaining a motion to dismiss a bill for want of equity, when it should have been attacked by demurrer, is harmless; the decree giving opportunity for amendment.

Appeal from chancery court, Dekalb county; S. K. McSpadden, Chancellor.

Bill by W. K. Sullivan, receiver of the American Building, Loan & Investment Society, against James M. Vernon and others. There was a decree dismissing the bill, and complainant appeals. Affirmed.

James Norfleet, for appellant. L. L. Cochran, for appellees.

PER CURIAM. The original bill was filed to foreclose a mortgage executed in this state, on real estate here situate, to secure the payment of a debt contracted with the American Building, Loan & Investment Society, a corporation organized and existing under the laws of the state of Illinois. A motion was made to dismiss the bill for want of equity, because it did not aver that, at the time of the execution of the mortgage, the corporation

had filed in the office of the secretary of state, pursuant to the statute approved February 28, 1887 (Pamph. Acts 1886-88, p. 102), an instrument in writing designating for itself, at least, one known place of business in the state, and an authorized agent thereat residing. The motion was sustained, but leave was granted to amend within 30 days. From the decree sustaining the motion, this appeal is taken.

Const. art. 14, § 4, prohibits a foreign corporation from doing any business in this state without having at least one known place of business and an authorized agent or agents therein. The statute to which we have referred was enacted in aid and execution of the constitution. The uniform construction of the constitution has been that it is prohibitory, rendering it unlawful for a foreign corporation, without compliance with its conditions, to transact any business here, and that all contracts into which it might enter, while executory, requiring the aid of the courts to enforce them, are void; and it is a settled rule of pleading in equity that a bill for the enforcement of such contracts is demurrable, unless it contains an express averment that, at the time of making such contract, the corporation had a known place of business in the state and an authorized agent therein. *Farrior v. New England Mortg. Security Co.*, 88 Ala. 275, 7 South. 200; *Mullens v. American Freehold Land Mortg. Co.*, 88 Ala. 280, 7 South. 201; *Christian v. Same*, 89 Ala. 198, 7 South. 427; *Ginn v. New England Mortg. Security Co.*, 92 Ala. 135, 8 South. 388. We have not apprehended that it was intended to overrule or depart from these cases by the decision in *Nelms v. Edinburgh-American Land Mortg. Co.*, 92 Ala. 157, 9 South. 141. Upon that point, the opinion manifests a difference of opinion among the members of the court as then constituted, some dissenting from the rule of pleading declared in the cases to which reference has been made. The precise question we have here under consideration was presented neither by the pleadings nor by the facts in that case. It shows that only two grounds of demurrer to the bill were considered by the court, and neither of which presented the question now before us. The first ground of demurrer was that the bill fails to sufficiently aver facts to show that the "agent designated" had authority to exercise or perform any of the corporate functions or powers of the corporation; and (2) "for that the bill fails to show that the corporation by its charter was authorized to engage in the business of loaning money and securing the same by mortgages on land in Alabama." In fact, the bill in that case distinctly averred a compliance, on the part of the complainant corporation, with the constitutional and statutory requirements as to foreign corporations having a known place of business, and a designated agent thereat, within the state. It follows, therefore, that what was said in that case, as to dissenting from the rule laid down by this court in the cases of *Farrior v. New England*

Mortg. Security Co., and *Christian v. American Freehold Land Mortg. Co.*, *supra*, can but be regarded as dictum, and we now reaffirm the rule as announced in those cases.

It is doubtless true, as a general rule, that the law presumes the contracts of corporations, like the contracts of natural persons, are legal. But it is a cardinal rule of pleading in equity, as has been said by this court, founded in reason and good sense, that a bill must show the complainant's title to relief with sufficient certainty and clearness to enable the court to see plainly that he has such a right as warrants its interference, and the defendant to be distinctly informed of the nature of the case which he is called upon to defend. Matters essential to the complainant's right to relief must appear, not by inference, but by direct and unambiguous averment. *Cockrell v. Gurley*, 26 Ala. 405; *Duckworth v. Duckworth's Adm'r*, 35 Ala. 70; *McDonald v. Insurance Co.*, 56 Ala. 468; *Railroad Co. v. Lancaster*, 62 Ala. 535; *Goldsby v. Goldsby*, 67 Ala. 560. When the constitution ordains that "no foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent or agents therein," and the legislature prescribes the mode in which the corporation shall make known to the public a designated place of business in this state, and who is or are its authorized agent or agents thereat, obedience to the constitution and the statute becomes a condition precedent to the transaction of business in the state. Whether there has or has not been performance of the condition is a fact lying peculiarly within corporate knowledge. It is a fact essential to a right of recovery, whenever relief is sought because of corporate transactions had within the state, and it must appear, not by inference or presumption, but by direct, unambiguous averment. It is one thing to presume in favor of the legality of the contracts of corporations or of natural persons, and quite another, and essentially a different, thing to presume that either have performed constitutional or statutory requirements, when performance is of the essence of the capacity to contract. We regard the rule of pleading established in the cases to which we have referred as founded in reason and good sense, in conformity to the cardinal rules of equity pleading, and we are unwilling to modify or depart from it. It seems an error to suppose that it is not by the bill affirmatively shown that the mortgage was executed in this state. A copy of the mortgage is exhibited with, and forms part of, the bill, and the certificate of acknowledgment of execution was taken in the county of Dekalb, before a notary public of the county, and affirms that the grantors acknowledged that they signed, sealed, and delivered the instrument as their free and voluntary act. The mortgage is unattested, and, until acknowledgment of execution before an officer having authority to take and certify it as a legal conveyance, it was without validity. As el-

ther a legal conveyance, or as creating a mere equity, delivery was essential. The just construction of the certificate of acknowledgment is that the signing, sealing, and delivery were contemporaneous acts, done in the county of Dekalb. A motion to dismiss a bill for want of equity is not the equivalent of a demurrer, nor is it appropriate to reach defects or insufficiencies of pleading curable by amendment. It would have been more regular if the motion to dismiss had been overruled, and the defendants put to a demurrer. The irregularity is error without injury, for the decree rendered is that which would have been rendered if a demurrer had been interposed and sustained, and the opportunity of amendment curing the defect in the bill was afforded the complainant, as it would have been afforded in sustaining a demurrer. Let the decree of the chancellor be affirmed.

(121 Ala. 379)

BIGBEE & W. R. PACKET CO. v. MOORE.
(Supreme Court of Alabama. April 5, 1899.)

CORPORATIONS—POWERS—BY-LAWS—CONSTRUCTION.

1. Whether a company was without corporate power to subscribe for the stock of another is immaterial in an action by it for dividends.

2. Under the by-laws of a corporation in which certain steamboat owners were stockholders, each was to put a boat into the service of the company, and, if any boat became unfit for service, the dividends on the owner's stock were to cease until it was repaired, or another furnished, but the proportion of the dividends up to the time the boat became unfit were to be paid to the owner. *Held*, that an owner who failed to repair forfeited only so much of the dividends as were earned during the default, whether they were declared during or after the period of default.

3. The by-laws of a corporation of steamboat owners provided that each was to furnish a boat, and keep it in repair, and, if he failed, the company, after notice, might repair at the owner's expense, and appropriate his share of the dividends until such expenses were repaid. *Held* not to impose on the company a duty to repair, but it could do so or not, at its election.

Appeal from city court of Mobile; O. J. Semmes, Judge.

Action by Hattie B. Moore against the Bigbee & Warrior River Packet Company. There was a judgment for plaintiff, and defendant appeals. Reversed.

This action was brought to recover from the defendant a stock dividend which had been declared by that company. The complaint contained two counts, which were as follows: "(1) Plaintiff claims of the defendant, a corporation, the sum of twenty-four hundred and four and $\frac{2}{100}$ dollars, with interest from the 2d day of February, 1895, the amount of dividends declared upon fourteen shares of the capital stock of the defendant owned on and prior to the said 2d day of February, 1895, by the Alabama Dredging & Jetty Company, a corporation, which said stock, together with the dividends thereon, were, on

said 31st day of July, 1895, duly transferred to the plaintiff." (2) "Plaintiff, as the assignee and transferee of the said Alabama Dredging & Jetty Company, claims of the defendant, the Bigbee & Warrior River Packet Company, a corporation, the further sum of twenty-four hundred and four and $\frac{2}{100}$ dollars, with the interest from the 2d day of February, 1895, and a like sum due by the defendant on an account stated between it and the Alabama Dredging & Jetty Company on, to wit, the 2d day of February, 1895, which was thereafter transferred to the plaintiff, and a like sum for money on, to wit, the 2d day of February, 1895, received by the defendant for the use of the Alabama Dredging & Jetty Company, and thereafter transferred and assigned to the plaintiff." In the first two pleas the defendant denied having contracted as alleged in the complaint, and pleaded the general issue, and then filed the following special pleas: "(3) And for further plea to the first count said defendant saith that in and by the by-laws of it, the said defendant corporation, made while the Alabama Dredging & Jetty Company was a member of said company, and which by-laws were known to the said last-named company, it was especially provided that no stockholder in said defendant company should receive any portion of the profits of the said company, or earnings of the said company, acquired or earned during such period of time as such shareholder was without a boat well equipped for service upon the rivers navigated by the said defendant company; and defendant avers that during the time during which were earned the sums covered by the dividends sued for in this suit the said stockholder company was in default in not keeping or placing a boat satisfactory to the board in the service of the company; that the stockholder was not entitled to have or receive said dividends from said company." "(4) For further plea defendant saith that said Alabama Dredging & Jetty Company, together with other persons owning and controlling steamboats, were the sole and exclusive stockholders in the defendant company, operating steamers and the carriage of passengers and goods thereon for hire upon the Tombigbee and Warrior rivers, and that one of the by-laws of the said company prior to January 2, 1895, and for a long time theretofore, and which was binding upon the said Alabama Dredging & Jetty Company, provided, should any boat be lost, or become permanently unfit for the company's business, dividend upon the share of the capital stock of this company then standing in names of the owners of said boat, or which at any time had been the property of said owners, shall cease from the time such boat is lost, or becomes permanently unfit for the business, or until another boat satisfactory to the board shall be furnished instead of the boat so lost, or until said boat is put in proper condition to perform the services for which it was char-

tered. The proportion of such dividend earned up to the loss or injury of such boat shall be paid to such owner. And defendant avers that the said Alabama Dredging & Jetty Company was the owner of the boat R. E. Lee, and had, under the by-laws of the company, chartered the same unto the said company, and that the steamboat had in the month of October, 1893, in a storm then prevailing, been driven ashore near Mobile, and lay for a long time stranded, out of the water, and became permanently unfit, as she lay, for use as a steamboat by said defendant company. And defendant further avers that for a long time thereafter the said Alabama Dredging & Jetty Company launched and floated the said steamboat from where she lay, and made considerable changes in her, and fitted her out as a suction dredge; but, as such she was wholly unfit for use upon the lines of the said defendant company and in their business, and that said owners of said boat, notwithstanding she had been and was chartered to the defendant company, chartered her to persons or corporations engaged in dredging the river Mobile after the said boat was so fitted as a dredge boat, and kept her for such services for a long period of time; and defendant avers that thereafter the said boat, which was, as defendant avers, the only boat owned by the said Alabama Dredging & Jetty Company, was never put in condition to fit her for the business of the defendant company until the 1st day of February, 1895, and that all of the earnings of the said company which went to make up the amount covered by the said dividend in this action sued for were earned after the loss or injury of the said boat by stranding in 1893 and prior to her being placed in proper condition to perform the services for which she had been chartered to the defendant company. Wherefore the defendant avers that the said Alabama Dredging & Jetty Company did not become and was not entitled to the dividend upon its share named in the complaint." "(5) For further plea of said first count, defendant avers as is averred in last above written plea, and avers that the said moneys constituting the dividend in said count named were earned by said company after the 1st day of September, 1894, and before the 1st day of February, 1895; and during the time the same were being earned by said defendant company, said Alabama Dredging & Jetty Company had no boat suitable for use in the business of the said company, and had tendered to said company no boat so fitted and suited to the business of the company. And the said defendant further avers that in and by a contract then existing between the said defendant company and said Alabama Dredging & Jetty Company during the time that the said dividend sued for was being earned, the said Alabama Dredging & Jetty Company forfeited and lost its right to share in the said earnings, because, as said defendant avers, the said Alabama Dredging & Jetty Company

failed to provide, and keep provided, during the period when the said dividend was earned, a boat fit and suitable for the business of the company, as the said Alabama Dredging & Jetty Company had agreed to do, and failed to keep said boat in proper condition to perform the services for which she was chartered; whereby the said Alabama Dredging & Jetty Company violated its said contract of charter party made with the said defendant company, and ceased to be entitled, during said period, to have or receive any dividend declared upon the stock held by it of moneys earned during the said period by the said defendant." "(6) And the said defendant, for further plea to the said count, avers as is averred in the plea last above written, and further avers that the said Alabama Dredging & Jetty Company had theretofore chartered unto the said defendant company a certain steamboat called R. E. Lee, and agreed, if the said steamboat was disabled, that they would promptly repair same at their own expense, or furnish another boat to the satisfaction of the board of directors in her stead, and upon default in said agreement that the company should have against said Alabama Dredging & Jetty Company all the rights and remedies provided by the by-laws for such case; and by the by-laws of the said company it is provided that during the time that said chartered steamboat should remain unfit for services in the business of said company that the stockholder owning the said boat should receive no dividends on his stock, earned during the period; and the defendant avers that the Alabama Dredging & Jetty Company owned the said stock in complaint mentioned at that time, and that the said moneys on which said dividend was claimed were earned during the time the R. E. Lee was unfit for said service, wherefore no dividend accrued due to the Alabama Dredging & Jetty Company upon said stock for said period of time." "(7) And the defendant, for further plea, says that in and by a certain contract of charter party entered into by and between the Alabama Dredging & Jetty Company and the said defendant company, the said Alabama Dredging & Jetty Company chartered the steamboat R. E. Lee unto the said defendant company for services with her for a period of time not yet expired, to end in September, 1896, and by said instrument of charter party said Alabama Dredging & Jetty Company agreed and promised, in case of injury or disability to the said boat, at their own expense to repair it. But the said Alabama Dredging & Jetty Company, in disregard of the contract of the charter party and the duty which it owed thereunder to the said defendant company, thereafter converted the said steamboat into a suction dredge, and used the same in the business of dredging business, wholly apart from the business of said corporation, for a long period of time, and without the consent of the defendant company. And the said de-

fendant claims of the said Alabama Dredging & Jetty Company during the said period that it was so chartered unto the said defendant company the value, hire, or use of the said boat by the Alabama Dredging & Jetty Company in violation of the duty to the defendant company during the said time, to wit, during the period of ten months that she was so used or caused to be used by the Alabama Dredging & Jetty Company as a dredge boat, twenty-five thousand dollars, which sum they offer to offset against plaintiff's demand to the extent thereof." "(a) And for further plea to said first count of said complaint, defendant avers that the said Alabama Dredging & Jetty Company, a corporation, was not lawfully a stockholder in the said defendant corporation." "(b) And for further plea to said first count, defendant avers that it was not within the corporate power of said Alabama Dredging & Jetty Company to subscribe for and hold and own stock in the defendant corporation, and that such subscription was so made by it in disregard of the law and its corporate duties, and that the stock in said complaint mentioned was acquired and held by it under such a subscription by it; wherefore it, and plaintiff as its transferee, hath no title to sue for and recover any dividend declared thereon."

The plaintiff demurred to each of the several pleas. To the third plea it demurred, among others, upon the following grounds: (1) Because said plea shows no duty incumbent upon plaintiff's assignor to keep or place a boat satisfactory to the board in the service of the company; (2) because said plea does not show what sort of a "board" shall be satisfied with the boat to be placed or kept in the service of the company; (3) because, under said by-law relied upon as a defense by defendant, plaintiff's assignor was under no duty to keep or place a boat satisfactory to the board in the service of the company; (4) because said plea is ambiguous and uncertain in that it charges a violation of a by-law requiring plaintiff's assignor not to do one thing, and then complains that plaintiff's assignor was in default in not doing another entirely different thing. These demurrers were sustained. The demurrers to the fourth, fifth, sixth, and seventh pleas were overruled. To plea (a) the plaintiff demurred upon several grounds, which may be summarized as follows: (1) Because said plea fails to allege in what way the Alabama Dredging & Jetty Company "was not lawfully a stockholder in the said defendant corporation,"—whether said Alabama Dredging & Jetty Company had not legal capacity to acquire said stock, or did not, as a fact, acquire it, though it may have had legal capacity to do so; (2) because said plea fails to show any right on the part of the defendant to complain of the incapacity of the Alabama Dredging & Jetty Company to acquire and hold shares of stock in defendant company; (3) because said plea fails to show that defendant was in any wise damni-

fied by the incapacity of said Alabama Dredging & Jetty Company to acquire and hold stock in said defendant corporation; (4) because said plea fails to show in what the illegality of the Alabama Dredging & Jetty Company's stockholding in said defendant company consists; (5) because said plea raises only an immaterial issue. To plea (b) the plaintiff demurred upon several grounds, substantially as follows: (1) Because said plea complains of the invalidity of "such subscription so made by" said Alabama Dredging & Jetty Company, and yet fails to allege that said Alabama Dredging & Jetty Company made any subscription to the stock of defendant company; (2) because the complaint seeks to recover for dividends declared upon stock owned by the Alabama Dredging & Jetty Company, and said pleas seek to set up the illegality of the original contract and subscription without denying that said contract had become wholly executed; (3) because said plea shows that the contract of subscription therein alleged had become wholly executed, and the stock acquired and held thereunder. The demurrers to pleas (a) and (b) were sustained.

Thereupon the defendant filed the following pleas, which were verified by the affidavit of the general manager of the defendant company: "(c) For further plea thereto the defendant says that the said Alabama Dredging & Jetty Company subscribed for and took and acquired certain fourteen shares of the capital stock of the defendant company, being the shares in the first count of the complaint described, as an original subscriber therefor at the organization of the defendant company, and not by purchase afterwards; and that it, the said subscribing company, was not authorized by its charter to subscribe for the same, the said company having been organized under the general incorporation laws of Alabama, and the provisions therefor for the incorporation of corporations of a general business character not specially provided for; that the said subscription was made in disregard of the law, and thereby the said plaintiff's said assignor acquired no title or right to any share or interest in the defendant corporation's assets or dividends, its said acts being wholly ultra vires, upon which no action could arise; wherefore it, and the plaintiff as its transferee, hath no title to sue for and recover any dividend declared thereon; and defendant avers that the money sued for in the said first count is the amount of a dividend declared upon said stock so subscribed for by said plaintiff's assignor by said defendant corporation." "(d) And defendant, for amended plea to the said second count in said complaint, avers as is averred in the amended plea hereinabove interposed to the first count, and which is initialed '(c)', and further avers that the said several sums of money alleged to be due in said second count are the sums declared as such dividends upon the stock wrongfully and illegally subscribed for by said Bigbee & Warrior River Packet Company, and

which stock was transferred to the plaintiff."

"(e) And, by leave of the court, for further plea defendant denies both of said counts, and puts in issue the assignment and transfer by the said Alabama Dredging & Jetty Company unto the said plaintiff of the said dividends on the stock of the said Alabama Dredging & Jetty Company in said defendant corporation, and denies the transfer by the said Alabama Dredging & Jetty Company of the said several sums of money in the two counts severally named, and due to it upon the common counts."

To the pleas (c), (d), and (e) the plaintiff demurred upon the following grounds: "(1) Because it shows that the suit is for dividends, and not upon any subscription by the Alabama Dredging & Jetty Company to the defendant company's capital stock; and said plea does not allege that said claim to dividends is based upon any executory contract of subscription." "(2) Because the complaint seeks to recover dividends, and said plea alleges that the said Alabama Dredging & Jetty Company not only subscribed for, but afterwards acquired, the capital stock therein mentioned, and thereby shows that said contract of subscription had become executed." "(3) Because said plea confesses that the dividends sued for were declared, and that they, together with the stock upon which they were declared, were transferred to the plaintiff, and said plea shows that the contract of subscription mentioned was executed by the Alabama Dredging & Jetty Company's acquiring said stock prior to said transfer." The plaintiff also moved to strike plea (e) from the file. The demurrers to pleas (c) and (d) were sustained, and the motion to strike plea (e) was overruled.

To the fourth, fifth, and sixth pleas the plaintiff filed the following replications: "First. That she takes issue thereon. Second. That at the time, and ever since, the dividends sued for in this action were declared, said steamboat R. E. Lee was and has remained in proper condition to perform the services for which it was chartered. Third. That at the time the dividends sued for in this action were declared, the said Alabama Dredging & Jetty Company was not in default under the by-laws mentioned in said plea. Fourth. Comes the plaintiff, and for the purpose of this replication only, but not otherwise, confesses the facts alleged by the defendants in its fourth plea, except in so far as it alleges that the R. E. Lee became permanently unfit for defendant's service; and further says that the subscription to the capital stock of defendant's corporation owned by the Alabama Dredging & Jetty Company was payable in money, and not by the charter of any boat, and was in fact so paid for; that the said steamboat R. E. Lee did not, by the matters and things alleged in said plea, become either lost or permanently unfit for the company's business, but did become in need of repairs, and temporarily unfit for the company's business until properly repaired. And plaintiff further

averts that by the by-laws of the defendant it was provided that, in case a stockholder, who was also the owner of a boat under charter of the company, failed, after due notice, to put such boat in proper repair, said company might repair said boat at the expense of the owners of said boat; or might repair said boat, and appropriate the dividends of such owner until the expenses, with interest, of such repairs were paid; or might appropriate the dividends of such owner until such owner repaired or replaced such boat in the company's service. And the plaintiff avers that the Alabama Dredging & Jetty Company, after the storm mentioned in said plea, was notified by the defendant to repair said steamboat within a designated period, and failed to do so until January 18, 1896, but did, to wit, on or before said date, have said boat properly repaired so as to be fit for the service of the defendant, and did, on said date, tender said boat to the defendant for its service; and thereafter, on the 2d day of February, 1896, defendant acknowledged such tender, and appointed a committee to see if said boat was in proper condition for its service, and accepted said boat back into its service as of said date, and thereafter acknowledged that the said Alabama Dredging & Jetty Company was entitled to receive charter money for said boat, and to participate in the dividends of said company, from the said 2d day of February, 1896. And plaintiff avers that defendant did not elect to repair said boat while it was out of repairs as aforesaid, nor did it, prior to said 2d day of February, 1896, take any steps to appropriate the dividends upon the stock of the said Alabama Dredging & Jetty Company. And plaintiff further avers that the dividends sued for were declared after the said boat had been properly repaired and rendered fit for the defendant's service, and after it had been duly tendered for that purpose, and after the defendant had acknowledged the tender of said boat, which it accepted. Further replying to the fifth plea, the plaintiff, for the purpose of this replication only, but not otherwise, confesses the facts alleged by the defendant in its fifth plea, except in so far as it may allege that the R. E. Lee became permanently unfit for the defendant's service, and avers the same facts heretofore averred by her in her replication to the defendant's fourth plea. Further replying to the sixth plea, the plaintiff confesses, for the purpose of this replication only, the facts alleged by the defendant in the sixth plea, except in so far as it alleges that the R. E. Lee became permanently unfit for the defendant's service, and further alleges the same facts which she has heretofore alleged as a replication to the defendant's fourth plea. And for replication to the fourth, fifth, and sixth pleas, as pleaded to the second count, plaintiff files and adopts by reference the foregoing replications to the same numbered pleas to the first count. Fifth. And for further replication, separately and severally, to each of the fourth, fifth, and sixth pleas, as

pleaded to each of the first and second counts of the complaint, plaintiff says that the following is a true copy of all of such of the by-laws, and parts of by-laws of defendant corporation as relate to the duty of any stockholder of said company who is the owner, or part owner, of any steamboat or other water craft chartered by the company, to keep said vessel or boat in good repair, or to repair the same, or to furnish another in the place of the same if lost, or permanently unfit for the company's business, or as to the effect of their failure to so do, or to the extent of the remedy of the defendant company for a breach of any of above mentioned duties, viz.: '(5) In case any stockholder of the company shall be the owner or part owner of any steamboat or other water craft chartered by the company, all such boats and vessels shall be in good condition and repair, and have all sufficient and proper tackle, apparel, and furniture when chartered by the company, and during the period of charter shall be kept in such condition, and with all sufficient and proper tackle, apparel, and furniture, by the owners, at their own expense.' '(6) In the event any boat is disabled, it is to be promptly repaired, at the expense of the owners. Should any boat be lost, or become permanently unfit for the company's business, the owners may, within thirty days after written notice to them, or either of them, from the board of directors, that the same has been so lost, or becomes so permanently unfit, furnish in its place another boat satisfactorily to the board.' '(7) Should the owners of any boat, after notice from the board so to do, fail to put the same, its tackle, apparel, and furniture in good condition and repair, or to furnish such additional tackle, apparel, and furniture as may be sufficient and proper, or fail to repair said boat, if temporarily disabled, in a reasonable time, to be fixed by the board, the company may make such repairs and additions at the expense of the owners, to be jointly and severally liable to the company for the cost thereof, and to pay the same to it within five days after demand; or the board of directors may, at their option, appropriate all the dividends of such owner until such expenses are paid, with interest thereon, or may appropriate for the benefit of such association the dividends of such owner until such boat is properly repaired and put into condition to perform the service for which it is chartered.' '(8) Should any boat be lost, or become permanently unfit for the company's business, the dividends upon the shares of the capital stock of this company then standing in the name of the owners of said boat, or which at any time have been the property of such owners, shall cease from the time such boat is lost or becomes permanently unfit for business, or until another boat satisfactory to the board has been furnished in the stead of the boat so lost, or until said boat is put in proper condition to perform the services for which it is chartered; but the proportion of such dividends earned up to the loss or injury

to said boat shall be paid to such owner.' '(9) If the owners of any boat shall fail to put the same, its tackle, apparel, and furniture in good condition and repair, or if it be lost or become permanently unfit for the company's business, shall fail to furnish a satisfactory boat in the place thereof, each within the time to which they may be entitled, by the provisions of the foregoing by-laws, then no charter money shall be paid by the company for such boat from the loss or disability of such boat as long as such default continues.'"

To the seventh plea the plaintiff filed the following replications: "First. That she takes issue thereon. Second. That at the time and ever since the dividend sued for in this action was declared, said steamboat R. E. Lee was and has remained in proper condition to perform the services for which it was chartered. Third. That at the time the dividends sued for in this action were declared the said Alabama Dredging & Jetty Company was not in default under the charter party mentioned in said plea. Fourth. And for further replication the plaintiff, for the purpose of this replication, but not otherwise, confesses the facts alleged by the defendant in its seventh plea, except in so far as it alleges that the R. E. Lee became permanently unfit for the defendant's service, and alleges that the said steamboat R. E. Lee did not, by the matters and things alleged in said plea, become either lost or permanently unfit for the company's business until properly repaired; and plaintiff avers that by the by-laws of the defendant it was provided that, in case a stockholder, who was also the owner of a boat under the charter of the company, failed, after due notice, to put said boat in proper repair, said company might repair said boat at the expense of the owners of said boat; or might repair said boat and appropriate the dividends of such owner until the expenses, with interest, of such repairs, were paid; or might appropriate the dividends of such owner until such owner repaired or replaced such boat in the company's service. And the plaintiff avers that the Alabama Dredging & Jetty Company was notified by the defendant to repair said steamboat within a designated period, and failed to do so until January 18, 1895, but did, to wit, on or before said date, have said boat properly repaired so as to be fit for the service of the defendant, and did on said date tender said boat to defendant for its service, and thereafter, on the 2d day of February, 1895, defendant acknowledged such tender, and appointed a committee to see if said steamboat was in proper condition for its service, and accepted said boat back into its service as of said date, and thereafter acknowledged that the said Alabama Dredging & Jetty Company was entitled to receive charter money for said boat, and to participate in the dividends of said company, from said 2d day of February, 1895. And plaintiff avers that defendant did not elect to repair said boat while it was out

of repair as aforesaid, nor did it, prior to said 2d day of February, 1895, take any steps to appropriate the dividends upon the stock of the Alabama Dredging & Jetty Company. And plaintiff further avers that the dividends sued for were declared after the said boat had been properly repaired and rendered fit for the defendant's service, and after it had been duly tendered for that purpose, and after the defendant had acknowledged the tender of said boat which it accepted. Fifth. The same as the fifth replication to the fourth, fifth, and sixth pleas. Sixth. For a further replication to said plea as pleaded to the first count, plaintiff avers that the Alabama Dredging & Jetty Company was, at the time of the matters and things set up in the seventh plea, a stockholder in defendant's company, and as such stockholder had the steamboat R. E. Lee chartered to the defendant; and by the by-laws of said company it was provided that all boats belonging to the stockholders should be in good condition and repair, and have all sufficient and proper tackle, apparel, and furniture when chartered by the company, and during the period of the charter should be kept in such condition, and that, in the event that such boat was disabled, should be promptly repaired at the expense of the owner; that should the owner of any boat, after notice from the board of directors of the defendant, fail to put the same, its tackle, apparel, and furniture, in good repair in a reasonable time, to be fixed by the board, the company might make such repairs at the expense of the owner, to be paid for by such owner, within five days after demand; or the board of directors might, at their option, appropriate the dividends of such owner until such expenses are paid, with interest thereon; or might appropriate, for the benefit of the association, the dividends of such owner until such boat was properly repaired and put in condition to perform the services for which it was chartered. And the plaintiff avers that the said R. E. Lee became disabled, and that defendant's board notified the owners of the said R. E. Lee to have her put in proper condition within a time named, but during the period mentioned in such plea the said owners failed to put said boat in proper condition, and the said defendant failed to repair said boat, and demand payment of the cost thereof from such owners, and failed to appropriate the dividends of the owners until such expenses were paid, with interest; wherefore the plaintiff says that the damages complained of in the plea were the result of the failure of the owners to so repair said boat, and that defendant's exclusive redress for such failure was prescribed by the said by-laws of said company."

To the second and third replications to the fourth, fifth, and sixth pleas the defendant demurred upon the following grounds: "(1) That the same, while in legal effect confessing the plea, do not show any legal avoidance thereof. (2) For that it is immaterial, under

the said plea, when the dividends sued for in the action were declared. (3) That the said replication, in legal effect admitting that the said dividends were earned while the said plaintiff's assignor was in default in regard to the said steamer R. E. Lee, sets up an immaterial fact in answer thereto, to wit, that the dividend was actually declared after the said steamboat was repaired, which is no answer to said plea, the plea showing and averring that holder of stocks should be entitled to no dividends earned during the time the said vessel was not in proper condition to perform the services, and the said stockholder in default therein. Said defendant demurs to the second and third replications to the fifth plea severally upon the several grounds named as grounds of demurrer as replications to the fourth plea; and defendant demurs to the second and third replication to the sixth plea upon the same grounds as are hereinabove set forth as ground of demurrer to the replications to the fourth plea; and the defendant demurs to the fourth extended replication to the fourth plea on the grounds set forth in the demurrer hereinabove interposed to the second and third replications to the fourth plea, and on the further ground: Fourth. That by nothing in the said plea set forth it is shown that the said Alabama Dredging & Jetty Company did, during the time within which said dividend was earned, by the operation of the votes of the said company provide a suitable boat equipped as provided by the said by-law, and by nothing in said replication does it appear that said Alabama Dredging & Jetty Company did in any wise relieve itself from the default that existed regarding its said duty under the said by-laws throughout the entire time that the said dividend was being earned, but bases the right to the dividend upon the immaterial averment that the dividend itself was declared after such default was ended, and the said boat had been refitted, and replaced in the service of the company; while, as appears from the said matters admitted in said plea and said replication, the right to the title did not depend upon the time when the same was declared but the time when the same was earned. (4) And to the further replication severally and separately to the fourth, fifth, and sixth pleas to the first and second counts of the complaint, in which replication is set forth an alleged copy of the by-laws of the defendant corporation, defendant demurs upon the same grounds hereinabove stated as grounds of demurrer to the other replications demurred to, and upon the further ground that in and by the by-laws in said replication set forth it appears that the dividends upon the shares of the capital stock then standing in the name of the plaintiff's assignor, the owners of the said steamboat R. E. Lee, shall cease from the time such boat is lost, or becomes permanently unfit for business, until another boat satisfactory to the board has been furnished, or the same put in proper condition to perform the

services for which it is chartered, but the proportion of such dividend earned up to the loss or injury to such boat only shall be paid to the owners; and on the further ground that in and by said by-laws it is manifest that the stockholder is not entitled to any dividend earned during the time of his default in the maintenance of the steamboat as provided therein." The court sustained the defendant's demurrer to the second and third replications to the fourth, fifth, and sixth pleas, and overruled the fourth and fifth grounds of demurrer to the fourth and fifth replications to the fourth, fifth, and sixth pleas.

To the second and third replications to the seventh plea the defendant demurred upon the following grounds: "(1) That the said plea sets up a breach of charter party by the plaintiff, and claims the damages arising therefrom in recoupment against plaintiff's demand; and nothing in the said second plea denies the breach of the said charter party for the damages alleged to have occurred to the defendant, nor the facts alleged in said plea. (2) That the said time when the dividend named in said second replication was declared furnishes no answer, and is wholly immaterial, to the matter of cross action set up in said seventh plea. (3) That said replication by implication admits said plea to be true, and sets up no matter legally sufficient to defeat the said plea, and does not show that said plaintiff's assignor, the Alabama Dredging & Jetty Company, duly performed its charter party, or was excused for not performing the same."

To the fourth, fifth, and sixth replications to the seventh plea, the defendant demurred upon the following grounds: "(1) And to the fourth replication the defendant demurs because the same undertakes to set up as a defense to a plea of recoupment, founded on a breach of a charter party, the plaintiff's own neglect and default, and the fact that the defendant did not exercise a right and privilege alleged to have resided in it, to wit, to have repaired the boat; and is no answer to the material matter set up in said seventh plea, wherein it is shown, and it is admitted in said replication, that said Alabama Dredging & Jetty Company, after chartering the said boat to the said defendant, did, without leave of the said defendant, charter her to another person for use of her in a different occupation and trade, and that she was so used. (2) And on the further ground it is immaterial to the matter involved in said plea, when, under the said by-laws, the said defendant company elected to require the said Alabama Dredging & Jetty Company to make the said boat fit for service, inasmuch as meanwhile the use of the same by the charter party was the exclusive right of the defendant, and her unwarranted appropriation to other services was a violation of such right of the defendant. (3) For that the said plea does not set up any denial of plaintiff's right to recover dividends except in so far as it seeks to recoup damages against

the same; while the said replication undertakes to set up as an avoidance of said recoupment plea the averment that the said dividends sued for by plaintiff were declared after the repairs of said boat,—an immaterial matter." The court sustained the demurrers to the second, third, and fifth replications to the seventh plea, and overruled the demurrers to the fourth and sixth replications to the seventh plea.

The rulings on the pleadings are the only questions presented for review on the present appeal. There were verdict and judgment for the plaintiff, assessing the amount of her recovery at \$2,307.25. The defendant appeals, and assigns as error the several rulings of the trial court upon the pleadings which were adverse to it.

Pillans, Torrey & Hanaw, for appellant.
Gregory L. & H. T. Smith, for appellee.

MCCLELLAN, C. J. The contract of subscription of the dredging company to the capital stock of the Bigbee & Warrior River Packet Company was fully executed before the institution of this suit. The money subscribed for the stock had been paid to the packet company, and the certificates of shares in the capital stock of that company had been issued to the dredging company. Therefore, in this action by the assignee of the dredging company's right for dividends declared by the packet company on its stock, the fact that the dredging company was without corporate power to subscribe for the stock of another corporation is wholly immaterial. *Long v. Railway Co.*, 91 Ala. 519, 8 South. 706; *Morris v. Hall*, 41 Ala. 510, 536; *Thomp. Corp.* § 6023. We do not construe the by-laws of the packet company in respect of the forfeiture of earnings or dividends by a stockholder who fails to keep a boat in the service of the company as they were construed by the city court. To the contrary, we hold that it was the purpose and is the effect of the provisions in the by-laws on this subject to forfeit to the company all moneys earned by it and as earned by it which, but for the stockholder's dereliction in respect of keeping a boat in the service of the company, would have become payable to him as dividends upon his stock, and been paid to him as such. It is doubtless true that by "dividends" is ordinarily intended dividends declared, earnings set apart by a corporation for payment to its stockholders, and that by "earnings" of a corporation is ordinarily meant earnings declared as dividends. But it equally cannot be doubted that the corporation, in the making of contracts and the ordination of by-laws, may give to these terms a different meaning, and employ them to designate money earned and as earned, and may provide in respect of such money that so much of it as is earned during a period of default on the part of the stockholder in any duty he owes the company shall be forfeited to the company, and deducted from the dividend declared for

or covering such period, whether such declaration of dividend be made during the time of such default or afterwards. And whether the packet company, in the by-laws before us, has thus provided for the forfeiture of earnings in such case as earnings and as they were earned, regardless of the time when the dividend is declared, is a question of intention to be gathered from the by-laws, interpreted in the light of surrounding circumstances, and the ends sought to be subserved. And, taking this point of view, it is clear, we think, that the money—or so much of it as was earned while the dredging company was in default—which constituted the dividend declared, after the default had ended, on the stock held by said company, was, by the terms and intent of the by-laws, forfeited to the packet company. As said by appellant's counsel: "It is apparent from the by-laws that the packet company was an incorporated association of steamboat owners, in which each agreed to put a boat into the service of the company as a price and condition of receiving dividends upon his stock; and that it was his duty, not only to put in a suitable boat, but to keep her in suitable condition for service." This being the general scheme of the organization, nothing is more natural and reasonable than for the by-laws to declare that the profits of the business of the association should be divided among those members who had contributed to earning them by keeping suitable boats in the service of the company, and that none of the profits earned by the association during any period when a member had no suitable boat in the service should be paid to such member. And this is provided by section 8 of the by-laws, as follows: "Should any boat be lost, or become permanently unfit for the company's business, the dividends upon the shares of the capital stock of this company then standing in the name of the owners of said boat, or which at any time had been the property of such owners, shall cease from the time such boat is lost or becomes permanently unfit for business, or until another boat satisfactory to the board has been furnished in the stead of the boat so lost, or until said boat is in proper condition to perform the services for which it is chartered; but the proportion of such dividend, earned up to the loss or injury to said boat, shall be paid to such owner." It is to be noted that the dividend is to cease from the instant that a boat is lost, or becomes permanently unfit for service, and is to commence again the moment another boat satisfactory to the board is furnished for the service of the company. It is also to be noted that the proportion of such dividend earned up to the loss or injury of a boat shall be paid to the owner. This, to our minds, is as clearly evincive of the intention of the packet company to forfeit by the provisions of the by-laws so much, and only so much, of the money forming the basis of a declaration of dividends as is earned during the default, wholly regardless of the time of declaration made, as can be conceived;

and we are constrained to the conclusion that it was the intent of the by-laws bearing on this matter, and is their just operation, to apportion any dividend declared over the period covered by the declaration, and to withhold from a boat-owning stockholder such part thereof as is thus apportioned to the time within the dividend period during which he may have failed to keep a suitable boat in the service of the company; and this whether the dividend is declared during or after the period of such default. It is further clear, we think, that the provisions in these by-laws with reference to boats of stockholders being repaired, etc., by the packet company were inserted for the benefit of that company, to be availed of or not, at its election, and that they impose no duty to repair, etc., upon said company. The rulings of the city court upon the pleadings are not in harmony with the foregoing views, and its judgment must therefore be reversed. The cause is remanded.

(121 Ala. 221)

LOUISVILLE & N. R. CO. v. BROWN.

(Supreme Court of Alabama. April 4, 1899.)

INJURY TO EMPLOYE — NEGLIGENCE — PLEADING — MEASURE OF DAMAGES.

1. In an action against a railroad company for a death of an employé, caused by the acts of another employé, plaintiff must allege that the employé acted willfully and wantonly, to justify a recovery notwithstanding contributory negligence; allegations of fact from which the jury might infer willfulness or wantonness being insufficient.

2. After a switchman had negligently taken a position of peril between an engine and a car, the fireman, with knowledge of the peril, negligently signaled the engineer to back the engine, and the switchman was killed. *Held*, that an instruction to find for the switchman's administrator, though the switchman was guilty of contributory negligence, was erroneous, as the switchman might have been guilty of negligence precluding a recovery other than that of assuming the perilous position, which would not preclude a recovery.

3. The measure of damages for negligently causing death is such sum as would support those dependent on deceased, to the extent he was accustomed to contribute to that end, during his life expectancy, in the absence of evidence of the probable value of his estate on the assumption that he had not been killed.

Appeal from circuit court, Mobile county; William S. Anderson, Judge.

This was an action brought by Henry H. Brown, as administrator of the estate of James L. Brown, deceased, against the Louisville & Nashville Railroad Company, to recover damages for the death of plaintiff's intestate, who was a brakeman on defendant's road, and who was killed on November 6, 1890, while engaged in switching a car on defendant's track. The court, at the request of the plaintiff, among others, gave to the jury the following written charges: (b) "The court charges the jury that, even if James L. Brown knew of the rule in question, and violated it, and even if he was guilty of contributory negligence, this would constitute no defense to the fifteenth and sixteenth counts

of the complaint, if the plaintiff has proven the allegations of these counts." (c) "The court charges the jury that, if the plaintiff has satisfied you of the truth of the allegations of the fifteenth or of the sixteenth counts of the complaint, then you must find for the plaintiff, whether James L. Brown was guilty of contributory negligence or not, and whether he knew of and violated the rule of the defendant or not." The defendant separately excepted to the giving of each of these charges, and also separately excepted to the court's refusal to give the several charges requested by it; but it is not necessary to set out in detail the charges requested by the defendant and refused by the court. There were verdict and judgment for the plaintiff, assessing his damages at \$8,000. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved. Reversed.

Thos. G. Jones, for appellant. Harry T. Smith, for appellee.

MCCLELLAN, C. J. The complaint originally contained nineteen counts. At the trial below all but five counts were stricken out or withdrawn, and the trial was had upon these five, numbered respectively 9, 11, 15, 16, and 19. They each count upon the wrong of one McDonald, a fireman, as of a person at the time in the charge and control of an engine. The ninth count avers that plaintiff's intestate, James L. Brown, "was killed by reason of the fact that while he was upon defendant's track, between the tender of the engine and a box car, engaged in the performance of his duties as a brakeman in uncoupling said engine from said box car, and while he, the said fireman, knew that said Brown was in such perilous position, and while he knew that the engineer was moving, or about to move, said engine towards the said Brown with such force and violence as to greatly endanger his life, he, the said fireman, failed to notify said engineer of the said perilous position of said Brown, although it was his duty as such fireman to have so notified said engineer, and by reason of said failure on the part of said fireman said engineer ran said train back upon said Brown with such force and violence as to throw him to the ground, and kill him." The eleventh count avers that "Brown was killed by reason of the fact that while he was about to go upon defendant's track between said engine and car for the purpose of uncoupling them, as was his duty, said fireman negligently allowed said engineer to remain unaware of the fact that said Brown was about to go between said engine and car, although he, said fireman, well knew said fact, although it was his duty as such fireman to have informed the engineer of said perilous position of said Brown, and by reason of all which said engineer backed his train against said Brown, and killed him." The fifteenth count ascribes the casualty to

the fact that Brown, in the discharge of his duties, was between the tender and a car for the purpose of uncoupling them; that the fireman knew this, and knew also that the engineer was not aware of Brown's perilous position; and that, although it was the fireman's duty to have informed the engineer of Brown's position, yet he nevertheless failed to do so, and in consequence of such failure the engineer backed his train against Brown, and killed him. The sixteenth count avers that Brown was killed by reason of the fact that, "although he was in a perilous position in the performance of his duties, to wit, between said engine and said car, and although this fact was unknown to the engineer and was well known to said fireman, and although said fireman knew that it would greatly imperil the life of said Brown for the engineer to continue to back said train, and although it was the duty of such fireman to have so informed said engineer, he nevertheless failed to inform his said engineer of the said perilous position of said Brown, by reason of which the engineer backed his train against said Brown, and killed him." The averment as to the cause of Brown's death in the nineteenth count is as follows: "Said Brown was killed by reason of the fact that at the time when he was about to go between the tender of said engine and one of the cars attached thereto for the purpose of uncoupling them, he, the said Brown, signaled for slack, and it was the duty of said fireman upon said engine to communicate said signal to said engineer, but said fireman, well knowing that Brown was about to go or had gone between said tender and car for the purpose of uncoupling them, and that it would endanger his life to run said tender back further than was necessary to give slack thereto, and well knowing that the engineer was not aware of the position of said Brown, and being charged with the duty of communicating to the engineer the signal given by said Brown, negligently communicated a wrong signal to said engineer, and instructed him to back up instead of give slack, by reason of which said engineer moved said engine and tender a greater distance than was proper for the purpose simply of giving slack, by reason of which said Brown was stricken to the ground and killed." To each of these counts the defendant pleaded not guilty and contributory negligence. The plaintiff thereupon moved the court to strike out the pleas of contributory negligence on the ground that each of the counts of the complaint charges "that the injury arose from conduct on the part of the servants of the defendant which was the equivalent to wanton or intentional wrong, and the plea of contributory negligence cannot, therefore, be pleaded as a defense to either of said counts, or to the whole complaint containing said counts." The court granted this motion, and struck said pleas.

It is clear, we think, that neither one of the counts of the complaint presents a case of

wanton or willful misconduct on the part of the fireman. At the most they severally allege only negligence on his part. It is averred that he knew Brown's peril, that by giving the proper signal or information to the engineer Brown's safety would have been conserved in spite of the perils which his position involved, and that with a consciousness that the engineer was unaware of the situation, he, the said fireman, failed to give such signal or information. It is not averred that he willfully or wantonly so failed, or that he was conscious of his failure, but, to the contrary, the express averment in some of the counts and the necessary implication in the others is that the fireman negligently failed to give the proper signal. To the implication of willfulness, or wantonness, or reckless indifference to probable consequences, it is essential that the act done or omitted should be done or omitted with a knowledge and a present consciousness that injury will probably result; and this consciousness is not to be implied from mere knowledge of the elements of the dangerous situation, for this the party charged may have, and yet act only negligently and inadvertently in respect of the peril; but it must be alleged either in terms that he willfully or wantonly or with reckless indifference failed to discharge the duty resting upon him, or that he was at the time conscious that his course would probably result in disaster. Of course, these necessary averments may be proved by the circumstances. The jury may, in a proper case, infer such consciousness, willfulness, or wantonness from his knowledge of the existing perilous conditions. But that this may be done is no excuse for the pleader's premission of their averment. *Railroad Co. v. Burgess* (Ala.) 25 South. 251; *Id.*, 114 Ala. 587, 22 South. 169; *Railroad Co. v. Markee*, 103 Ala. 160, 15 South. 511; *Railroad Co. v. Swope*, 115 Ala. 287, 22 South. 174; *Railroad Co. v. Hall*, 105 Ala. 599, 17 South. 176; *Railroad Co. v. Burgess*, 116 Ala. 509, 22 South. 913. It follows that the trial court erred in sustaining plaintiff's motion to strike defendant's pleas of contributory negligence from the files. The counts to which they were addressed do not "charge that the injuries arose from conduct on the part of the servants of the defendant which was equivalent to wanton or intentional wrong," as set forth in the motion. And, this being true of all the counts upon which the trial was had, the court similarly erred in giving charges (b) and (c) for plaintiff, and in refusing to give the several charges requested by the defendant to the effect that plaintiff could not recover for the wanton or willful misconduct of defendant's engineer and fireman. That issue was not in the case.

This case involves an application of another well-established principle of law going to defendant's liability, notwithstanding negligence on the part of plaintiff's intestate. It is this: Where the injured party is negligent in assuming a position of danger in such de-

gree and so contributing to his hurt as that his fault will leave him without a right of recovery for any primary negligence of the other party, by which we mean any negligence which has, from the point of view of the person inflicting the injury, no relation to the other party's situation, yet he may, nevertheless, recover if the person charged with the wrong and injury became aware of his peril in time to avoid injuring him by the proper use of all preventive means at his command, and listlessly, inadvertently, negligently failed to resort to such means in conservation of his safety, provided he is himself free from negligence after he becomes conscious of his danger. In such case the original negligence of the injured party, whereby he is placed in a perilous position, does not, in a legal sense, contribute to the result; it is a remote, not a proximate, cause; it is a condition indeed, rather than a cause remote or proximate; and the law ascribes the disaster solely to a want of due care on the part of the person controlling the agency of the injury, but for whose negligence no hurt would have been done notwithstanding the injured party's original fault. We need not enlarge in the discussion of this doctrine. It obtains in the common law of England (*Davies v. Mann*, 10 Mees. & W. 546), and has been often recognized and declared by this court (*Tanner's Ex'r v. Railroad Co.*, 60 Ala. 621; *Frazer v. Railroad Co.*, 81 Ala. 185, 1 South. 85; *Railroad Co. v. Womack*, 84 Ala. 149, 4 South. 618; *Railroad Co. v. Webb*, 97 Ala. 308, 12 South. 374; *Railroad Co. v. Hurt*, 101 Ala. 34, 13 South. 130; *Railroad Co. v. Burgess*, 116 Ala. 509, 22 South. 913. There may be some expressions in the opinion in *Railway Co. v. Lee*, 92 Ala. 262, 9 South. 230, on this subject, and in respect of willfulness and the like, which are to be taken as shaded and modified by the later decisions cited above. Counts 15 and 16 of the complaint present a case falling within the principle just stated, if it be assumed that Brown, plaintiff's intestate, was negligent in placing himself between the tender and car just before he was hurt. With this assumption these counts proceed in legal contemplation upon the theory that Brown's negligence brought him into a position of peril, which became known to the fireman in time for the engine to have been stopped short of the injury, had he promptly informed the engineer of the situation; that he negligently failed to give the engineer this information, or the proper signal; and that such failure caused the death of Brown. It was no answer to these counts that Brown was guilty of negligence in assuming the perilous position. Such negligence was remote, not proximate, and hence not contributory in a material sense. It produced merely a condition upon which the alleged negligence of the fireman operated to Brown's death, and did not co-operate with the fireman's negligence as a joint cause of the disaster. But it does not follow that there could have been no negligence on the part of Brown

which could have proximately contributed to the injury as laid in these counts. He might have been at fault in failing to make proper effort to extricate himself after becoming aware of his peril, and such fault may have combined with the fireman's negligence to cause the result. Hence it is that to such a count contributory negligence may be pleaded; and when such plea is interposed its sufficiency should be tested by demurrer, and not by a motion to strike; nor, of course, can the insufficiency of the plea be assumed in instructions given to the jury. Charges (b) and (c), before referred to, given for plaintiff, were asked and given upon the erroneous notion that counts 15 and 16 charged wantonness or intentional wrong, and, as we have said, should have been refused, because no such charge was made in any count of the complaint. Taking the counts in question to charge negligence of the defendant operating upon a known perilous position assumed by Brown, these charges were yet bad, in that, while Brown's negligence in assuming the position may not have been a proximate cause of his injury, yet he might have been guilty of other negligence in the premises which was proximate and contributory, and which would have defeated the action. Moreover, a plea to these counts denying negligence on the part of the fireman after he became aware of Brown's peril, and affirming contributory negligence on the part of Brown in being at the place where he was killed, would have been a complete defense to them; as also, indeed, would be a want of proof or disproof under the general issue that the fireman knew of Brown's peril. If it should be made to appear, under proper issues on another trial, that Brown signaled the fireman for the engine to "come back," that the latter communicated this signal to the engineer, that the engineer put the engine in motion in compliance with this signal, and that Brown then went in between the tender and car, and was killed by the tender running against or upon him in the movement of the train for which he had signaled, then, in such case, the affirmative charge should be given for the defendant. Again, if Brown signaled for "slack" only, and the fireman misinterpreted his signal, and directed the engineer to "come back," and Brown went in between the cars on the assumption that they would be moved only sufficiently to give "slack," and they were moved with the force and violence incident to coming back, and in consequence of such increased momentum beyond that necessary to give slack Brown was killed, the plaintiff would be entitled to recover, unless the jury should find that Brown was guilty of contributory negligence in going between cars moving at the rate these were at the time, or that he violated a rule of the company, known to him, which forbade brakemen to go between cars moving at all, if it be not made to appear that such rule was impracticable of observance consistently with the duties imposed upon and

required of brakemen by the defendant company. And there may be other possible categories of fact in the case, but we deem it unnecessary to attempt to set them hypothetically down here. It is also unnecessary for the purposes of another trial, we think, to pass upon the other questions reserved on the record before us, further than to say that, as the evidence fails to furnish any data by which the jury could determine the probable value of Brown's estate on the assumption that his mortality had not been untimely cut off, their verdict should have been for such sum only as would suffice to pay for the support of those dependent upon him, to the extent he was accustomed to contribute to that end, during his life expectancy, as computed in the case of Railroad Co. v. Trammell, 93 Ala. 350, 9 South. 870. Reversed and remanded.

(121 Ala. 505.)

MOBILE, J. & K. C. R. CO. v. OWEN.

(Supreme Court of Alabama. April 4, 1899.)

CORPORATIONS—OFFICERS—COMPENSATION—ELECTION—REMOVAL—EVIDENCE—RELEASE—CONSIDERATION—LIABILITY FOR SALARIES—ESTOPPEL—APPEAL—BILL OF EXCEPTIONS—RECORD.

1. It is no defense to an action by the secretary of a corporation for his salary that during his incumbency he also acted as secretary for another company, it not being shown that the duties of the latter office conflicted with the former, or involved the doing of acts prejudicial to defendant.

2. Incumbent assumed the office of secretary of a corporation at a fixed monthly salary under a verbal agreement with the president, and performed his duties during the period claimed. The by-laws created the office of secretary, and fixed the term of office at one year and until a successor was elected. The power of filling the office and fixing the salary was in the directors, but, though they did not fix the salary of the incumbent, they elected him to the office when he had filled it over a year, and after they had approved his report charging himself with the salary agreed on with the president, and afterwards re-elected him. The directors never removed him, nor notified him his salary would be discontinued. *Held*, that he was entitled to the salary during the entire period of service, and his recovery could not be limited to the value of the services performed.

3. In an action against a corporation for the salary of an officer, transactions and conversations between the corporation and other officers were properly excluded.

4. A release of valid claim for salary without consideration is nudum pactum.

5. One elected secretary of a corporation by the directors, as provided by the by-laws, to hold office until his successor is elected, cannot be discharged by the president.

6. The fact that a corporation was without funds does not relieve it of its obligation to pay salaries of its officers, so long as it permits them to remain in office, and accepts their services.

7. Where the directors of a corporation recognize and adopt a contract of employment made by its president, and the services are performed, the corporation cannot object that the contract was not in writing, nor that the president had no authority to make it.

8. Where the record fails to state that the bill of exceptions sets out all the evidence, it will be presumed that the testimony justified the rulings, if, under any state of proof, they would be free from error.

9. A motion to set aside an order directing execution, not appearing in the bill of exceptions, cannot be reviewed.

10. Error in denying a motion to set aside an execution cannot work a reversal of the judgment entered prior thereto.

Appeal from circuit court, Mobile county; William S. Anderson, Judge.

Action by Richard B. Owen, Jr., against the Mobile, Jackson & Kansas City Railroad Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

This action was brought by the appellee, Richard B. Owen, Jr. as assignee of Richard B. Owen, Sr., to recover an amount alleged to be due as salary for services rendered by the latter as secretary and treasurer of and to the defendant, the Mobile, Jackson & Kansas City Railroad Company, and was commenced on December 10, 1896. The complaint contained six counts, the substance of each of which is sufficiently stated in the opinion. The defendant filed several pleas, to which demurrers were sustained, but, in view of the assignments of error made on this appeal, it is unnecessary to set out in detail any of these pleas or demurrers, except a special plea filed June 1, 1897, which was as follows: "Defendant says that plaintiff's assignor, R. B. Owen, was on or about the 15th day of March, 1891, elected secretary of the quarantine board of Mobile Bay, and has held said office of secretary of said quarantine board of Mobile Bay from the 15th of March, 1891, to the 1st day of December, 1894, inclusive; and defendant avers that said R. B. Owen, plaintiff's assignor, was during the time mentioned continuously about the duties of said office of secretary of said quarantine board of Mobile Bay, and has been paid an adequate monthly salary for said service; and defendant avers that since said 15th day of March, 1891, said R. B. Owen, plaintiff's assignor, has rendered no valuable service to defendant, and that defendant has not had the benefit of his time or services; and defendant avers that the only service rendered or offered to defendant by plaintiff during said time mentioned in said complaint was to attend at long intervals the meetings of its board of directors, and keep the minutes of said meetings, during which time defendant was not actually engaged in any business; and defendant avers that it never consented or assented to the employment of said R. B. Owen, plaintiff's assignor, by said quarantine board of Mobile Bay, and was not consulted by him about said employment, and did not at any time agree to pay any sum whatever while he was employed by, and engaged in the service of, other parties." To this plea the plaintiff demurred upon several grounds, which may be summarized as follows: (1) It is not shown therein that it was stipulated in said contract of employment that the said R. B. Owen was to give his entire time to the defendant, or was to refrain from doing any other employment during his employment by the defendant. (2) It is

not denied that the plaintiff's assignor performed all the services required by him by his contract of employment with the defendant. (3) It is not shown that the employment as secretary of the quarantine board in any wise interfered with the faithful performance or was a violation of said contract. (4) Said plea sets up no defense to the maintenance of the action. This demurrer was sustained. Issue was joined on the pleas of the general issue, payment, and the statute of limitations of three years, the latter alleging the cause of action to be an open account. The bill of exceptions recites that "the plaintiff announced at the opening of the cause that he did not claim anything upon a quantum meruit; that the common counts were retained and relied upon only so far as they entitled the plaintiff to recover upon a specific contract which had been fully performed."

The plaintiff introduced R. B. Owen, Sr., as a witness, and he testified that he was in the employ of the defendant as secretary and treasurer of the defendant company from about the middle of August, 1888, until December, 1894. Upon this witness being asked with whom, if anybody, did he make the original contract of employment, the defendant's counsel objected to the question upon the ground that the contract should have been in writing. The court overruled the objection, and the defendant duly excepted. The witness testified that H. Austill had offered him the position of secretary and treasurer at a salary of \$50 per month. The witness was then asked the following question: "Did Austill hold any official position with the company?" The defendant objected to this question, upon the ground that the record of the company was the best evidence. The court overruled the objection, and the defendant duly excepted. The witness then testified that Austill was president of the defendant company at the time the witness was offered his employment, and continued to act as president until the witness left the service of the defendant, and that the defendant's board of directors knew of this fact; that they were present at the meetings of the board at which Mr. Austill presided, and he exercised all the powers usually exercised by presidents of corporations. The witness further testified that he performed all the duties of secretary that were incumbent upon him from the time of his employment, in August, 1888, until the time of his resignation, in December, 1894. There was then offered in evidence, after being properly identified, a by-law of the corporation, which provided that the officers of the corporation should consist of a president, vice president, secretary and treasurer, and a general solicitor, who should be elected by the board of directors, and "shall hold their office for one year, and until their successors are elected and qualified." There was then introduced in evidence the minute entry of the defendant corporation which showed that at the annual meeting of

the stockholders on December 18, 1887, R. B. Owen, Sr., was elected secretary and treasurer for the ensuing year, and also the minute entry of the defendant, which showed that on December 30, 1890, said Owen was again elected secretary and treasurer. This witness further testified that he had been paid a salary by the defendant at the rate of \$50 per month from August 15, 1888, up to December 18, 1889, and that since December, 1888, his salary had not been paid him; that on November 16, 1890, he assigned his claim against the defendant for unpaid salary to his son, R. B. Owen, Jr., the plaintiff in the present action. This assignment was in writing, and, after proving its execution, was introduced in evidence. During the examination of this witness he identified the two by-laws of the defendant which were introduced in evidence. One of these by-laws provided for the appointment of a president of the executive committee from the board of directors, who should have power to act in the place of the board when not in session; and the other one provided that the salary of the elected officers of the company should be fixed by the board of directors. The defendant thereupon moved to exclude from the jury all of the testimony of this witness relative to the contract of employment by H. Austill, as being in violation of said by-laws. The court overruled the motion, and the defendant duly excepted. For the purpose of showing the amount of labor done for defendant by the witness, the defendant offered to prove by him that 75 pages of minutes, as written in the minute book, constituted the entire minutes kept by the witness during the period for which the salary was claimed. The plaintiff objected to this evidence. The court sustained the objection, and the defendant duly excepted. This ruling constitutes the basis of the fourth assignment of error. The defendant then asked the witness if it was not a fact that the keeping of the minutes, as shown in the minute book, constituted chiefly all the services rendered defendant during the period for which he claimed a salary. The court sustained the plaintiff's objection to this question, and the defendant duly excepted. This ruling constitutes the basis of the fifth assignment of error. Thereupon the defendant asked the witness to examine the minute book, and tell it how many of the minutes of the meetings in the record were in his handwriting. The court sustained the plaintiff's objection to this question, and the defendant duly excepted, and this ruling is the basis of the sixth assignment of error. This witness was then asked the following question: "When were you elected secretary of the quarantine board of Mobile Bay?" The plaintiff objected to this question. The court sustained the objection, and the defendant duly excepted, and this ruling constitutes the basis of the seventh assignment of error. The witness was then asked if, after he was elected secretary of the quarantine board, al-

most all of his time was exclusively devoted to its service. To this question the court sustained the plaintiff's objection, and the defendant duly excepted, and this ruling constitutes the basis of the eighth assignment of error. The witness was then asked if he was not elected secretary and the treasurer of the quarantine board of Mobile Bay on March 5, 1891. The court sustained the plaintiff's objection to this question. The defendant duly excepted, and this ruling constitutes the ninth assignment of error. The witness then testified that on the 1st of May he made out his demand for salary in December, 1894, and presented it to Mr. H. Austill, and also to another director. The statement of the claim of the plaintiff, as thus presented, was in writing, and, after stating the amount due as being \$2,750, there was a voluntary release, without consideration, of \$2,000, leaving a balance of \$750. The plaintiff objected to the introduction of this statement in evidence. The court sustained the objection, and the defendant duly excepted. This ruling constituted the basis of the tenth assignment of error. The witness was then asked by the defendant's counsel the following question: "Do you remember telling me, some time after Mr. R. B. Owen, Jr., got this statement of the account from you, that Mr. Austill said that you were not entitled to this salary?" The plaintiff objected to this question. The court sustained the objection, and the defendant duly excepted. This constitutes the basis of the eleventh assignment of error. The witness further testified that he had not been notified by the president of the company, or by any one else in authority, that the money for the construction of the railroad was out, and that there was nothing further with which to pay the defendant's salary, and that from March or April, 1890, he had not been paid his salary. The defendant offered to introduce in evidence a minute entry of the meeting of the board of directors of the defendant company at which they had consented for their civil engineer to accept the employment from another railroad, and at the same time retain his position as chief engineer for the defendant company. The plaintiff objected to the introduction of these minutes. The court sustained the objection, and the defendant duly excepted. This ruling constitutes the basis of the twelfth assignment of error. Upon the introduction of T. W. Nicols, who was chief engineer of the defendant company at the time in question, he testified that the effort to collect money to carry on the survey and the operations in the construction of the railroad ceased some time in May, 1890. The defendant then asked the witness this question: "State whether or not about that time president Austill of the company notified you, as chief engineer, that from and after that time the salaries of the officers would have to cease, and that whatever labor was performed by any of you after that time you could not expect pay for it."

In connection with this question, the defendant's counsel stated to the court that they expected to show that the information as to the collection of funds of the defendant upon which the statement of the president to the witness was based was obtained from R. B. Owen, Sr., then secretary, and who was plaintiff's assignor. Upon the witness further testifying that he did not think Mr. Owen was present when any of the statements inquired about were made, the plaintiff objected to the question. The court sustained the objection, and the defendant duly excepted. This ruling constitutes the basis of the thirteenth assignment of error. The defendant introduced one F. B. Merrill as a witness, who testified that he met R. B. Owen, Sr., the plaintiff's assignor, in November or December, 1894; that he went to his office by direction of H. Austill, to get the minute book of defendant, and, upon his asking him for the minute book, he (Owen) said that he was glad to see the book go out of his office, that it had been a bother to him, and a thankless job, as there was no salary attached to it. Owen, when examined as a witness, denied having made the statement as testified to by Mr. Merrill. Merrill was then asked the following question: "When you took charge of this matter, was any statement of the liabilities of the company furnished you?" The plaintiff objected to the question. The court sustained the objection, and the defendant duly excepted. This ruling constitutes the basis of the fourteenth assignment of error. Defendant then introduced H. Austill as a witness, who, being duly sworn, testified that he was president of defendant during the year 1890, and up to May, 1894; that the officers of the company ceased to collect the survey fund in the spring of 1890. "Cannot positively say that about that time I had any conversation with R. B. Owen about the salaries of the officers. I discharged the engineers, and stopped their salaries, and when the matter came up, four years after, my impression was that I had said something to Mr. Owen about it. Mr. Owen came to me about November, 1896, and stated that his account was so much; and, as I have said, the impression on my mind was, when he had exhausted the survey fund, that we had the account made up, and there was several hundred dollars due him at that time. When the account was made up, both the engineer's and his account, my impression was that the officers were notified that the salaries would cease. Mr. Owen insisted that I had given him no notice, and had not discharged him. I cannot swear positively that I did. The matter just dragged along as those things usually do. He was in and out of the office as he was called, and was needed, and I cannot swear positively that I gave him the notice, though that was the impression on my mind." Plaintiff moved the court to exclude the testimony of the witness as to his impression, and also his testimony that

he stated those impressions to Mr. Owen. The court granted the motion, and defendant excepted. Upon the defendant offering to prove by a witness introduced by it what was the value of the services rendered by the plaintiff's assignor, as shown by the minute book of the defendant, the plaintiff objected. The court sustained the objection, and the defendant duly excepted.

The bill of exceptions does not recite that it contains all, or substantially all, of the evidence introduced. It is unnecessary to set out in detail the court's oral charge. The court, at the request of the plaintiff, gave to the jury the following written charges: (1) "If the jury believe from the evidence that R. B. Owen, Sr., was employed by the president of the defendant company as secretary and treasurer of the company at fifty dollars per month, payable monthly, and that he served the company for some time, and was paid for his services at the rate agreed upon, and that the directors knew this fact, and elected Mr. Owen as secretary and treasurer of the company without fixing his salary, and that he served thereafter under such election, then the plaintiff is entitled to recover for his assignor's services under such election for the time of such services at that rate." (2) "The court charges the jury that when a party employs another to work for him for a certain time at a stipulated monthly salary, payable each month, and at the end of that time continues said employé in his employ thereafter without any change in the terms of the employment, and without specially making any new contract, the law requires the renewal of the old contract upon the same terms." (3) "The court charges the jury that the plaintiff shows a sufficiently specific contract for compensation for services rendered by his assignor if he shows a specific, express, original contract, and implies renewals of the same contract." The defendant separately excepted to the giving of each of these charges, and also separately excepted to the court's refusal to give each of the following charges requested by it: (1) "The court charges you that the third, fifth, and sixth counts of the complaint are what is known to the law as common counts for work and labor done, and, in order for the plaintiff to recover on any of these counts, he must reasonably satisfy you by the evidence that plaintiff's assignor rendered to defendant some service, work, or labor, and that defendant accepted such services, and what was the reasonable value of the same, and that said services were not rendered as a gratuity; and, unless the evidence satisfies your minds on these points, your verdict should be for the defendant under these counts." (2) "The court charges the jury that, under the by-laws of the defendant, the only person authorized to make a contract and fix the salary to be paid to plaintiff's assignor was the board of directors, and, unless you are satisfied from the evidence that the board of directors entered into a contract with said assignor, and fixed

his salary at \$50 per month, then the plaintiff could only recover for such services and labor as he has shown were performed by said assignor, and it would be your duty to only find for plaintiff for the reasonable value of the services proven to have been performed." (3) "The court charges you that if you believe from the evidence that plaintiff's assignor was acting as the secretary of defendant, and you further believe from the evidence that said assignor went to work for another corporation, to wit, quarantine board, and that he did not have the consent of the defendant to go and work for said other corporation, and you further believe that this claim was assigned to plaintiff long after it was due, then you cannot give plaintiff anything for such time as said assignor worked for said quarantine board." (4) "The court charges you that if you believe from the evidence that during the time between April, 1890, and December, 1894, the defendant actually did no business, and plaintiff's assignor had, in consequence, no occasion to render defendant any service, then the failure of defendant to object to his acceptance of permanent employment by others cannot be construed to mean assent or acquiescence in such course, and plaintiff cannot recover for the time he was employed by others." (5) "The court charges you that, if plaintiff's assignor had a specific contract of employment with the defendant for a given time for a fixed compensation, then, in that event, the defendant was entitled to the time and services of plaintiff's assignor; and, if he sought and obtained other employment that occupied his time, plaintiff cannot recover of defendant any amount for the time his assignor was engaged in the service and employment of others, unless defendant assented to such employment." (6) "The court charges you that if you find from the evidence that plaintiff's assignor had no specific contract fixing the compensation to be paid him for services to be rendered by him to the defendant, then plaintiff can only recover the reasonable value of the services shown to have been performed by his assignor, and he cannot recover any amount for the time during which his said assignor was engaged in the service of others." (7) "The court charges the jury that if you believe from the evidence that the claim counted upon and claimed in the first, third, fourth, fifth, and sixth counts of the complaint are open accounts, as defined by the court, then the statute of limitations of three years would bar all items which accrued and matured three years prior to the date of the filing of the complaint, to wit, the 10th day of December, 1896." (8) "If the jury believe the evidence, they will find for the defendant." (9) "If the jury believe the evidence, they must find for the defendant under the fourth count of the complaint." (10) "If the jury believe all the evidence, they cannot find anything for plaintiff after December, 1891." (11) "If the jury believe the evidence, they must find for the defendant under the

first and second counts of the complaint." (12) "The court charges you that the official salaries of officers of corporations are fixed with the view to the rendering of valuable services by the officer, and if you believe from the evidence that between April, 1890, and December, 1894, the defendant did no business, and had no revenues, and the plaintiff's assignor was called to render only nominal services, then you should find a verdict for defendant." (13) "There is no evidence before the jury that Austill ever reported his employment of plaintiff's assignor to the board of directors, and under the eleventh article of the by-laws plaintiff cannot recover unless the directors in some way fixed the salary."

There were verdict and judgment for the plaintiff for the sum of \$2,000. The judgment was rendered on June 8, 1897. On June 10, 1897, the attorney for the plaintiff filed an affidavit setting forth the fact that delay in the issuance of the execution upon the plaintiff's judgment would result disastrously to plaintiff, and thereupon moved the court to order the execution to issue upon said judgment immediately. The court granted this motion, and directed that execution be issued upon said judgment instantly. The defendant moved the court to set aside the order directing the issuance of the execution as stated above, and to quash said execution, upon the following grounds: "First. Said motion was granted upon ex parte affidavit, without notice to the defendant or its attorneys of record. Second. The allegations of the affidavit of the plaintiff show no sufficient cause for the issuance of said execution." This motion was overruled, and the defendant duly excepted. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

McIntosh & Rich, for appellant. R. W. Stoutz, for appellee.

TYSON, J. It appears from a recital in the record that the plaintiff, when the cause was announced ready for trial, stated that he did not claim any recovery upon a quantum meruit, and that the common counts in the complaint were retained and relied upon only so far as they entitled him to recover upon an executed special contract. There were six counts in the complaint, and all of them were common counts except one, which was designated as "No. 6." This declared upon a special contract, in substance as follows: That on, to wit, the 1st day of August, 1888, the defendant elected, employed, and hired one Richard B. Owen, plaintiff's assignor, as secretary of defendant company (who is sued as a corporation), to perform the duties of said office of secretary from the said 1st day of August, 1888, until his successor in said office should be duly elected and qualified, at the stipulated salary of \$50 per month; that by virtue of said election plaintiff's assignor entered upon the discharge of the duties of his

office, and was subsequently re-elected; that under these elections as secretary he remained continuously in said office, faithfully discharging the duties thereof from the date of his first election to December 1, 1894; and that defendant has failed to pay the compensation for the services performed by plaintiff's assignor as secretary during the months from April, 1890, to November, 1894, both inclusive. There were a number of pleas filed by the defendant, to which demurrers were sustained, but it is unnecessary to determine the correctness of the rulings of the court with respect to any of them except the special plea filed June 1, 1897, as the sustaining of the demurrer to this plea is the only error assigned. The theory upon which this plea was constructed proceeds upon the hypothesis that when the plaintiff's assignor accepted the office of secretary of the defendant company, and entered upon the discharge of his duties as such, that debarred him from accepting and discharging the duties of secretary of another company without the consent of the defendant. In effect, the plea asserts that by doing so the defendant was absolved from all liability, notwithstanding it alleges facts which show that he continued to serve the defendant corporation as its secretary, and, for aught that appears, it accepted his services with full knowledge of his official relations to the other company, and notwithstanding there was no term in his contract by which he bound himself not to accept the office of secretary of another company. We know of no rule of law or public policy which inhibited him from filling both offices at the same time, so long as the duties required of him as secretary of the other company were not inconsistent with his employment by the defendant, or involved the doing of no act prejudicial to its interest. All that defendant had a right to demand of him as its officer was a faithful discharge of his duties as such. And so long as he remained in office, and exercised its functions with fidelity and capacity, he was entitled to the compensation or salary agreed to be paid him. Even in the case where the master, under his contract, is entitled to the entire time of his servant, the master could not defeat an action by the servant for wages earned, upon the ground that he had performed services for another during the term of his employment, but might, in a proper case, recoup or set off, by appropriate plea, the money earned by the servant to which the master would be entitled. Wood, Mast. & Serv. p. 202. There was no error in sustaining the demurrer to the plea.

The case was tried upon the pleas of the general issue, payment, and the statute of limitations of three years, the latter alleging the cause of action to be an open account. There are many assignments of error based upon objections to testimony by defendant and the exclusion of testimony offered by it. Many of these can be disposed of without discussing them at length, by merely stating

the rules of law by which the liability of the defendant to the plaintiff are to be determined. Thompson, in his work on the Law of Corporations (section 4692), says: "The secretary of an incorporated company is an officer of the company, * * * and not merely an officer of the managers or directors by whom he is employed;" and in section 4704 he says: "Such offices as that of secretary, treasurer, and general managing agent are merely ministerial offices. Their incumbents do not stand on the same footing as directors, nor even as the president, in respect to their compensation. It is not a rule, as in the case of a director, that the law does not imply a promise to pay for such services. * * * So where a salary has been attached to such an office, the presumption is that it continues so long as any duties remain to be performed by the officer, notwithstanding a change so radical as that of a consolidation with another company." Wood, Mast. & Serv. p. 190, says: "Where a person has been employed by another for a certain definite term at fixed wages, if the services are continued after the expiration of the term in the same business, it is presumed that the continued services are rendered upon the same terms;" and in section 97 he says: "A person employing another for a definite term is bound to provide him with labor for the whole term, and cannot deduct from the wages of the servant for the time he was not at work, when the failure results from his own fault." The evidence offered by plaintiff showed that the by-laws of the defendant created the office of secretary, and that plaintiff's assignor performed all the services required of him as secretary of the defendant company for the entire period covered by the claim sued upon. He was first elected to the office of secretary by the board of directors on December 21, 1889, and re-elected to such office on December 30, 1890. The term of his office, as fixed by the by-laws of the defendant corporation, was for one year, and until his successor was elected and qualified, unless previously removed. The board of directors, under the by-laws, was invested with the power of the election of persons to fill this office, and to fix the salary to be paid by defendant to this officer. No minute entry appears upon the record kept of the acts and doings of the board of directors fixing the amount of the salary to be paid plaintiff's assignor as secretary of defendant company. It does appear, however, that \$50 per month was agreed upon at the time he accepted the office, in August, 1888, between the president of the defendant company and plaintiff's assignor, as the salary to be paid him by defendant; and that defendant paid him this stipulated sum from August 15, 1888, to April, 1890; and that in his annual report made, as secretary, of the expenditures of the company, to the stockholders, on December 18, 1889, the item paid him as salary from August 15, 1888, to December, 1889, was included in said report, and approved by the

stockholders. He was never removed from office, or notified that his salary would be discontinued, by any one authorized to do so. The only evidence introduced by defendant which in the least tended to contradict or break the force of the evidence offered by plaintiff was the testimony of one Merrill, who testified to a conversation with plaintiff's assignor in November or December, 1894, when he called upon him for the minute book of defendant corporation. Merrill says that plaintiff's assignor told him that "he was glad to see the book go out of his office; that it had been a bother to him; that he had been keeping it up, and it was a thankless job; that there was no salary attached to it; that he had received no pay." This conversation was denied emphatically by plaintiff's assignor. When the defendant's managing agents, the board of directors, elected plaintiff's assignor, on December 21, 1889, secretary of defendant corporation, with a knowledge that he had served in that capacity for more than a year under a contract with the president, for which he had been paid the salary as stipulated for between them, and re-elected him in December, 1890, and continued him in office until December 1, 1894, by failing to elect his successor or removing him, accepting his services, the defendant cannot now be heard to say that he is not entitled to the salary, or to say that he is only entitled to reasonable compensation for the services performed. Upon the plainest principles of equity and fair dealing their acquiescence in or their failure to dissent from that term of the contract which fixed his salary was an estoppel against the defendant to do so after the service was rendered. 4 *Thomp. Corp.* § 4708. Under the issues upon which this case was tried, the only question was whether the defendant was liable upon a special contract to plaintiff for the salary of his assignor during the months intervening between April 1, 1890, and December 1, 1894, at the agreed sum of \$50 per month, there being no dispute about the amount paid by defendant; and all testimony offered by defendant not relevant to this issue was properly excluded from the consideration of the jury.

Assignments of error numbered 4, 5, 6, and 18 are based upon the rulings of the court in sustaining objections to testimony offered by defendant for the purpose of showing the reasonable value of the services rendered by plaintiff's assignor as secretary.

Assignments numbered 7, 8, and 9 relate to the exclusion of evidence offered to support the averments of the special plea to which the court had properly sustained a demurrer.

Assignments numbered 11, 12, 13, and 14 are manifestly without merit. The evidence excluded by the court to which they relate was purely hearsay, and involved statements made by and transactions between the defendant and third parties which could not have affected the rights of plaintiff.

The tenth assignment seeks to review the

ruling of the court in excluding a certain paper writing made out by plaintiff's assignor in the form of an account against the defendant, "To salary as secretary from April 1, 1890,—\$2,750," being the amount claimed in this suit, and for reasons written thereon he remitted \$2,000 of the said sum. No consideration was expressed in the writing for the remittance or release and none was shown by the testimony. It was *nudum pactum*. *Crass v. Scruggs*, 115 Ala. 258, 22 South. 81; 20 Am. & Eng. Enc. Law, 744.

There was no error in excluding the testimony of witness Austill as to what his impressions were as to his statement to plaintiff's assignor that the funds of the company were exhausted, and that he notified him that his salary would cease. Austill, the president of the defendant, was not shown to have been authorized by the board of directors to stop the payment of the salary. It required action on their part or of the stockholders to deprive him of it. He was not secretary of the president of the company or the board of directors, but of the defendant. Neither would the fact that the defendant was without funds with which to pay salaries relieve it of liability for his salary, so long as it permitted him to remain in office, and accepted his services. Nor was the plaintiff deprived of the right to make proof of the original employment by the president, because the contract was not reduced to writing. While, perhaps, under the by-laws of the company, the original contract was not binding when made, yet, if it recognized and adopted it as made, and the services were performed under it, it became executed, and it is of no consequence whether it was reduced to writing, or made without authority on the part of Austill, its president.

The record contains no statement that the bill of exceptions sets out all the evidence introduced upon the trial. Under the rule as settled by the uniform decisions of this court, when this is the case we will presume that there was testimony to justify the rulings of the court, if, under any state of proof, they would be free from error. *Railway Co. v. Kolb*, 73 Ala. 396, and authorities there cited; *Wadsworth v. Williams*, 101 Ala. 264, 13 South. 755. However, we have examined the charge of the court to which exceptions were reserved, and we find no error. Taking it as a whole, we think the presiding judge correctly stated the law, and fairly submitted the only controverted question of fact to the jury. There was no error in giving the written charges requested by plaintiff, and no error in refusing the written charges requested by defendant.

The motion to set aside the order directing the issuance of execution upon the judgment in this cause does not appear in the bill of exceptions, and for that reason we cannot consider it. *Ewing v. Wofford* (Ala.) 25 South. 251. But, if it did, and there was error committed by the trial court in refusing it, this

could not work a reversal of the judgment of the court in this cause rendered prior to the making of such motion and the rulings thereon. We find no error in the record, and the judgment must be affirmed. Affirmed.

(121 Ala. 536)

WILLIAMS v. WOODS et al.

(Supreme Court of Alabama. April 5, 1896.)

DECREE—RES JUDICATA—DISMISSAL ON MERITS.

A dismissal of a bill for complainant's failure to obtain security for costs within the time prescribed by an order of court is not a dismissal on the merits, within rule 28 of chancery practice, declaring that a dismissal is equivalent to one on the merits where it is made by reason of complainant's default when the cause is called on to be heard.

Appeal from chancery court, Clay county; J. R. Dowdell, Chancellor.

The bill in this case was filed by A. N. Williams against S. H. Woods, Sarah A. Woods and W. J. Williams, to enforce the specific performance of a contract to convey lands. The bill avers the purchase of 40 acres of land, described, by W. J. Williams of Samuel H. Woods on December 9, 1892, for \$500, of which \$300 was paid in cash, and his promissory note was executed and received for the balance, \$200, to S. H. Woods, payable October 15, 1893, and the execution of a bond for title to said land to him by the said S. H. Woods and wife on December 9, 1892, acknowledging the payment of the \$300, and conditioned on the payment of the \$200 balance on October 15, 1893, to convey to him said lands by deed with warranty,—the bond for title being set out as an exhibit to the bill; that W. J. Williams was put in possession under his purchase at such time, but was forcibly ejected therefrom by the defendant S. H. Woods in March, 1893. Thereupon said Williams filed his bill in chancery for an injunction against said Woods from trespass. That afterwards a final decree was rendered in favor of said Williams on pleading and proof, February 10, 1894, but a rehearing was granted as to such decree at the next term of court, and W. J. Williams became a nonresident and was required to give security for cost, which he failed to do, and his bill was dismissed for such failure to give security for cost at the September term, 1894. The bill also avers that on the 29th of June, 1893, said W. J. Williams for a valuable consideration, transferred said bond for title to A. N. Williams, the complainant, and all of his interest in said land and put him in possession thereof. Complainant remained in possession until October, 1894, when defendant S. H. Woods took forcible possession and has kept it ever since. The bill avers the insolvency of S. H. Woods, and prays the specific performance of the contract and that defendant be required to account for the value of the rents received by him and that it be credited by him on such balance of the purchase money, also offering to pay any balance that might be found due.

The defendant S. H. Woods filed a plea of *res adjudicata*, the substance of which is sufficiently stated in the opinion. The complainant moved to dismiss this plea, because it was insufficient, and also demurred to the plea upon the following grounds: (1) For that such plea is not a sufficient defense to the bill. (2) The dismissal of the bill of complaint filed by W. J. Williams, for failure to give security for cost of the suit, as averred in the plea was not equivalent to a decree on the merits of such suit. (3) The averment that the cause was called to be heard when the respondent moved to dismiss the same for failure to give security for cost, is a conclusion of the pleader, unsupported by any facts averred in the plea. (4) The plea shows that the decree (Exhibit C) requiring complainant to give security for costs was not rendered when the cause was called to be heard, but in the progress of the cause and the preparation of the same to be in a condition to be heard, on motion of the defendant therein. (5) The averment that such decree was a consent decree is a conclusion of the pleader, unsupported by any facts stated in the plea, and the copy of such decree shows that it was admitted in open court that complainant was a nonresident, and not that such decree was by consent of the parties. (6) Such plea is duplicitous and a joinder of two defenses. (7) The dismissal of such bill for failure to give security for cost at the September term, 1894, was not equivalent to a dismissal on the merits; and the averment that such a decree was equivalent to a dismissal on the merits, is a conclusion of the pleader. (8) The averment that the decree requiring the complainant to give security for cost, was equivalent to a dismissal on the merits, is a conclusion of the pleader.

On the submission of the cause upon the motion to strike the defendant's plea and upon the demurrer to said plea, the court overruled both the motion and the demurrer, and held the plea to be sufficient as a bar to the maintenance of this suit. From this decree the complainant appeals, and assigns the rendition thereof as error. Reversed.

Whetson, Graham & Haynes, for appellant. Knox, Bowie & Dixon, for appellees.

HARALSON, J. The defendant, Woods, interposed in the court below his plea of *res adjudicata*, to the further maintenance of the bill in this case.

The facts set up in that plea, as stated by appellees' counsel in their brief in this court, are: "That on, to wit, the 25th day of March, 1893, W. J. Williams, the party described in the bill (in the original suit) as grantee of the appellant (in this suit) filed his bill against the appellee (S. H. Woods), asking for specific performance of the same contract which is here sued on; that an answer was filed to this bill, the cause (was) set for final hearing, and was submitted and a decree rendered

granting the relief prayed for, (and) that respondent filed a petition for a rehearing, which after argument was granted. Thereupon, the cause, being fully at issue and testimony in on both sides, was called on to be heard, and the respondent moved to dismiss said cause, because complainant was a non-resident and had failed to give security for costs. This motion was confessed by (W. J. Williams, the) complainant (in that suit), and a consent decree was rendered, whereby it was provided, that unless security for costs was given within thirty days, the cause would stand dismissed. The security for costs was not given and the cause was dismissed; that by a mistake the cause was carried forward on the docket, and was called the next term of the court, the cause being at issue, the testimony on both sides having been taken, (and) the case was then, again dismissed for failure to give security for costs."

The appellees contend that the dismissal of said former suit constitutes *res adjudicata* under rule 28 of chancery practice.

The decree of the chancellor, which is attached to the plea as an exhibit, was rendered on the 24th March, 1894, and after stating the case,—*W. J. Williams v. S. H. Woods*, and term of the court,—recites: "This cause is submitted on motion of respondent to require complainant to give security for cost on the ground, that he is a nonresident of the state of Alabama, and to give an additional bond on the ground that the sureties on his present (injunction) bond are insolvent. It is admitted in open court that complainant is a non-resident of Alabama." Then follows the decree: "Therefore it is ordered, that he give security for costs in this cause, within thirty days from date, to be approved by the register, otherwise the cause stands dismissed."

The other part of the decree in reference to the injunction bond, was to the effect, that it be referred to the register, to investigate and determine and report his conclusions on the sufficiency of the sureties on the injunction bond; that if he found the bond to be insufficient in suretyship, he should so report, and thereupon, within thirty days, the complainant should give a new injunction bond payable, conditioned and approved according to law, and if he should fail to give such bond within that time, the injunction should stand dissolved. At the end of the decree and just before its date, appear the words, "By consent of parties."

From the foregoing, it appears that the decree made two provisional orders, the first, that the complainant being a nonresident,—which fact was admitted,—should give security for the costs of the suit within 30 days from the date of the decree; otherwise the cause should stand dismissed out of court. The second order was in reference to the alleged insufficiency of the sureties on the injunction bond that had been given by the complainant in the cause, which order was, of course, contingent upon a compliance by com-

plainant with the first order as to the security for the costs of suit. If he complied with that order and gave the security for costs, the register was then to carry out the order to him, to investigate the sufficiency of the sureties on the injunction bond. If complainant failed to give security for costs, the cause, by the terms of the decree, was to stand dismissed out of court, and there remained no longer any room or necessity for executing the second provision of the decree. The complainant, as is shown, failed to give the security for costs, and it does not appear that the register ever took any steps towards executing the reference touching the injunction bond. He carried the case, however, on the docket of the court, to the next ensuing term, when the court, on the 20th day of September, 1894, entered the following order: "This cause is dismissed for want of security for costs, and the complainant is taxed with the costs for which execution may issue." As to the effect of this dismissal, the respondent, raising the question to be now decided by us, states in his petition: "Respondent further avers that the complainant in said cause, did fail to give said bond for costs within thirty days, from date of said decree, and thereupon the same stood dismissed out of this court, which dismissal was equivalent to a dismissal on its merits, as the court did not otherwise order in said decree, and said dismissal is hereby pleaded in bar of this suit." According to this averment, the latter order of dismissal, of date 20th September, 1894, was unnecessary, and was merely confirmatory of the previous order of dismissal.

Rule 28 (31) of chancery practice contains two provisions as will be seen from its reading: (1) "If the complainant, after the cause is set down to be heard, cause the bill to be dismissed on his application, or (2) if the cause is called on to be heard in court, and complainant makes default, and by reason thereof the bill is dismissed, then, and in such case, such dismissal, unless the court otherwise orders, is equivalent to a dismissal on the merits, and may be pleaded in bar to another suit for the same matter." The plea of defendant is based, not upon the first provision of said rule,—for there is no pretense that the cause was dismissed on the application of complainant,—but upon its second provision. It occurs to us, that a just construction of this rule requires us to hold, that the dismissal of the former suit was not, and cannot be fairly construed as a dismissal on its merits. The case being at issue was submitted at a former term of the court for a decree on its merits, and was held for decree in vacation. The chancellor in vacation rendered a decree in favor of the complainant. The respondent under rule 79 (80) of chancery practice, by the second day of the next, ensuing term of the court, applied to the court for a rehearing in the cause, and the same was granted. The granting of this order, had the effect to restore the case to the precise condition it would have been in,

had it not been submitted for decree and no decree had been rendered in the cause. The cause was never after that, so far as appears, "called on to be heard in court" on its merits; but, at this juncture, being ripe for hearing, the respondent moved the court to require the complainant to give security for the costs of the case, on the ground that he was a non-resident of Alabama. The object of this motion and its effect, if granted, were to prevent the case from being heard on its merits, if complainant should refuse to give the security, and, in any event, to postpone the hearing on the merits, until complainant,—if defendant's motion should be granted,—had complied with the proposed order for the security for costs. It was merely a preliminary and incidental motion in the cause, to get it in readiness for submission for final decree, for which defendant was not willing the cause should be submitted in its then condition. His motion was granted by the court; the complainant was required to give the security moved for; the cause was necessarily continued, as for any consideration and decree on its merits, to await a compliance by complainant with the order requiring him to give security. It would seem, under such conditions, the respondent is in no position, the cause having been dismissed, on his motion for a failure to give security for costs, to now plead the failure of complainant to give the security, as an adjudication of the cause on its merits. The giving or the failure to give that security did not, in any manner, affect the merits of the controversy. The authorities seem to conclude this question. In *Strang v. Moog*, 72 Ala. 460, it was said: "The rule is everywhere settled, that when a decree is rendered by a court of equity, dismissing a bill for want of jurisdiction, or because the complainant has a plain and adequate remedy at law, or because of any mere defects in the pleadings, or, we may say generally, on any other ground not involving the merits of the cause, such dismissal is usually stated to be 'without prejudice,' and is not held to be a final and conclusive adjudication of the matters in litigation, so as to come within the doctrine of *res adjudicata*." To the same effect is *McCall v. Jones*, 72 Ala. 368. In *Hanchey v. Coskrey*, 81 Ala. 149, 1 South. 259, it was said: "A judgment founded on nonjoinder or misjoinder of parties, or merely defective pleading, or any technical ground, or collateral or incidental question, whereby the merits of the case were not and could not have been determined, will not preclude an inquiry into the merits in a subsequent suit, so instituted as to avoid the objection by which the first was instituted." *Neafie v. Neafie*, 7 Johns. Ch. 1; *Story, Eq. Pl.* § 798; *Bigelow, Estop.* p. 52 (3); 1 *Greenl. Ev.* §§ 529, 530.

The complainant moved the court to strike the plea, because the same was insufficient, and at a regular term, the cause was submitted on objections to the sufficiency thereof.

The court sustained the plea and held it to be sufficient. From what has been said, it will appear this was an erroneous ruling. The plea was bad, and the objections to it should have been sustained.

Reversed and remanded.

(122 Ala. 666)

HARDY et ux. v. GUNN.

(Supreme Court of Alabama. Nov. 5, 1898.)

DAMAGES FOR USE OF LAND—TORTS—EXEMPTIONS—EJECTMENT—GENERAL CHARGE—EVIDENCE.

A judgment for damages for the use and detention of land by one in possession under a naked legal title rendered in favor of the holder of a superior equitable title is for a tort, and hence a claim of exemptions cannot prevail against it.

On Rehearing.

It is error to give a general charge in favor of the grantee under a sheriff's deed, bringing ejectment for the land, as against the execution debtor's wife, introducing in evidence a deed from her husband, executed and filed before the issuance of the execution.

Appeal from circuit court, Shelby county; George E. Brewer, Judge.

This was an action of ejectment brought by James H. Gunn against J. D. Hardy and Louisa Hardy to recover certain lands specifically described in the complaint. There were verdict and judgment for the plaintiff. The defendants appeal, and assign as error the giving of the general affirmative charge requested by the plaintiff. Reversed.

Knox, Bowie & Pelham, Longshore & Beavers, and W. S. Cary, for appellants. Browne & Leeper, for appellee.

BRICKELL, C. J. The sole question presented by this record is whether the damages assessed against one in possession of land under a naked legal title, for the use and detention thereof, as against the holder of a superior equitable title, as determined by a bill to divest the holder of the legal title of his interest therein, and invest the holder of the equitable title with the legal title, and a decree granting such relief, are damages arising from relations in their nature contractual, or are compensation for a tort.

James H. Gunn, the appellee, filed a bill in the chancery court of Shelby on October 29, 1883, against J. D. Hardy and others, seeking the divestiture of legal title to a lot in Calera, and its investiture in the complainant. Complainant acquired his equity through a paper purporting to be a deed, but which was neither witnessed nor acknowledged, dated April 9, 1872; and J. D. Hardy acquired the legal title January 20, 1880. He brought ejectment against Gunn, recovered judgment for the lot in controversy, and on March 15, 1883, was put in possession. A decree was rendered in said cause in accordance with the prayer of the bill; and it appearing that J. D. Hardy had been in possession of the lot for more than three years, and that the value of the

use and occupation during the period was \$344, a decree for that sum was rendered in favor of the complainant against Hardy. Execution was issued upon this decree, which was levied upon the house and lot in controversy, and the same was sold by the sheriff on December 18, 1893, purchased at said sale by Gunn, and the sheriff's deed, in ordinary form, was executed and delivered to him. The present action was commenced February 18, 1894, to assert the title thus acquired. That decree settled the title as between the parties, and would of itself have supported an action of ejectment. *Brunson v. Morgan*, 86 Ala. 318, 5 South. 495. The defendant Hardy, being in possession of the lot on January 30, 1893, conveyed the same to Louisa Hardy on that day; the deed reciting the consideration at "the sum of one dollar, and the further consideration that I wish to provide a home for my family," and it was recorded March 4, 1889. At the execution of the conveyance, Hardy was occupying the premises as a homestead. It consisted of $3\frac{1}{2}$ acres, and at the time of the sale, and since, it did not exceed in value \$2,000, and since the conveyance the grantee has been in possession of it. The circuit court gave the affirmative charge at the instance of the plaintiff, and this alone is assigned as error. There were no contractual relations between plaintiff and the grantor, J. D. Hardy. Hardy recovered the lot in controversy of plaintiff in an action testing the legal title to it. He went into possession under a writ issued upon the judgment. He held the possession, not by contract, but by a recovery in the ejectment suit, on a title superior to that which could have been asserted by Gunn in a court of law. This title, however, was burdened with the superior equity residing in the appellee, compelling its divestiture in a court of equity. There is no difference in the relation of parties where one must resort to equity to divest an adverse legal title, and where one sues at law to dispossess one holding an adverse title. In the latter class of cases it has been held by this court that a claim of exemption cannot prevail against a judgment for damages and costs in a statutory action in the nature of ejectment. *Penton v. Diamond*, 92 Ala. 610, 9 South. 175. As is said in *Stuckey v. McKibbin*, 92 Ala. 622, 8 South. 379, respecting a judgment rendered in a detinue case: "No element of contract was involved in the case. The right of plaintiff to recover the value of the hire or use of the property resulted from the wrongful or tortious act of the defendant in withholding it, and in no sense from a contract, express or implied, on his part to pay therefor." *Meredith v. Holmes*, 88 Ala. 190; *McLaren v. Anderson*, 81 Ala. 106, 8 South. 188; *Vincent v. State*, 74 Ala. 274; *Dangaix v. Lunsford*, 112 Ala. 403, 20 South. 639. The circuit court did not err in giving the charge requested. Let the judgment of the circuit court be affirmed.

On Application for Rehearing.

(Feb. 10, 1899.)

PER CURIAM. On a careful examination of the record in this case, it appears that in the former opinion and decision a mistake was made in confounding the lot for which this suit was brought with the lot, the subject of the suit in the chancery case of Gunn against Hardy, wherein a decree was rendered in favor of said Gunn, and divesting Hardy of title and vesting same in Gunn. The two lots are separate and distinct. The sheriff's deed on which the plaintiff relied in the present suit for a recovery of the lot in question was executed six or seven years subsequent to the deed from J. D. Hardy to his wife, Mrs. Louisa Hardy. The sheriff's deed to the plaintiff was under an execution against the defendant J. D. Hardy. Mrs. Louisa Hardy, a co-defendant in the present suit, introduced in evidence the deed above mentioned from her husband, J. D. Hardy, to her. This deed was executed in January, 1889, and was filed in the office of the probate judge of Shelby county in March, 1889. The decree upon which the execution issued was rendered after the execution and filing of the deed from Hardy to his wife. Under this view of the case, which is supported by the facts as disclosed in the record, the court below erred in giving the general charge requested by the plaintiff. The application for rehearing must be granted. The judgment of affirmance heretofore rendered is set aside, and for the error pointed out the judgment of the circuit court is reversed, and the cause remanded.

(121 Ala. 28)

O'HARA v. STATE.

(Supreme Court of Alabama. April 11, 1899.)

LICENSES—AUCTIONEERS—CONSTITUTIONAL LAW—STATUTES—ENACTMENT—HOUSE JOURNAL—ENTRIES.

1. Acts 1896-97, p. 1505, § 35, dividing cities and towns into classes according to population, and imposing license taxes on auctioneers engaged therein, the amount being different for each class, is not unconstitutional as discriminating between persons engaged in the same occupation.

2. Acts 1896-97, p. 1505, amending the revenue laws, is not void on the ground that the house journal shows that amendments thereto, passed by the senate, were not adopted by the house.

3. The house journal contained an entry of the receipt of a message from the senate requesting the speaker's signature to certain bills set out by number and caption, immediately following which was another entry that the speaker, in presence of the house, signed the bills, whose titles were set out in such message. Succeeding this entry was one that the committee on enrolled bills reported certain bills, among which was mentioned, "H. 972. To amend the revenue law," being Acts 1896-97, p. 1505. Immediately following was an entry that the speaker, in presence of the house, signed the bills whose titles were set out in the foregoing senate message. *Held*, that the latter entry was a clerical error, the words "re-

port of the committee on enrolled bills" being intended, so that the journal affirmatively showed that the bill above named was properly signed.

Appeal from city court of Montgomery; A. D. Sayre, Judge.

James O'Hara was convicted of doing business as an auctioneer without a license, and he appeals. Affirmed.

Gordon Macdonald, for appellant. Charles G. Brown, Atty. Gen., for the State.

MCCLELLAN, C. J. The appellant, James O'Hara, was indicted, tried, and convicted for doing business as an auctioneer in the city of Montgomery without a license, in violation of section 35 of the "Act to amend the revenue laws of the state of Alabama," approved February 18, 1897 (Acts 1896-97, p. 1505). The defendant demurred to the indictment on the ground that said act is unconstitutional and void, assigning (1) that it is an attempt to discriminate between individuals engaged in the same occupation, in that it imposes a license tax on some auctioneers, and does not impose it upon others; (2) that said act was not passed by the general assembly, for that it is not shown by the journal of the house of representatives to have been signed by the speaker thereof in the presence of the house; and (3) that the journals of the house show that amendments to said act passed by the senate were not adopted by an aye and nay vote of the majority of the house of representatives. The demurrer was overruled, and that action of the city court is the only matter presented for review by this appeal.

There is no merit in the first assignment of demurrer above stated (Phoenix Carpet Co. v. State [Ala.] 22 South. 627), nor in the third (Ex parte Howard-Harrison Iron Co. [Ala.] 24 South. 516). Whether the act was signed by the speaker in the presence of the house—the inquiry raised by the second assignment—is to be determined by an examination of the journal of the house, upon which the organic law requires the fact of signing to be entered. Const. art. 4. § 27. Bearing upon, and directly upon, this matter, the house journal shows the following: First, a message from the senate to the house, beginning thus: "Senate Chamber, February 18, 1897. Mr. Speaker: The president of the senate, in the presence of the senate having signed the following bills, your signature thereto is requested." Then follows the identification of 15 or 20 senate bills by their numbers and captions, and the message is signed, "John F. Proctor, Secretary." Immediately after this is the following: "Signing Bills. The speaker of the house, in the presence of the house, immediately after their titles had been publicly read by the clerk, signed the bills whose titles are set out in the foregoing senate message." And immediately succeeding this the journal continues as follows: "Enrolled Bills. Mr. Speaker: The committee, having exam-

ined the following house bills, find them correctly enrolled: H. 782. An act making it unlawful for fire, fire marine, and marine insurance companies not organized under the laws of the state of Alabama, but legally licensed to transact fire, fire marine, and marine insurance therein, and doing business therein through regularly commissioned agents, to place or cause to be placed insurance against loss by fire or property in this state, except through agents located in the state legally authorized to write policies of insurance therein, and prescribing penalties for violation of same; also to prescribe further conditions to be complied with by fire, fire marine, and marine insurance companies before receiving licenses to do business in this state. H. 891. To incorporate the Mercy Home of Birmingham, Alabama, and prescribe its corporate rights and privileges. H. 1,078. For the improvement of roads and bridges in Tuscaloosa county. H. 1,102. To amend subdivision 15, article 1, section 629 of the Code, so far as the same relates to Barbour county. H. 1,153. To establish a separate school district in Chambers county in this state. H. 824. To constitute the city of Luvern, in Crenshaw county, a separate free-school district for children, and to provide for the management of said free school in said school district. H. 1,067. To provide for the payment out of the convict funds for certain items of costs in felony cases, to fix the amount of said items, to prescribe the extent to which such costs will be paid, and the manner of paying them. H. 506. Making the fees of the officers of the court arising from certain criminal cases in Randolph county a claim and charge against the fine and forfeiture fund of said county, and to provide for their registration and payment. H. 632. To make appropriation for the expenses of encampment of the Alabama National Guards for the years 1897 and 1898. H. 1,099. To incorporate the Land Bank and the Farmers' Mutual Aid Association of America. H. 1,108. To establish a new charter for the town of Clayton, Alabama. H. 128. To fix the compensation of not more than two regular bailiffs of the criminal, city, and circuit courts of Jefferson county, and to provide for its payment. H. 461. To amend sections one and two of an act entitled 'An act to amend sections one, two and eleven of an act entitled 'An act to regulate the practice of pharmacy and the sale of poisons in towns and cities of more than one thousand inhabitants in the state of Alabama,' approved February 25, 1889, and to amend sections four, six, eight, and nine of an act entitled 'An act to regulate the practice of pharmacy and the sale of poisons in cities and towns of not more than one thousand inhabitants in the state of Alabama,' approved February 23, 1887. H. 521. To more effectively protect the people against combinations, conspiracies, and agreements between insurers, whereby rates of insurance are raised or fixed. H. 1,190. To authorize the court of county commission-

ers of Chambers county, Alabama, to issue and sell bonds of said county to an amount not exceeding \$25,000 for the purpose of building a new court house for said county. H. 972. To amend the revenue law of the state of Alabama." "Joint Resolution. To appoint a commission to ascertain and report to the next general assembly whether the state of Alabama is justly and equitably indebted to the University of Alabama in an amount exceeding that now recognized by the state as an endowment fund. H. 1,157. To establish a separate school district in Chambers county, in this state. L. P. Troup, Chairman." "Signing Bills. The speaker of the house, in the presence of the house, and immediately after their titles had been publicly read by the clerk, signed the bills whose titles are set out in the foregoing message from the senate."

The act of February 18, 1897, "To amend the revenue laws of the state of Alabama," originated in the house, and was house bill 972, and by its number and title it was reported by the committee on enrolled bills as having been correctly enrolled in the report copied last above. That all the bills embraced in that report are shown by the journal to have been signed by the speaker, there can be no serious question. As is made to appear above, no senate message requesting the speaker to sign bills was before the house when the speaker is stated in the journal to have signed the bills "whose titles are set out in the foregoing message from the senate." There had been such senate message before the house just before this report of the committee on enrolled bills was presented, but that senate message had been acted upon and disposed of. The bills named in it had been duly signed by the speaker before this report was made. When that had been done, the report was made of the correct enrollment of divers house bills, including No. 972, "To amend the revenue law of the state of Alabama." In that report, and in it alone, were set out the titles of the only bills then before the house for the signature of the speaker. That report was the only paper of any kind "foregoing" the entry of signing bills on page 1,319 of the printed journal, and setting out titles of bills. The entry could not, therefore, have possibly referred to anything else than that report, nor to the titles of any other bills than those set out in that report. The use of the words "message from the senate," instead of the words "report of the committee on enrolled bills," in said entry, was patently a mere clerical misprision, which corrects itself on the face of the journal; and the entry is to be read as if the latter instead of the former words had been employed in it. Our conclusion is therefore that the journal of the house does affirmatively show the fact of signing of house bill No. 972, "To amend the revenue law of the state of Alabama," and that the city court properly overruled the demurrer to the indictment. Affirmed.

(122 Ala. 96)

ATKINSON et al. v. STATE.

(Supreme Court of Alabama. April 4, 1899.)

CRIMINAL LAW—RECORD—TERMS OF COURT—ADJOURNMENT.

Code, § 917, provides that an order of the judge adjourning a regular term of court, when entered on the minutes, shall be notice of the same. A transcript of the minutes showed the organization of the 1896 fall term of the court, and recited that at that term were had the following proceedings. This was followed by minutes of certain proceedings, which, in turn, were followed by an order directing an adjourned term to be held beginning January 31, 1898. The order was without date, and, unless referable to the preceding recitals, was without recitals showing when or by whom made; and following it, and under date of November 6, 1897, was an order setting February 9, 1898, for defendant's trial; also, an order that court be adjourned until January 31, 1898. A recital in the minutes under date of January 31, 1898, stated that the 1897 fall term had been adjourned to that date. *Held*, that the record did not show that the order prescribing the period of the adjourned term was made at the 1897 fall term, and hence the validity of the adjourned term, and the proceedings thereat, was not shown.

Appeal from circuit court, Butler county; John R. Tyson, Judge.

Dennis Atkinson and another were convicted of an offense, and they appeal. Dismissed.

Charles B. Parkhill and D. M. Powell, for appellants. Charles G. Brown, Atty. Gen., for the State.

SHARPE, J. The transcript of the record in this case begins with recitals of the organization of the circuit court for Butler county at its regular fall term in 1896, and also recites that at that term "were had the following proceedings." Next following the minute entry of those proceedings, which included the finding of this indictment, appears what purports to be an order directing, among other things, that an adjourned term be held, beginning January 31, 1898. This order, as it appears in the transcript, unless it be referable for its date and authority to the preceding recitals, is without date, and without recitals to show when, or by what court or judge, it was made. It could have no validity as relating to the fall term of the circuit court for 1896, under the caption and date of which it is placed, since that term could not have been adjourned beyond the regularly succeeding terms. The regular term is limited by the statute, and the authority for prolonging the term by adjournment to a future day is given only by the statute which empowers the judge of the court to make the appropriate order therefor, which order, the statute provides, when entered upon the minutes, shall be notice of the same. Code, § 917. In the absence of record evidence of such order appearing as of the term to be adjourned, it must be presumed that the term expired with the period fixed by the statute for its sitting. Following the order in question, and under the date of November 6, 1897, is an order setting

February 9, 1898, for defendant's trial, and also an order "that this court be adjourned until Monday, January 31, 1898"; and there is a recital, of date January 31, 1898, that the fall term of 1897 had been adjourned to that date. We cannot hold, however, in opposition to other recitals of the record, that the order prescribing the period of the adjourned term was made at the fall term of 1897. Without such order, the validity of the adjourned term and the proceedings thereat are not shown, and they are not such as to sustain an appeal. This appeal will therefore be dismissed. If the minutes of the fall term, 1897, really show the necessary order adjourning the term to the time the trial was had, then it would appear that a mere omission has occurred in the transcript, and the disposition here made of the case will in no way affect the judgment of conviction and sentence.

(121 Ala. 45)

STATE v. McFARLAND.

(Supreme Court of Alabama. April 6, 1899.)

FORMER JEOPARDY—WHAT CONSTITUTES—WAIVER.

1. If a judgment of conviction is set aside, whether on motion to arrest or for new trial, or on appeal or writ of error, at the instance of defendant, it is a waiver of his constitutional right of not being again placed in jeopardy.

2. A defendant charged with grand larceny was brought for examination before a recorder, who had jurisdiction to finally try and punish petit larceny and to bind offenders in cases of grand larceny to the city court. On his examination he gave testimony which, if true, would have reduced his offense to petit larceny. The recorder, however, bound him over to the city court. *Held*, that defendant had not been in jeopardy before the recorder as to petit larceny.

Appeal from city court of Montgomery; A. D. Sayre, Judge.

Habeas corpus by Robert McFarland. From a judgment discharging petitioner, the state appealed. Reversed.

On the 3d October, 1898, S. O'Dill made affidavit for a warrant of arrest before A. Gerald, chief of police of the city of Montgomery, Ala., charging the defendant with the offense of grand larceny, for stealing from the person of the affiant a gold watch of the value of \$10. On the same day, that officer issued a writ of arrest for defendant on that charge, returnable before the recorder of the city of Montgomery. The defendant was arrested under this writ and carried before the recorder of said city, and on the 4th of October, was bound over by him in a bond of \$300 to the next term of the city court of Montgomery, to answer an indictment for the offense of grand larceny. At the October term, 1898, of said city court, the grand jury returned an indictment into court against defendant for grand larceny for having feloniously taken and carried away from the person of S. P. O'Dill one gold watch of the value of \$8, the personal property of said O'Dill. On the trial of the cause in the city court, which was on the plea of not guilty, the state introduced

evidence tending to prove the offense as charged. The defendant's evidence tended to show that he did not steal the watch from the person of said O'Dill, but that he found it on the sidewalk of the street, near the store of O'Dill, and took it to the pawnbroker and pawned it for money. The court, in its general instruction to the jury, charged them on the law of larceny by finding, and instructed them that if they believed certain facts in evidence which were hypothesized, they might find the defendant guilty of petit larceny, the charge being based entirely, as the bill of exceptions states, on the question of finding, and not on any question as to the value of the watch being less than \$5. The jury returned a verdict: "We the jury find the defendant guilty of petit larceny and assess a fine of one hundred dollars (\$100)," and judgment of conviction was accordingly entered by the court. At a later day of the term, the defendant moved in arrest of the judgment of conviction, and for the discharge of defendant, on the grounds that the record in the case showed that defendant, employing the language of the motion, "was guilty of petit larceny, and because for said crime he was once in jeopardy before the recorder of the city of Montgomery, which court has jurisdiction of said grade of offense and which court failed to take jurisdiction thereof. Wherefore, having once been in jeopardy for this offense and on the same facts and with the same witnesses who here secured conviction, he ought to be discharged." "The court granted said motion on the ground" (as shown by defendant) "that it had erred in charging that the defendant might be convicted of petit larceny," and entered the following order in the case: "Comes the defendant and moves the court for arrest of judgment and sentence and that he be discharged on the grounds set forth in his motion entered upon the motion docket of this court. Upon consideration it is ordered by the court that the verdict of the jury rendered in this case be and the same is hereby set aside, but the court refuses to discharge the defendant, and the said defendant is held to answer an indictment which may be preferred against him for the offense of petit larceny. It is ordered that the defendant may be admitted to bail in the sum of \$250." It was shown, that on the trial, the defendant did not plead nor offer to prove any former conviction or acquittal before the recorder, or that he had been in jeopardy, and made no suggestion of any defense save the plea of not guilty. It appeared that defendant was in jail at the time the writ of habeas corpus was sued out, —was in confinement in default of the bond fixed by the court. It appears also, that on the trial before the recorder, the defendant was tried on the affidavit and warrant above referred to, charging him with grand larceny; that he pleaded not guilty and made no suggestion of any other defense; that the testimony before the recorder was substantially the same as that brought out on the trial in

the city court, and there was no evidence that the watch was worth less in value than five dollars. On this evidence, on the trial of the habeas corpus, the judge rendered a judgment discharging the defendant, from which judgment the state appeals.

Chas. G. Brown, Atty. Gen., and Tennent Lomax, for the State. John W. A. Sanford, Jr., for appellee.

HARALSON, J. The Code, § 5049 (3789), provides among other things, that "any person * * * who steals any personal property of the value of five dollars or more, from the person of another, * * * is guilty of grand larceny," etc. The defendant was proceeded against, on affidavit and writ of arrest for the violation of this section of the Code. It appears, when carried before the recorder for trial, he was tried for this offense and for no other. He did attempt to show, that he was not guilty of the offense charged, by proving that he did not take the watch from the person of the prosecutor, but that he found it on the street. The recorder evidently did not believe that theory of defense, for he bound defendant over to the city court to answer an indictment for the offense charged in the affidavit and warrant,—an offense the recorder did not have jurisdiction to try finally and punish. We need not consider and decide whether the recorder had jurisdiction under this affidavit and warrant, to convict the defendant of petit larceny, if the facts brought out before him on the trial convinced him that he was guilty of petit and not of grand larceny; for, however that may be, he did have the authority, and it was his duty, if he believed defendant to be guilty of grand larceny, the offense with which he was charged, to bind him over to answer an indictment therefor. *Nicholson v. State*, 72 Ala. 176; *Ex parte Crawlin*, 92 Ala. 101, 9 South. 334. It is true, as we have before now decided, that if one is charged before a magistrate, with the commission of a misdemeanor, of which the officer has jurisdiction to finally try and punish, he cannot bind the defendant over to answer an indictment therefor, but must proceed to try and make final disposition of the cause. *Ex parte Pruitt*, 99 Ala. 225, 13 South. 317; *Brown v. State*, 105 Ala. 117, 16 South. 929. But, when the offense charged is a felony, as here, and the recorder so adjudged, and bound the defendant over, he did what he had the jurisdiction and authority to do. The grand jury, at the ensuing term of the city court, indicted the defendant for grand larceny, for stealing the watch from the person of the prosecutor. That indictment was well drawn under the section of the Code referred to, and its sufficiency was not questioned by defendant. He did not plead on the trial, and could not have interposed a plea of former jeopardy, growing out of any state of the proof before the recorder. On the phase of the evidence tending to show a larceny by finding, the

learned judge below charged the jury, that they might, if they believed the evidence, find the defendant guilty of petit larceny. That charge, it seems the court afterwards recognized to be erroneous; for it had theretofore been settled, that when one is indicted under the statute for larceny from the person of another, and the proof showed that the property was not stolen from the person named, but from some other place, the defendant could not be convicted of larceny, either grand or petit. *Stone v. State*, 115 Ala. 121, 22 South. 275. Afterwards, on the motion of the defendant, the judgment rendered by the court on the verdict of the jury finding him guilty of petit larceny was set aside. The court, however, refused to discharge but bound defendant over to answer an indictment for petit larceny.

It is well settled that when on motion of a defendant a judgment is set aside, whether accomplished on motion to arrest, for a new trial, or on appeal or writ of error, such action having been taken at the instance of defendant, is an express waiver of the constitutional privilege of not being placed in jeopardy a second time for the same offense. On another trial, therefore, under a new indictment, if preferred, for petit larceny of this watch, the defendant would not be entitled to plead former jeopardy for anything growing out of this trial. He estopped himself to do so, by moving to set aside the judgment. *Kendall v. State*, 65 Ala. 492; *Morrisette v. State*, 77 Ala. 71; *Gunter v. State*, 83 Ala. 96, 105, 3 South. 600. As we have seen, the defendant was put on his trial for grand larceny, and was found guilty of petit larceny, growing out of his finding and criminal misappropriation of the watch, afterwards. The jury might have found him guilty of grand larceny for stealing the watch from the person of the prosecutor, but they refused to do so. He was in jeopardy as to that offense. The verdict they rendered, though not authorized in such an indictment, was, however, in legal effect, an acquittal of the offense with which he was charged. *Clayborne v. State*, 103 Ala. 53, 15 South. 842, where the authorities are collated. The judge below on the trial of this writ, discharged the defendant from custody. This decision was based on the theory that defendant had been once in jeopardy for the offense of petit larceny, even, growing out of the facts of the case. The court, when it set aside the judgment of conviction for petit larceny, on the facts disclosed, very properly bound defendant over to answer an indictment for that offense, of the guilt of which there was an admission by defendant in his application for arrest of judgment. The jury believed his guilt on the evidence and so declared by their verdict. The evidence was fully sufficient for believing there was probable cause for charging defendant with it. The order of the judge from the bench binding him over for petit larceny, was a mittimus to the jailor

to keep him in custody until duly discharged, which the court had the discretion and authority to issue. Code, § 4922 (4394); *Ex parte Graves*, 61 Ala. 381. We are constrained to hold that the order of discharge rendered on this trial was erroneous. The defendant is in custody on a proper commitment, and will so remain until discharged by law. Reversed and remanded.

(121 Ala. 583)

LADD et al. v. LADD et al.

(Supreme Court of Alabama. April 11, 1899.)

**JUDICIAL SALE—EVIDENCE—VALUE OF TIMBER
LAND AND TIMBER.**

1. Evidence of the value of timber in near-by markets and the cost of marketing the same, there being no market at the land on which it stands, is competent as to the value of the land, which is principally valuable for its timber.

2. To ascertain the net value of timber, the difficulties of getting it to market and the impossibility of doing so, except at uncertain periods of high water, may be shown.

3. In a proceeding to ascertain the value of land to determine whether or not a judicial sale thereof should be confirmed, evidence on cross-examination of the price at which other like lands in the same locality sold about the time of the sale in question is competent.

4. In a proceeding to ascertain the value of land to determine whether or not a judicial sale thereof should be confirmed, evidence of what witnesses intended to bid therefor should not be admitted, except, perhaps, on cross-examination.

Appeal from probate court, Mobile county; Price Williams, Jr., Judge.

Petition by J. M. Ladd and others against U. V. Ladd and others for an order to sell for division among them real estate owned jointly or in common by said parties. From orders for the sale thereof and confirming a commissioner's report of sale, and a decree for the execution of a deed to the purchaser, U. V. Ladd and others appeal. Reversed.

On the 18th day of December, 1897, the appellees filed their original petition in said court, setting forth that they and the appellants and others were the joint owners or tenants in common of the lands therein described, and alleging that it could not be equally and equitably partitioned or divided without a sale, and praying for an order to sell the same for division among the several owners. On the 15th day of January, 1898, said petition was amended and the hearing set for the 15th day of February, 1898, and on said last-named day the order of sale was made and James K. Glennon appointed as commissioner to make said sale, which was, after due and legal advertisement, made on the 5th day of July, 1898, and reported to the court on the 25th day of July, 1898, showing that he had sold the lands, consisting of about 8,000 acres of pine timber lands lying on the west side of Mobile river, and about 1,818 acres of cypress timber lands lying on the east side of Mobile river; that he had offered and sold said two bodies of lands in separate parcels, and that it brought the sum of \$20,000, each parcel selling

for \$10,000. The appellants filed objections and exceptions to the confirmation of the said report of sale so far as the same related to the 1,818 acres of cypress timber lands lying on the east side of Mobile river, upon the ground that said portion of the lands sold for a sum greatly less than its real value. Upon an examination of the said report and the testimony offered by all parties in connection therewith, the court, on the 31st day of August, 1898, overruled the objections and exceptions of appellants, and confirmed said report of sale so far as said cypress lands were concerned, and ordered and decreed the said commissioner to execute deeds to the purchasers. From said orders and decree confirming the sale of said cypress timber lands, the present appeal is prosecuted, and the appellants assign as error the rulings of the court upon the evidence. The facts relating to the rulings upon the evidence are sufficiently stated in the opinion, and need not be here stated at length.

McIntosh & Rich, for appellants. Bestor & Gray, for appellees.

MCCLELLAN, C. J. This is an appeal from the order of the probate court confirming a sale of land for division among tenants in common. The only issue litigated in the court below was whether the price paid for the land was greatly less than its value. The court overruled the exceptions made to the report, and confirmed the sale. The questions presented for our consideration arise on the probate court's rulings upon the competency of testimony. The land in question was a body of about 1,800 acres, valuable only for the cypress timber on it. In arriving at the value of the timber, the court confined the evidence to the stumpage,—that is, to the number of trees on the land and their value as they stood,—and excluded testimony offered by the appellants going to show the value of the timber in the markets nearest the land and the costs of getting out the timber and transporting it to those markets. We think the court erred in this ruling. While it is true that it was the land, and not the timber, that was sold, this was so only in a nominal sense. It appeared most clearly that the land dissociated from the timber was wholly valueless. The purchase, though nominally of the land, was really of the timber upon it. Not only so, but all the evidence that was received by the court went directly to the value of the timber and only indirectly to the value of the land, in that the timber valuation represented the entire value of the land. Under the peculiar circumstances of the case, the real issue to be tried, and which was tried, was whether the price bid for the land at the sale was greatly less than the value of the timber on the land. And we see no reason for not applying the same rules of evidence, in trying that issue, that would have obtained had the sale been nominally, as well as in reality, of the trees standing on the land and of those which had been felled, but had

not been removed from the land; and we think those rules should have been applied. Of course, even under this view, evidence of stumpage values was competent. That would still be one way of proving the issue. But it is not the only way. Evidence of the market value of the timber itself at near-by markets—there being no market at the land—and of the cost of marketing the timber should have been received to show the value of the timber as it stood on the land, and constituted the value of the land itself. This was independently competent, and it would also have gone to show the value of stumpage, strictly speaking. The same rule should obtain here as in an action of trover for timber severed and converted. *Railroad Co. v. Le Blanc* (Miss.) 21 South. 748; *Tower Co. v. Phillips*, 23 Wall. 471, 479, 480. The facts that it was difficult to get this timber off the land and to market, and that it could only be done at high stages of water, which were of uncertain recurrence, should, of course, be taken into account in ascertaining the net market value of the timber; but these considerations are just as much to be dealt with in fixing stumpage values, and in the former case no more than in the latter are they insuperable objections to the mode of proving the value of the land. Evidence of the price at which other like lands in the same locality sold about the time of the sale in question, and under like circumstances, is competent at least on cross-examination. Evidence of what witnesses intended to bid for this land should not have been admitted, except, perhaps, on cross-examination. The judgment must be reversed. The cause will be remanded.

(121 Ala. 561)

MANASSAS CLUB v. CITY OF MOBILE.

(Supreme Court of Alabama. April 12, 1899.)

INTOXICANTS—LICENSE—SALES FOR PROFIT—SOCIAL CLUBS—BURDEN OF PROOF.

Under an ordinance taxing social clubs where liquors are sold to members and guests, enacted pursuant to Mobile city charter, authorizing the council to license and regulate liquor dealers, and to tax trades and business, the burden is on the city to show that the members of a club include an extended number, to whom sales are made for profit.

Appeal from city court of Mobile; O. J. Semmes, Judge.

Proceeding by the city of Mobile against the Manassas Club for failure to take out a retail liquor license. There was a judgment against defendant, from which it appeals. Reversed.

E. L. Russell, for appellant. B. B. Boone, for appellee.

SHARPE, J. By the statute a retail liquor dealer is defined to be any person who sells or disposes of spirituous, vinous, or malt liquors or intoxicating bitters in any quantity less than one quart. Code, § 4122. The charter of the city of Mobile confers upon the general council the power to enact ordinances "for

the licensing and regulation of retail liquor dealers," and also provides that it shall "have the authority to assess and collect from all persons or corporations trading or carrying on any business, trade or profession, by an agent or otherwise, within the limits of said corporation, a license tax which shall be fixed and declared each year by ordinance of said corporation," and, further, that the general council "may also by ordinance impose such fines and penalties within the limitations named in this act as they may deem advisable for the doing of any business or the carrying on of any trade or the practicing of any profession by any parties who shall fail to take out such license as may be imposed by this act." The foregoing being the extent of the power conferred upon the municipality in respect of licensing retail liquor dealers, the corporate powers ordained "that a license tax for the fiscal year beginning on the 15th day of March, 1897, and ending on the 14th day of March, 1898, is hereby imposed and assessed on each person, firm, association, or corporation trading or carrying on any business, trade or profession, by agent or otherwise, within the limits of the city of Mobile, and the same is hereby fixed for such business, trade or profession as follows, to wit": and in the license schedule following appears, "clubs and social circles where liquors are sold to members, guests and visitors." For failure to obtain the required license the ordinance provides for a fine of not less than \$5 nor more than \$50 for each day of such failure. The defendant was fined as for the breach of the ordinance in failing to take out a license, and, appealing to the city court, was tried upon an agreed statement of facts. Judgment was rendered by the city court for the fine assessed, from which judgment this appeal is brought.

The statement of facts shows that the defendant had obtained no license, and as to the nature of the club, and its manner of dealing with liquors, it recites: "That the defendant corporation is a social club, and that said corporation did engage in and carry on the business of selling by retail, in quantities in less than one quart, vinous, malt, and spirituous liquors to its members for valuable considerations, and at the usual retail prices prevailing at liquor saloons elsewhere in the city of Mobile; said sales to its members being made in the rooms of said Manassas Club, within the city of Mobile, by the steward or bar-keeper of said club, who was a salaried servant or agent of said club, and employed by the Manassas Club to dispense said vinous, malt, and spirituous liquors to its members. That said sales of vinous, malt, and spirituous liquors have been made by the Manassas Club in the manner above stated to its members during the entire year 1897. That the money derived from the sale of the vinous, malt, and spirituous liquors to its members by the Manassas Club, a corporation, were reinvested by said Manassas Club in purchasing the same liquors, and that the profits derived from

the sale of the liquors to its members, as well as the principal money invested therein, was kept separate and apart from the general funds of the club, and was and is used only for the purpose of replenishing and keeping up the stock of said corporation in vinous, malt, and spirituous liquors. That no persons are allowed in the rooms of the building of said Manassas Club, a corporation, except its members and introduced nonresident visitors." The ordinance in question is not a police regulation of liquor dealers or others, but it includes various other occupations, as to which no power is given in the charter merely to regulate. It purports, by its terms, to impose a license tax for the carrying on of business, and is referable for its authority to that part of the charter granting power to assess and to collect such tax from persons or corporations "trading or carrying on any business, trade, or profession." We construe the ordinance as relating only to the revenues of the city. It has been generally held, and uniformly so in this state, that the business intended to be taxed by such enactments is one which is carried on for a livelihood or profit; and, though the number of sales, and the fact as to whether they so result, are not tests of the purpose of such business, yet, to be within the meaning of the law, they must be with a view of profit, or of pursuing business for a livelihood. *McPherson v. State*, 54 Ala. 221; *Harris v. State*, 50 Ala. 127, and other cases cited in note to section 5467 of the Code. Applying the principle to the present case, we think the proof is insufficient to bring the defendant club within the meaning either of the ordinance or the charter power. Similar operations in social clubs have been the subject of consideration in other courts, and, though a difference of opinion appears as to whether such disposition of liquors constitutes sales, yet it is generally held that, lacking the purpose of profit, such as might accrue from dealings with many persons or with the public, they do not, within the meaning of enactments simply requiring a license for the carrying on of business. *State v. Boston Club (La.)* 12 South. 895; *Tennessee Club of Memphis v. Dwyer*, 11 Lea, 452, 47 Am. Rep. 298; *Piedmont Club v. Com.*, 87 Va. 540, 12 S. E. 963; *State v. McMaster*, 35 S. C. 1, 14 S. E. 290, and 28 Am. St. Rep. 826; *Barden v. Montana Club*, 10 Mont. 330, 25 Pac. 1042, and 24 Am. St. Rep. 27. It may be that a case could occur of business carried on by "clubs and social circles where liquors are sold to the members, guests, and visitors," and so within the meaning of the ordinance and the charter, since such business might include an extended number of members, together with guests and visitors, to whom the sales might well be made for profit. Such a case was considered in *Rickart v. People*, 79 Ill. 85, where persons became members by purchasing tickets entitling them to drinks, and which the court held was a device to evade the law. The facts here show no dis-

position of liquors except to members, and even the number of persons included in the membership is not stated. For all that appears, the membership may have been limited to the smallest number necessary to constitute a club. The burden of proof to show a carrying on of business being upon the city, we cannot presume a larger membership. We would not be understood as departing from the decision in *Martin v. State*, 59 Ala. 34, where such transactions in a club were held to be sales; nor is this decision authority upon any case which may arise under police regulations of liquor selling, made either by statute or ordinance. Under the rule that courts will not pass upon the constitutionality of a statute where the decision can be properly placed upon other grounds, we decline to consider the constitutionality of the club's charter provision reciting that such disposition of liquors "shall not constitute a sale thereof, but shall be held and treated as a consumption by such members of their own property." The judgment of the city court will be reversed, and the judgment here rendered in favor of the defendant.

(121 Ala. 292)

CHRISTIAN-CRAFT GROCERY CO. v. KLING.

(Supreme Court of Alabama. April 6, 1899.)

MECHANICS' LIENS—BILL TO ENFORCE—MULTIFARIOUSNESS—CONTRACTORS—MORTGAGES.

1. A bill alleging that complainant furnished material and performed work in and about the construction of defendant's mill, under a contract made by complainant with defendant, shows that the material was furnished and the work was done by him as an original contractor.

2. A bill to establish a lien and enforce the same against real estate and improvements alleged that one of the defendants had severed machinery, and carried it out of the state, after the lien had attached, and prayed that the court decree that complainant have a lien on the land, and that the same be sold, and that said defendant be required to replace the machinery, or to account for its value. *Held*, that the bill was not multifarious.

3. The joinder, in a bill, of prior mortgagees as parties defendant, for the purpose of subordinating their liens to complainant's lien to the extent of the improvement for which complainant seeks to establish and enforce his lien, does not make the bill multifarious.

4. A mechanic's lien is superior to the lien of a mortgagee as to the increased value of the property, due to improvements made by the lienor subsequent to the mortgage.

Appeal from chancery court, Mobile county; William H. Tayloe, Chancellor.

The bill in this case was filed by August Kling against the Christian-Craft Grocery Company and others to enforce a mechanic's and material man's lien for work and labor done and material furnished. The bill alleged: "That during the months of April and May, 1896, orator furnished to the defendant the Fruitdale Lumber Company certain materials, fixtures, engine, and machinery, which material, engine, and machinery were furnished for and were used in constructing and re-

pairing and in the completion of an unfinished steam sawmill of the said defendant the Fruitdale Lumber Company, and he also performed certain work and labor upon the engine, boiler, fixtures, and machinery contained in said mill. Said work and labor were performed, and said materials, fixtures, engine, and machinery were furnished, under a contract made by orator with the said defendant the Fruitdale Lumber Company. An itemized statement of the work and labor so done and performed by orator, and the material, fixtures, engine, and machinery as furnished by orator, is hereto attached, marked 'Exhibit A.' The bill also alleged that appellee, within six months after said indebtedness accrued, to wit, on the 5th day of August, 1896, filed in the office of the judge of probate of Washington county, Ala., the county in which the property was situated, a statement in writing, verified by the oath of appellee, containing a just and true account of the demand after all just credits had been given, and describing the one acre of land and the improvements upon which the lien was claimed. The bill further alleged that the defendant Blanchard claimed to hold a mortgage upon the said sawmill of the Fruitdale Lumber Company, which mortgage was prior in time to the lien of appellee. It also alleged that, after the work and labor were performed, and after the materials, fixtures, engine, and machinery had been furnished, the defendants the Christian-Craft Grocery Company and the D. R. Dunlap Mercantile Company sued out attachments against the Fruitdale Lumber Company, and caused the same to be levied by the sheriff of Washington county upon the said steam sawmill, its machinery, and the lands upon which it was situated; and that after the levy of said attachments, and after appellee's claim had been filed in the probate court of Washington county, said defendants the Christian-Craft Grocery Company and the D. R. Dunlap Mercantile Company obtained an order of sale of the machinery upon which appellee claimed his lien, and sold the same, and at such sale the defendant the Christian-Craft Grocery Company became the purchaser, and it caused said machinery upon which appellee claimed a lien as before stated to be torn from said steam sawmill building, and shipped out of the state of Alabama. The bill also alleged that the building, engine, and machinery were purchased and erected for the sole purpose of manufacturing lumber, and that such engine and machinery were essential to the manufacture of lumber, and that the work and labor done and performed by appellee upon said fixtures, engines, and machinery greatly enhanced the value of said sawmill and the machinery contained therein. The Fruitdale Lumber Company, John W. Blanchard, the Christian-Craft Grocery Company, the D. R. Dunlap Mercantile Company, and D. J. Long were made parties defendant. The prayer of the bill was for the court to ascertain and fix the amount of appellee's claim against the Fruitdale Lum-

ber Company, and to decree that he had a lien upon said one acre of land and upon the improvements thereon for the work and labor done and performed by him, and that the court would ascertain the extent of the enhanced value imparted to said one acre and to the improvements thereon by the work and labor, materials, fixtures, engine, and machinery furnished by appellee, and that he be decreed to have a lien thereon to the extent of said enhanced value, superior to the defendant Blanchard, and that the respective rights and priorities of Blanchard and appellee be adjusted, and said property be sold, and the proceeds apportioned between them according to their respective priorities. The bill further prayed that the defendant the Christian-Craft Grocery Company be required to restore and replace in said steam sawmill building the machinery, fixtures, and engine purchased by it at said sheriff's sale, and afterwards caused by it to be removed from said mill building; and, upon the said defendant failing so to do, that the value of said machinery, engines, and fixtures be ascertained, and a decree rendered against it for such value. By the prayer of the bill the defendants D. R. Dunlap Mercantile Company and D. J. Long, the sheriff of Washington county, were required to propound such claim as they or either of them may have upon the said one acre, and upon the improvements thereon, and upon the said machinery, engine, and fixtures. There was also a prayer for general relief. The Christian-Craft Grocery Company and the D. R. Dunlap Mercantile Company demurred to this bill upon the following grounds: "(1) Because it is multifarious, in that it seeks to fasten a mechanic's lien on property now situated in Washington county, Alabama, and also seeks to compel the replacing of certain property not now in the state of Alabama back upon said property in said Washington county, or for damages for failing to do so. (2) Because it is multifarious in this, viz.: it has for its purpose the enforcement of a mechanic's lien and material man's lien, and also to recover property not in the state of Alabama, or its alternative value of the defendant the Christian-Craft Grocery Company. (3) It is multifarious in this, viz.: it seeks the enforcement of distinct and separate matters of equitable cognizance between the same parties of so dissimilar character as to render it unfit that they should be litigated in the same suit. (4) It is multifarious in that it makes one D. J. Long a co-defendant, and fails to show that he has any interest in this suit. (5) It fails to show what were the terms of the contract between the complainant and the Fruitdale Lumber Company. (6) It fails to show whether complainant was an original contractor, or a material man, or a journeyman, or day laborer, as to the demand filed in the probate judge's office in Washington county, Alabama. (7) It fails to state facts which show that the complainant's demand filed in the probate judge's office, as aforesaid, was such a de-

mand under the contract existing between complainant and the Fruitdale Lumber Company as the filing thereof on, to wit, the 5th day of August, 1898, and within six months after the indebtedness accrued, as stated in said bill, would be sufficient to fasten a lien on the property described in said bill. (8) It is not shown that any notice of the filing of the demand in the probate judge's office was given to the Fruitdale Lumber Company as to all such claims therein as are for work and labor done as a journeyman or day laborer, or as to all such claims therein as are those of a material man, and not as original contractor. (9) It fails to show a filing of the demand in the probate judge's office within the time required by law, so as to establish a lien for all such claims therein as the complainant was entitled to claim as a journeyman or day laborer. (10) It fails to show said contract was made with the owner of said sawmill, or the proprietor thereof, or his agent, architect, trustee, contractor, or subcontractor. (11) It fails to show said contract was made with the owner of the one acre of land described in the complaint, or the proprietor thereof, or his agent, architect, trustee, contractor, or subcontractor. (12) It seeks to fasten a lien for an indebtedness which accrued more than six months before the filing of the claim of lien in the office of the probate judge, as appears from the first item in Exhibit A. (13) Because the bill fails to show that complainant ever filed in the probate judge's office of Washington county a sufficient description of the one acre of land upon which the lien is claimed. (14) Because the bill, and also the claim filed in the probate judge's office, claim a lien on one acre of land in Factory block, in the town of Fruitdale, Alabama, and each describes more than one acre as the land upon which a lien is claimed. (15) Because it fails to show that the land described in the claim filed as above stated is in an incorporated city, town, or village." Upon the submission of the cause upon the demurrers, the court rendered a decree overruling them. From this decree the Christian-Craft Grocery Company prosecutes the present appeal, and assigns the rendition thereof as error. Affirmed.

Chas. L. Bromberg, Jr., for appellant. Bes-
tor & Gray, for appellee.

McCLELLAN, C. J. This is a bill to enforce a mechanic's and material man's lien on certain machinery constituting a sawmill, and upon the lot of land upon which the sawmill plant was located.

1. The objection to the bill, taken by demurrer, that it does not show but that the work done by the complainant was that of a journeyman artisan, and not by a contractor,—the question being important in relation to the statute of limitations,—is without merit. Giving the bill a fair construction, it does sufficiently appear that complainant's claim is for materials furnished and work done by him as

an original contractor, and hence that his claim of lien and itemized account was seasonably filed in the office of the judge of probate.

2. The bill also sufficiently shows the amount of the claim, and when it became due; and the objection in this connection is without merit.

3. The bill is not multifarious, nor otherwise objectionable, because of the facts therein alleged that the Christian-Craft Grocery Company had wrongfully removed the machinery from the sawmill after complainant's lien attached, and carried it out of the state; nor because of its prayer that they be decreed to be trustees thereof, and either to return the same, or to account for the value thereof to complainant. *Smith v. Smith*, 106 Ala. 298, 17 South. 680.

4. Nor is the bill multifarious, or otherwise bad, for making prior mortgagees parties, and seeking, as against them, to subject to complainant's demand that part of the value of the property which resulted from the improvements which complainant put upon it in labor and supplies. The object of the bill is single,—to enforce the lien,—and such will be the effect of granting the relief prayed. So long as only this end is kept in view and sought to be effectuated, it cannot be said to be multifarious, however many respondents may be brought in, and however diverse and independent may be their claims and attitudes with respect to each other. Having the right in and under one bill to all relief necessary to the full effectuation of his lien on this property, all interests in it entitled to a day in court may well be brought in under the bill.

5. That complainant is entitled to subject the increased value of the property due to his improvement and betterment of it after the execution of the mortgage is clear. *Wimberly v. Mayberry*, 94 Ala. 240, 10 South. 157.

It appears by the bill that the lot of land upon which the sawmill was situated at the time the lien asserted accrued is in the town of Fruitdale. It is therefore immaterial that the lot contains more than one acre. *Acts 1894-95, p. 1238*. The decree overruling the demurrer to the bill must be affirmed.

(121 Ala. 580)

CHADWICK v. CHADWICK.

(Supreme Court of Alabama. April 5, 1899.)

SPECIFIC PERFORMANCE—CONTINUOUS DUTIES —PLEADING.

1. Equity will not decree specific performance of a contract to convey land, where the consideration is an agreement of complainant to allow defendant to reside with him, and to support her for life; since it involves the performance of continuous duties, which the court cannot enforce by process.

2. In suits for specific performance of contracts, unless there is mutuality as to the remedy, as well as the obligation, so that complainant can be compelled to perform as well as defendant, the parties will be left to other remedies.

3. A bill to compel the execution of a conveyance, alleging that defendant's name was

written on the deed by her direction, without any averment as to whether it was acknowledged, is defective, since it may be inferred that the execution was already complete.

Appeal from chancery court, Russell county; Jere N. Williams, Chancellor.

Bill by J. L. Chadwick against M. F. Chadwick for injunction to restrain an action of ejectment, and for decree of specific performance of a contract. From a decree dismissing the bill, complainant appeals. Affirmed.

In the bill the complainant alleged that, some six or seven years ago, he and his two brothers, T. H. Chadwick and O. D. Chadwick, and his mother, M. F. Chadwick, the defendant, purchased from one D. B. Preston a certain described tract of land. That the said land was bought on credit, and that he and his two brothers just named paid the entire purchase money therefor, but the deed was executed by Preston to his mother, M. F. Chadwick. That after said purchase, to wit, in November, 1894, there was an agreement entered into between the complainant, T. H. Chadwick, O. D. Chadwick, and M. F. Chadwick, by which the complainant was to pay to T. H. Chadwick and O. D. Chadwick, each, \$150 for his respective interest in the lands purchased from Preston; and that in said agreement the complainant obligated himself to take care of and support his mother, M. F. Chadwick (who, at that time, was a widow), the rest of her natural life, furnishing her a residence with him, and support. That, for this consideration, the said T. H. Chadwick and O. D. Chadwick and M. F. Chadwick were to execute to the complainant a deed, conveying their interest in said lands. It was then averred that the complainant had complied with his part of the contract by payment to T. H. and O. D. Chadwick of the \$150 each, and had furnished a home and supported the said M. F. Chadwick up to February, 1896, when she voluntarily left the complainant's home; that, on November 5, 1894, there was a deed purporting to convey the interest of said parties in said lands; that this deed was signed by T. H. Chadwick and O. D. Chadwick; and that, at the time of their execution, the said M. F. Chadwick complained that she could not see well enough to write her name to the deed, and requested a justice of the peace, who was present, to write her name for her; that he did so, making her mark for her, but the said M. F. Chadwick did none of the mechanical work of writing her name, or of making her mark. It was averred that, after the voluntary abandonment of his home by M. F. Chadwick, the complainant repeatedly requested her to return thereto, in order that he could furnish her a home and support, as he had contracted to do, but that she had declined to do so. The complainant then averred that, in July, 1896, M. F. Chadwick had brought an action of ejectment against him for the recovery of said lands, and that said action was then pending. The prayer of the bill was for an injunction to restrain the fur-

ther prosecution of the action of ejectment, and for a decree requiring the defendant to specifically perform the contract entered into, by which she was bound to convey to the complainant her interest in the lands involved in the controversy. The defendant filed an answer, in which she set up that, at the time of the purchase of the lands referred to in the said bill, the complainant and his two brothers were minors; that said lands were bought jointly by the complainant and his two brothers and herself, and were paid for with money made by the joint labor of herself and her said three sons. She denied, in her answer, making any such agreement as was averred in the bill, and set up that she left his home because of threats of bodily injury which the complainant had made against her, and which caused her to fear her personal safety. That she could write, herself, and had not authorized the signing of the deed by the justice of the peace. The evidence in behalf of the complainant tended to substantiate the averments of the bill of complaint, while the evidence for the defendant tended to support the averments of her answer. On the final submission of the cause, on the pleadings and proof, the chancellor decreed that the complainant was not entitled to the relief prayed for, and ordered the bill dismissed. From this decree the complainant appeals, and assigns the rendition thereof as error.

Smith & Henry, for appellant. J. J. Abercrombie, for appellee.

SHARPE, J. The contract described in this bill belongs to a peculiar class, to which the remedy of specific enforcement is not adapted or applied. The chief consideration moving to the defendant for the conveyance which the complainant seeks to compel is the agreement on his part to allow the defendant to reside with him, and to support her during her life. It is an undertaking which implies the legal duty on his part not only to furnish necessities for defendant's support, but to treat her with due consideration, so that her existence as a member of his household might be at least tolerable. The court of equity will not undertake to regulate or control the performance of such continuous duties, and it would be powerless to do so by any of its processes. *Bumpus v. Bumpus*, 53 Mich. 346, 19 N. W. 29; *Bourget v. Monroe*, 58 Mich. 563, 25 N. W. 514; *Mowers v. Fogg*, 45 N. J. Eq. 120, 17 Atl. 296. Even if such power existed, yet its exercise in such a controversy, between a mother and her son, would be of doubtful expediency. The incidents of such interference by the court would go far to engender feelings of antagonism between the parties, destructive of the affection and confidence natural to the relation, and which, in the interest of society at large, the court of equity would conserve, rather than disrupt. But, aside from any ethical consideration, and upon general principles of equity, the jurisdiction will be declined, be-

cause of the inequality in which the parties are placed by such contract in respect to the remedy for its enforcement. To compel its observance by one, when its benefits could not be secured to the other, would be alike unequal and inequitable. Upon that ground, the doctrine is well established, as applicable to suits for specific performance, that, though no difficulty may attend the execution of the contract on the part of the defendant, yet, unless there be mutuality as to the remedy as well as the obligation, so that the complainant, in case of his defection, could be compelled to perform, the parties will be left to other remedies. *Iron Age Pub. Co. v. W. U. Tel. Co.*, 83 Ala. 498, 3 South. 449; *Irwin v. Bailey*, 72 Ala. 467; *Fry, Spec. Perf.* § 296; *Pom. Cont.* § 162. If the defendant's presentment of the case be the true one, the remedy, if it existed, might well be applied in her favor, since it reveals a gross breach of his obligation in respect of his treatment of the defendant. But the bill is without equity, and the plaintiff's case fails, regardless of the matters set up in defense, so that particular reference to those matters is unnecessary. It may be noticed that the bill, being to compel a conveyance, is also defective in not averring with more certainty a failure of defendant to execute the conveyance. It avers that her name was written upon the deed, by her direction, in a way which may have amounted to a valid signature, and is silent as to whether there was any attestation or acknowledgment; leaving room for the inference, which may be drawn against the pleader, that the execution of the deed was completed. The decree of the chancery court will be, in all things, affirmed. The appellant will pay the costs of the appeal in this and in the chancery court. Affirmed.

(51 La. Ann. 1060)

BOSCHER v. FAUCHT. (No. 12,963.)¹

(Supreme Court of Louisiana. March 20, 1899.)

LANDLORD—UNLAWFUL PROVISIONAL SEIZURE—DAMAGES.

Evidently defendant in two suits, in which she sued out provisional seizures before one of the city courts, was in error as to the amount due her, and was absolutely without right to the rental claimed. The writs were dissolved. Damages growing out of a provisional seizure made on a claim which had already been paid are due by defendant.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Nicholas H. Rightor, Judge.

Action by Tousain P. Boscher against Barbara Faucht. Judgment for plaintiff for less than the amount sued for, and he appeals. Amended and affirmed.

Oliver B. Sansum, for appellant. E. Howard McCaleb, for appellee.

BREAUX, J. Plaintiff sues defendant, an old, widowed lady, whose means are limited, for the sum of \$10,000 damages. He charges that about the 1st of September, 1896, defendant maliciously and without probable cause brought suit in the First city court of New Orleans against plaintiff for an amount she claimed was due for rent, and caused plaintiff's stock in trade to be seized and taken out of his possession until the cause was heard by the court, and finally determined in his favor. This was for rent due at the end of April, under the contract. Plaintiff further charges that about the 3d of September, 1896, the defendant brought a certain other suit in the same court for rental for the month of September following, and a second time had his goods and chattels seized and taken possession of by the sheriff, by whom they were kept until the cause was tried, and again decided in plaintiff's favor. Plaintiff avers that defendant's intention in instituting these two suits was to harass him, and injure and destroy his good name and credit. Defendant, in answer, filed the plea of general denial. The facts are that defendant had been paid on the day that she sued plaintiff the first time and took a writ of provisional seizure. This was shown by a receipt introduced in evidence. Although the evidence regarding the payment of her rent by plaintiff when she brought the second suit and took out the second provisional seizure is not as conclusive as in the first case, yet it does appear that she had been paid. George Dast, a lad, testified that the rental claimed by defendant was paid on the 2d day of September, and that he wrote the receipt for the amount, which receipt was introduced in evidence. The date of the receipt was torn off. The following is a copy: "New Orleans, Sept. [date torn off]. Received from Mr. T. Boscher the sum of twenty-eight dollars for one month's rent. The month beginning on the 1st of September, and ending on the 30th of September, 1896. Received payment in full. [Signed] Leontine Faucht." There is some conflict in the testimony regarding this receipt. Plaintiff and the other witnesses testify that it was given for rent paid before the seizure. The defendant swears that it was paid after the seizure of the property had been made. It was proven that plaintiff (defendant here) acted under the advice of an attorney at law. Plaintiff valued his stock in trade at the date of the seizure at about \$700. His goods were under seizure about 20 days. He usually bought for cash. He claims that he had credit among the merchants, which was injuriously affected by the seizure. His sales would average about \$125 per month. He kept no books. The plaintiff, as a witness in his own behalf, was asked by his counsel to tell the jury, as near as he could, the amount of damages he had sustained by the seizure. He answered that he had about \$800 worth of goods in the yard, and they were damaged by rain; that his credit and his name were good; that he had been in business

¹ Rehearing denied May 1, 1899.

23 years. He valued his credit and name at \$8,000 or \$9,000, and he had no more credit. He is the only witness who testified regarding the value of his credit and name, and this in general terms, as stated above. The case was tried before a jury. From the verdict and the judgment of the court condemning the defendant to pay damages in the sum of \$100, plaintiff prosecutes this appeal.

As the amount of rent had been paid in full, defendant was at fault in taking out the two writs of provisional seizure under which she caused plaintiff's property to be seized. The facts do not show any particular motive on her part. Her anxiety evidently was to collect closely all due her, and in her apprehension that she had not collected she sought to recover too much. She was not careful enough. Counsel urges in her defense that under article 287 of the Code of Practice a lessor may take out a writ of provisional seizure, whether the rent be due or not, "provided, that in case the rent be paid when it falls due, the cost of seizure shall be paid by him, and that the measure of damages is the cost of the seizure." This article does not apply to the case before us for decision. Manifestly, the lessor may take out a provisional seizure prior to the maturity of his claim when the lessee is about to remove the property on which he has a lessor's privilege. Here no such question arises. Defendant had no claim to become due and exigible in the future, no "debitum in presenti solvendum in futuro," no privilege, for she had been paid; and therefore she had no cause to apprehend that her lessee would remove his property, and thereby that she would be made to lose the amount due her as lessor. With reference to the first seizure, it is true that it was discontinued the day after it was made, and it does not appear that plaintiff thereby suffered damages to any great extent. There was, none the less, some negligence on the part of the defendant in thus instituting proceedings for an amount not due, which must meet with the disapproval of the court of justice. Another article of the Code of Practice directly applies: The lessor "shall be personally responsible for all damages by the defendant, should the seizure be wrongfully obtained." Code Prac. art. 295. As relates to the first suit, unquestionably the writ was unlawfully obtained. The second seizure also was issued without cause at defendant's instance. The weight of the evidence shows that defendant had been paid for September, as well as for all preceding months.

There remains for decision only the question, what is the amount of the damages which the plaintiff has suffered? His business was small. He sold secondhand goods. His monthly profits were quite limited, considered from a most favorable view. His limited stock was bought for cash. We are not informed of the profits he usually made on his sales,—whether small or large. Judging from the amount of monthly sales, the profits were not

large. Under the circumstances we think that a small increase in the judgment will do justice between the parties. Therefore the verdict and judgment appealed from are amended by increasing the amount of the verdict and judgment from \$100 to \$250, with interest on the last-stated sum at the same rate and from the same date as heretofore. As amended, the judgment is affirmed.

(51 La. Ann. 920)

BROWN SHOE CO. v. HILL et al.
(No. 13,137.)

In re BROWN SHOE CO.

(Supreme Court of Louisiana. April 17, 1899.)
SUPREME COURT—JURISDICTION—APPEALS FROM
COURT OF APPEALS—CONSTITUTIONAL LAW
—WRIT OF ERROR—APPLICATION.

1. The ruling in *Re Ingersoll*, 23 South. 889, 50 La. Ann. 748, reaffirmed as a correct interpretation of the true meaning and intention of article 101 of the constitution of 1898.

2. Section 2 of Act No. 191 of the Acts of 1898, in declaring that the party cast in the court of appeals, or other person in interest, who may feel aggrieved by the judgment rendered, shall, in any case, have the right to bring the cause before the supreme court for its review and determination, goes beyond the constitutional intendment, and, as far as it does, is not to be followed.

3. Where the legislative interpretation of a constitutional provision conflicts with the judicial interpretation thereof, the latter prevails.

4. A rule of this court requires litigants making application for the writ of review to annex to such application a copy of the opinion of the court of appeals complained of. Hereafter no application for the writ will be considered unless the opinion of the court of appeals is so annexed.

(Syllabus by the Court.)

Certiorari to court of appeals, Second circuit.

Action by the Brown Shoe Company against J. N. Hill & Bro. and others. Application by the Brown Shoe Company for certiorari or writ of review to the court of appeals. Denied.

Charles S. Wyly, for relators.

BLANCHARD, J. This is not a case in which the writ of review should be granted. We took occasion in the case of *In re Ingersoll*, 50 La. Ann. 748, 23 South. 889, to lay down the rule which would govern the action of the court in respect to applications for the writ. It was there said, speaking of article 101 of the constitution of 1898: "It was not intended, by a resort to the power here granted, to make of the supreme court a sort of superior court of appeals over the circuit courts, to take jurisdiction of and hear and determine any and all cases that may have been decided by the latter courts in the exercise of their legitimate, constitutional jurisdiction. In other words, it was not intended that the circuit courts of appeal should be made merely a stopping place for causes between one hundred dollars and two thousand dollars on their way from the district courts to the supreme court. It was, rather, intended

that the power thus lodged in the supreme court should be exercised only in special or extreme cases, whose peculiar circumstances as to the facts or the law governing the same justify, in the opinion of this court, a resort to it. For example, when the court of appeals refuses to be guided, in a clear case, by the well-established jurisprudence as defined and laid down by this court, a case would be presented warranting this court in sending down its writ to bring up such cause for review and determination. This might be necessary to enforce uniformity of jurisprudence throughout the state in the courts thereof. Other cases for other reasons may arise justifying a resort to the writ, care being always taken against its abuse, to the impairment of the dignity and power and usefulness of the courts of appeal, and protracting litigation, and deferring the final enforcement of just rights." We have, as far as possible, in subsequent cases adhered to the ruling in the *Ingersoll* Case, frequently citing the same as a controlling authority in respect to applications for the writ of review. We again affirm it as a correct interpretation of the true meaning and intention of article 101 of the constitution. In saying this we are not unmindful of Act No. 191 of the Acts of 1898, entitled "An act relative to courts of appeal and to carry out the provisions of article 101 of the constitution of this state." Section 2 of that act, in declaring that the party cast in the court of appeals, or other person in interest, who may feel aggrieved by the judgment rendered, shall, in any case, have the right to bring the cause before this court for its review and determination, goes beyond the constitutional intendment, and, so far as it does, is not to be followed. The case of *In re Ingersoll*, and other cases subsequent thereto, defining the true meaning of the article of the constitution, were decided prior to the enactment of the statute referred to, and, in so far as the legislative interpretation of the constitution conflicts with the judicial interpretation thereof, it is familiar doctrine that the latter prevails. The application now before us neither in its law nor facts presents such a special case as that contemplated by the ruling in *Re Ingersoll*, and, were we to grant the writ and bring up the case for review, it could be only upon the hypothesis that the constitution intended to give a further and additional right of appeal to litigants who may be cast before the courts of appeal. This, clearly, was not within the contemplation of the framers of the constitution. In cases, however, presenting features of law or fact justifying the granting of the writ, if it is granted, this court has the same power and authority in reference to the decision of such cases as if the same had been brought before us by direct appeal from the court of the first instance. In the instant case the application for the writ seems to proceed upon the idea that the averment of errors of law alone on part of the court of appeals justifies the granting of the writ. That this is

a mistaken conception of the intention of article 101 of the constitution, and of the scope of the powers it confers, is shown when we come to consider that, if this were so, every case, practically, decided by the courts of appeal, would be reviewable here, and this would, indeed, be making of the latter court a mere "stopping place for causes between one hundred dollars and two thousand dollars on their way from the district courts to the supreme court," and would certainly be to the impairment of the dignity and usefulness of the courts of appeal, and to the protracting of litigation. We do not overlook that in the present application the statement is made that the court of appeals, in one of its rulings, held contrary to the ruling of this court in *Area v. Milliken*, 35 La. Ann. 1150, on a similar point. But an examination of that case, in connection with the ruling aforesaid of the court of appeals, does not satisfy us that it is necessary to bring this case up for review in order to enforce the principle of uniformity of jurisprudence.

It is proper to remark here that the rule of this court requires litigants making application for the writ of review to annex to their application a copy of the opinion of the court of appeals in the case. While we have not applied the aforesaid rule in this particular case, it is now announced that hereafter no application made to this court for its writ of review will be considered unless the opinion and decision complained of, or a copy thereof, is so annexed. We are constrained to hold that the case presented does not justify the writ asked for, and, accordingly, the same is denied.

(51 La. Ann. 1067)

WOODVILLE v. KLASING. (No. 12,862.)¹
(Supreme Court of Louisiana. March 20, 1899.)

SUSPENSIVE APPEAL—DISMISSAL—DEVOLUTIVE APPEAL—BOND—SUFFICIENCY—PARTIES ON APPEAL.

1. The district court had jurisdiction to determine the appellees have a right to proceed with their execution. Its dismissal of the suspensive appeal had only that effect, and left the judgment debtor to whatever right she may have to a devolutive appeal. The dismissal of the suspensive appeal did not prejudice whatever right she may have had to a devolutive appeal.

2. A suspensive appeal bond must be one-half over and above judgment and interest.

3. While it is true that the amount of the bond, as fixed by the district judge, will suffice for a devolutive appeal, though not enough for a suspensive appeal, it will not be sufficient if it is not preceded by any order whatever.

4. An order was entered dismissing the appeal. From this judgment, only defendant appealed. Defendant did not appeal from the moneyed judgment rendered against her. It follows appellees could not join in an appeal from a judgment from which no appeal had been lodged before the supreme court, and the amendments prayed for remained without effect, as related to a judgment not before the court.

(Syllabus by the Court.)

¹ Rehearing denied May 1, 1899.

Appeal from civil district court, parish of Orleans; George H. Théard, Judge.

Action by John Alonzo Woodville against Mrs. Wilhelmina Klasing, wife of Henry H. Brinkman. Judgment for plaintiff, and defendant appeals. Affirmed.

James B. Rosser, Jr., for appellant. Edwin T. Merrick, for appellee.

BREAUX, J. This is a suit by plaintiff to collect a fee for services rendered by him as an attorney at law in obtaining a judgment for defendant against her husband of separation from bed and board and separation of property. Judgment was rendered in favor of the plaintiff, Woodville, for \$2,500, with legal interest from judicial demand, and costs. A suspensive appeal was taken from this judgment upon a bond for \$3,850. Plaintiff moved the court to dismiss the appeal on the ground that the bond was insufficient in amount. The motion was granted, and appeal dismissed. A suspensive appeal was taken from the judgment dismissing the appeal. Plaintiff here answered the appeal, alleging, in the first place, that he is entitled to a judgment of \$5,000, instead of \$2,500, and that defendant had no cause to appeal. Appellee's prayer is for an increase of \$2,500, if, he averred in these proceedings, an increase is permissible; but, in case the judgment is a finality, plaintiff prays for 10 per cent. damages for a frivolous appeal. The bond, as alleged by appellee, was not sufficient for a suspensive appeal.

Principal and interest amount to....	\$2,598 75
One-half over the bond.....	1,299 37
	<hr/> \$3,898 12

The suspensive appeal bond signed by defendant, we have seen, was for less than the amount just stated. Appellant endeavors to meet plaintiff's position regarding the insufficiency of the bond by the defense that a bond for a suspensive appeal is sufficient to sustain the appeal as devolutive. As the bond was insufficient in amount, it follows that appellant was not entitled to a suspensive appeal. The decisions sustaining that view upon the subject are clear enough, and the article of the Code of Practice, being positive, leaves but little, if anything, to interpretation. The requirement is that the appeal bond be for a sum exceeding by one-half the amount for which the judgment was given. Code Prac. art. 575. Here, if account be taken of the interest on the amount of the judgment, the bond was for less than the law requires. It is well settled that, in making up the bond, interest should be held as forming part of the judgment. *Ross v. Pargoud*, 2 La. 85; *Brown v. Brown*, 9 La. Ann. 810; *Paland v. Railroad Co.*, 42 La. Ann. 290, 7 South. 899.

The right vel non of the lower court to dismiss the appeal for insufficiency in amount of the bond is the next question in order for our decision. The contention of the defendant is, if the amount of the bond is found insuffi-

cient, the appeal should not have been dismissed, but that it should have been held to operate only as a devolutive appeal. Generally, the only effect of the party's failure to comply with the requirements of the law, as relates to the amount of the bond, is to render the appeal devolutive. The district court, in such a case, has jurisdiction to authorize the judgment creditor to take out his execution. Here it is manifest that plaintiff had the right, after the suspensive appeal had been dismissed, to take out an execution, and to that extent, at least, this right is recognized by the judgment of dismissal of defendant's appeal. The judgment was legal. This was the only effect the order of dismissal had. It left defendant at liberty to prosecute a devolutive appeal, if she had such a right under the order of appeal granted. In answer to position assumed by appellant,—prayer for an amendment and an increase of the judgment of \$2,500 appealed from to \$5,000 is a waiver and abandonment of the motion to dismiss the appeal, and likewise the prayer for 10 per cent. on the amount of the judgment appealed from,—we deem it proper and sufficient to say that defendant has not appealed from the judgment rendered in the case against her and in favor of plaintiff. She appealed solely from the judgment dismissing her suspensive appeal, and it follows not from the judgment itself. It is not before us at all, and for that reason is not considered by us. We are constrained to decline affirming, amending, or reversing a judgment from which no appeal has been taken. We are not inclined to the opinion that a devolutive appeal lies in all cases in which the amount of the bond is less than is required for a suspensive appeal. When the appeal bond is given as required, in amount fixed by the order of the court, the appeal is devolutive, though the amount thus fixed by the court does not exceed by half the amount of the judgment. But it is different, in our view, when, as in this case, no such order is to be found of record. We had in mind the case of *Poydras v. Patin*, 5 La. 127, and other cases sustaining a similar rule of practice, when we stated, as we did in *Michenor v. Reinach*, 49 La. Ann. 361, 21 South. 552, "The amount of the bond is that fixed by the judge *à quo*." (Italics ours.) When there is no order, the mere fact that one has attempted to give a suspensive appeal bond, but failed, as to the amount of the bond required, we very much question his right to a devolutive appeal after the court has decreed that the bond is not large enough in amount for a suspensive appeal. If there yet remained a right to a devolutive appeal, without any preceding order fixing an amount, it might give rise to some uncertainty, even confusion, in matter of appeal, in that it might be claimed that a bond for any amount, at first entitled a bond for a suspensive appeal, was enough security for the costs and for a devolutive appeal. Such, we take it, never was the intention.

The weight of the decision, conservatively, requires an order from the court. When it has been complied with, it gives rise to the conclusion always accepted that the court required bond in an amount sufficient to cover costs, but it is not left to the party appealing to determine the amount of the bond for suspensive appeal, however small, and in case it is not large enough to grant him the right to a devolutive appeal. The appeal from the order dismissing defendant's appeal was not, in our view, frivolous, and not such an appeal as should be condemned by right to seek at the hand of the court an interpretation of the judgment of the dismissal. The judgment appealed from is therefore affirmed.

(51 La. Ann. 747)

**STATE ex rel. KLOTTER v. POLICE
BOARD OF CITY OF NEW
ORLEANS. (No. 13,038.)**

(Supreme Court of Louisiana. April 17, 1899.)

**MUNICIPALITIES—POLICE BOARD—RULES—NEW
TRIAL—EFFECT—MANDAMUS.**

1. Under the powers granted to it by law, the police board of the city of New Orleans is vested with authority to grant new trials to parties convicted by it of infractions of its rules and regulations; the power being exercised at its discretion if rules on that subject have not been adopted, and, if rules have been adopted, then to be exercised under the terms thereof.

2. The order of the board granting a new trial is generally final, and cannot be set aside unless inadvertently given; certainly not in the absence of legal cause, made ordinarily to appear contradictorily with the party interested.

3. An order granting a new trial, as a general rule, vacates a former judgment without any special order to set it aside, and leaves the case as though no trial had been had.

4. Where the board, outside of its proper powers, revokes an order for a new trial, which it had legally granted, mandamus will lie to it, commanding it to proceed to a new trial of the case.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frank A. Monroe, Judge.

Application by the state, on the relation of David Klotter, for a writ of mandamus to the police board of the city of New Orleans. Judgment for plaintiff. Defendant appeals. Affirmed.

The plaintiff, in his petition, represented that he had been for several years a sergeant of police of the city of New Orleans, under the control and supervision of the police board of said city under Act No. 63, 1888; that he was charged with oppression in office, conduct unbecoming an officer, and insult and abuse; that, under the powers granted to said police board, it acted in a judicial capacity, and tried the charges so brought against him, and found him guilty of same, and therefore passed sentence on him, dismissing him from the police force; that on the — day of August, 1898, feeling aggrieved at the verdict and sentence, he filed a petition, in which he alleged that since his conviction he had discovered additional evidence, of which he was

ignorant at the time of his trial; that the charges against him were unfounded, and that he could and would establish his innocence were a rehearing granted him; that the board, being convinced of the error committed in discharging relator from the police force, after due deliberation, on the 28th of September finally granted a rehearing of relator's case, and fixed the hearing thereof for October 12, 1898; that on that day the prosecuting witness and those for the defense appeared before said board, when, on motion, the board, without hearing plaintiff, and against his will and consent, revoked the order granting a rehearing, and refused to proceed in the examination of the charges against him; that said board is vested with judicial powers quoad the members of the police force; that their rulings and judgments are of as binding effect upon said board as they are on those subject to them; that the board has discretionary powers either to grant or refuse rehearings, with which discretion the courts cannot interfere; that, it having granted petitioner a rehearing, he was, by the granting thereof, reinstated in his position on said force, subject to the charges pending against him; that, the judgment of dismissal having been set aside, he, by said order, acquired the right of trial and investigation into the charges brought against him, and he could not have been deprived of said right but by due process of law; that the board refused to try said charges; that it was a duty imposed on it by law; that the law had assigned no relief by ordinary means which he could invoke to protect his rights other than the equitable writ of mandamus. He prayed for an order directed to said board commanding it to proceed with the trial of the charges brought against him, and determine the same, that the writ be made peremptory, and that the court grant such orders and decrees as plaintiff is entitled to under the law and in equity. The defendant was ordered to show cause, if any it had, why the relief prayed for should not be granted. The police board seems to have made no return. The case was tried, and judgment rendered by the district court commanding the police board of the city of New Orleans to proceed under the new trial granted to plaintiff with the trial of the charges brought against him, and to hear and determine the same. The judgment recites that it was rendered, after hearing pleading, evidence, and counsel, by reason of the law and the evidence, in favor of the plaintiff and against defendant. The defendant appealed, but filed no brief, and made no appearance in the supreme court. The transcript comes up without evidence, though the district clerk certifies that it contained all the proceedings had and documents filed and adduced upon the trial of the cause.

E. A. O'Sullivan, for appellee.

NICHOLLS, C. J. (after stating the facts). It was stated by counsel of the plaintiff in

his argument before the court that the order of the board granting a new trial was set aside, not in the exercise of a supposed reserved discretionary right to do so, but because, in the opinion of the city attorney, it was without power or authority to have granted, as it had, the order for the new trial, which was thus set aside. By the sixteenth section of the act creating the board it was empowered in its discretion to enact, modify, and repeal, from time to time, orders, rules, and regulations of general discipline, wherein, in addition to such general rules as might be deemed expedient by said board, there might be particularly defined, enumerated, and distributed the powers and liabilities of the officers, clerks, and members of the police force, and wherein should be declared the mode of appointment to office, the manner of discipline and procedure of trial and removal from office of the said officers, clerks, and members of said force, provided that such laws, ordinances, orders, rules and regulations, forms and modes of procedure should not conflict with any of the provisions of the same act. We find no restriction or limitation placed upon the board under the broad powers given to it by this section in respect to its authority to grant new trials, and fix the circumstances under which they should be allowed. If such a limitation or restriction exists outside of the act itself, it has not been in any manner brought to our attention. We have not been informed of the adoption by the board of any rules on this subject which the granting of the new trial in this particular case contravened. We have to deal with matters from the standpoint that the board, having power to grant new trials, had exercised the same in favor of the plaintiff in this particular case, and that, having so exercised it, it had revoked its action, without notice or hearing, for no assigned reason. The district court, in reaching its conclusion, evidently acted upon evidence before it, of which evidence we have not the benefit. Under the circumstances in which this matter reaches us, we are justified in either dismissing the appeal or in affirming the judgment appealed from upon the presumption of correctness, which attaches *prima facie* on appeal to the judgments of the district court. In view of the statement made by counsel that the board of police commissioners is in doubt in respect to the extent of its power of control over matters of new trial, and of that question being of a public character, which should be set at rest, we think it best to say that they are within the power and control of the board, to be exercised by it, in their discretion, if rules on the subject have not been adopted, but, if such have been adopted, then to be granted or refused under the terms of the rules; that, if a rehearing is once granted, its action is generally final, and not subject to revocation,—certainly not in the absence of legal cause shown contradictorily with the party interested. The power to undo is not as great as the power to do. In *Am. & Eng.*

Enc. Law, verbo "New Trial," the rule as to the order for a new trial, and its effect, is announced as follows: "The order of the court on a motion for a new trial is final, and cannot be set aside unless it was inadvertently given." "An order granting a new trial, as a general rule, vacates a former judgment, without any special order to set it aside, and sweeps away the verdict, and leaves the case as though no trial had been had." This latter statement covers the position taken before us by the appellee. He contends that the effect of the order granting a new trial was to sweep away the order of dismissal, and leave his case open for trial and decision; that the order of revocation was one beyond the power and authority of the board to make, and that he is entitled to require the board to hear and dispose of the charges preferred against him. We think he is entitled to that relief, and we reach this conclusion the more readily because we feel satisfied that the revoking order was not due to any change of opinion on the part of the board in respect to the correctness or propriety of its order granting a new trial, but by reason of its (erroneously) supposed want of authority to have granted it. Our judgment will have the effect of restoring the status as it existed prior to the order of revocation, leaving the order for a new trial standing as one granted in the exercise of its discretionary powers by the board, and placing matters where the board, when acting freely, placed them. See, on this subject, 24 *Am. Law Reg.* 531; *Williams v. Railroad Co.*, 110 N. C. 466, 15 S. E. 97; *Champion v. Board* (Dak.) 41 N. W. 739; *Mills v. Wilson* (Minn.) 60 N. W. 1083. For the reasons assigned, the judgment appealed from is hereby affirmed.

MONROE, J., having decided this case in the lower court, takes no part in the decision here.

(51 La. Ann. 900)

CENTRAL MANUFACTURING & LUMBER CO., Limited, v. MUTUAL BUILDING & HOMESTEAD ASS'N et al.
(No. 12,879.)

(Supreme Court of Louisiana. April 17, 1899.)

APPEAL—REVIEW.

The constitutionality of Act No. 180 of 1894 is not before the court on appeal.
(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

Action by the Central Manufacturing & Lumber Company, Limited, against the Mutual Building & Homestead Association and the Fidelity & Deposit Company. Judgment for plaintiff, and defendants appeal. Dismissed.

J. Zach. Spearing, for appellant Mutual Building & Homestead Ass'n. P. M. Milner, for appellant Fidelity & Deposit Co. of Maryland. Dart & Kernan, for appellee. Edwin T. Merrick, *amicus curiæ*.

BREAUX, J. Plaintiff sued the defendant the Mutual Building & Homestead Association for the price of materials used in the construction and erection of one of its buildings, and the Fidelity & Deposit Company, its surety, on a bond given to secure the association against the consequences growing out of non-payment of the furnisher of materials to erect the latter's building. The defendants are sued in solido for \$309.51, amount claimed. There being a constitutional question involved, the appeal lies to this court.

The facts are that the building material sold by plaintiff was actually used by the contractors in the construction of a building of the Mutual Building & Homestead Association, and that a bond was given by the contractors in favor of the association to protect it against a claim of material men and laborers; that the contractors left the city, and failed to pay the amount due to material men and others; and that, in consequence, plaintiff brings this suit to collect the amount of the contractors' indebtedness to it. The Fidelity & Deposit Company filed the exception of its pendens against its co-defendant (the Mutual Building & Homestead Association), called in warranty. It appears that, although the Fidelity & Deposit Company was already one of the parties defendant, the Mutual Building & Homestead Association asks to have the former—that is, the Fidelity & Deposit Company—cited in warranty. This demand, it appears, was dismissed on the ground of its pendens. From this decision the Mutual Building & Homestead Association appealed, although more than one year had elapsed since the judgment dismissing this demand had been rendered. The case was afterwards tried on the merits between the Central Manufacturing Company, Limited, plaintiff, and the Mutual Building & Homestead Association and the Fidelity & Deposit Company, defendants, without the presence of the Fidelity & Deposit Company as warrantors, and judgment was pronounced in favor of the Mutual Building & Homestead Association against plaintiff, dismissing the latter's demand, and in favor of the plaintiff, the Central Manufacturing & Lumber Company, Limited, against the Fidelity & Deposit Company for the amount claimed. The latter—that is, the Fidelity & Deposit Company—appealed to this court.

On Motion to Dismiss the Appeal of the Homestead Association.

The Mutual Building & Homestead Association took an appeal from the order dismissing its demand made to have the Fidelity & Deposit Company cited in warranty. More than 12 months had elapsed from the date of the judgment dismissing the call in warranty to the date that the Mutual Association moved for an appeal. Upon this point we found that, whether the judgment from which the Mutual Building & Homestead Association appeals was, as it contends, an interlocutory judgment, and not appealable, as it insists, it remains

as a fact that it was the only judgment from which the Mutual Building & Homestead Association appealed, and the time had elapsed within which to appeal. It is true that an appeal from a final judgment has the effect of bringing up for review the ruling of the court on interlocutory orders, but, on the other hand, it is well settled that an appeal from an interlocutory order has not the effect of securing a hearing from the final judgment. The motion to dismiss the appeal of the Mutual Building & Homestead Association is therefore sustained.

As relates to the other defendant, the Fidelity & Deposit Company, in this court it has filed an assignment of errors, setting forth in substance that, the court a qua having decided Act No. 180 of 1894 unconstitutional, the action of plaintiff was at an end; that the court a qua erred in holding that plaintiff had a direct action on the bond. This defendant, the Fidelity & Deposit Company, did not raise any question in the district court of the constitutionality of the law. No pleadings were filed in that view. Before this court the assignment of error shows that the district court declared a law unconstitutional. On that decision this defendant claims that the action against it fell; that it no longer can be held bound. But this does not present an issue on the part of this defendant of the unconstitutionality of Act No. 180 of 1894. That issue (unconstitutionality of a statute), we have frequently decided, should be reviewed in the lower court. If, however, we should hold that it can be urged on an assignment of error, the assignment of error here does not show that this defendant and warrantor seeks some right on the ground of the unconstitutionality of a law. For reasons assigned it is therefore ordered, adjudged, and decreed that the appeal in this case is dismissed.

(51 La. Ann. 130)

Succession of MANSON. (No. 12,905.)

(Supreme Court of Louisiana. Jan. 23, 1899.)

TUTORS AND WARDS—LEGAL MORTGAGE—RECORDING—VESTING TITLE—PROPERTY OF NATURAL TUTOR.

1. The effect of the registry laws is not so potent as to necessarily vest in a minor a legal mortgage on certain property standing on the records in the name of his natural tutor, when, in point of fact, it had never belonged to him. He had not assumed ownership over it, but had, ab initio, in the only instrument connecting him with the title, recognized the property to belong to another person.

2. The mortgage in favor of minors upon the property of their natural tutors to secure the fidelity of the tutors' administration is created by the law, and not the convention of parties. It is declared by the law to attach to the property of the tutors, not that apparently belonging to them. There may be cases where the mortgage would attach to property so circumstanced, but there are others where the mortgage should not be made to extend beyond the exact terms of the law.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Francis A. Monroe, Judge.

In the matter of the succession of Robert Manson. Rule by the Whitney National Bank on Lizzie D. Oliver and others. Judgment on the rule, and Oliver appeals. Affirmed.

Buck, Walshe & Buck and Samuel L. Gilmore, for appellant undertutor of Olive Manson. Harry H. Hall, for appellee Whitney Nat. Bank.

NICHOLLS, C. J. The Whitney National Bank took a rule in this case on Mrs. Lizzie D. Oliver, widow of Robert Manson, and now wife of James M. Pagaud, natural tutrix of her minor child, Olive Manson, on James M. Pagaud, co-tutor, and James J. Manson, undertutor, to show cause why the general mortgage resulting from the co-tutorship of the minor to secure the sum of \$83,213.54, as per certificate of the clerk of the civil district court, dated April 5, 1897, recorded in the mortgage office on the 5th of April, 1897, in Book 489, folio 604, should not be canceled and erased in so far as it rests upon or affects the following property: "Two certain lots of ground, together with the buildings and improvements thereon, and all the rights, ways, privileges, servitudes, and advantages thereunto appertaining and belonging, situated in the Sixth district of this city, designated by the Nos. 1 and 2 of square No. 23 on the original plan of the Fauborg Plaisance, bounded by Carondelet, Baronne, De La Chaise, and Louisiana avenue, and measuring each 30 feet, front, on Louisiana avenue, by a depth of 128 feet between parallel lines, lot No. 1 forming the corner of Louisiana avenue and Carondelet street," for the following reasons: That on the 17th of June the Whitney National Bank paid to William G. Mitchell the sum of \$5,000, payable in 30 days after date, to secure which sum Mitchell pledged to the bank his mortgage note, dated December 16, 1892, payable in one year from that date, for \$5,000, the note being identified with an act before J. C. Wenck, notary public of the same date, and by which Mitchell mortgaged and hypothecated the above-described property in favor of Frank W. Ellerman, or any future holder to secure the note. That on the 28th of October, 1897, the bank, in the absence of its regular attorneys, handed to the above counsel the mortgage note, requesting him to have executory process issue upon the same. That the counsel, aware of the absence of said directors of the bank from the city, and without being instructed by the president of the bank, but acting on his own motion, and solely for the purpose of more conveniently transferring the property mortgaged in case it should be necessary to bid it in at the sheriff's sale of the property, bid it in in the name of James M. Pagaud, who was the cashier of the bank, and had the civil sheriff of the parish of Orleans make title to him on the 23d of December, 1897. That said counsel was not informed,

and did not know, of the minor's mortgage against James M. Pagaud, nor of its inscription against the property. That Pagaud is, and was at the time, cashier of the bank, but never had, nor had he any, interest, direct or indirect, in either of the notes, nor in the property, nor in the bank's mortgage which rested upon it. That, as a precautionary measure against the death of Pagaud, a counter letter was duly executed by him at the time of sale, and delivered to the bank, recognizing the bank as the sole owner of the property. That, upon the bank finding a purchaser for the property, the certificate of mortgage requested by the purchaser showed an inscription of the minor's general mortgage against the property. That, as the property never belonged to Pagaud, who never had or has now the least right, title, or interest in or to the same, it belonging solely or exclusively to the bank, it was obvious the minor's mortgage was not legally attached to the property merely because it happened to be temporarily in the possession of the co-tutor. After hearing, the lower court rendered judgment, making the rule absolute, and directing the recorder of mortgages for the parish of Orleans to erase and cancel the mortgage above referred to. The defendants in rule thereupon took an appeal to this court.

The evidence shows that in October, 1897, the Whitney National Bank was the owner of a certain promissory note for \$5,000, made and subscribed by W. G. Mitchell to his own order, and by himself indorsed, dated December 16, 1892, and payable one year after date, which note was secured by special mortgage on certain property in the city of New Orleans. That on the 16th of October, 1897, this note and mortgage, being still owned by the bank, were handed by Mr. Whitney, one of its directors, to H. H. Hall, Esq., attorney at law, for foreclosure, the regular attorney of the bank being absent at that time. That Mr. Hall instituted proceedings by way of executory process against the property in the name of James M. Pagaud (who was then cashier of the bank), instead of in the name of the bank itself. That these proceedings culminated in a judicial sale on the 23d of December, 1897, at which the civil sheriff adjudicated the property to Harry H. Hall for account of James M. Pagaud, as being the last and highest bidder. That a sheriff's deed of the property was executed by the sheriff on the 7th of January, 1898, and was recorded on the same day in the conveyance office of the city of New Orleans. That in the meantime, on the very day of the adjudication (23d December, 1897), Mr. Pagaud signed an instrument in which he declared that whereas, at a sale made on the 23d of December, 1897, in the suit of James M. Pagaud v. W. G. Mitchell, he (Pagaud, plaintiff in said suit) became the adjudicatee and purchaser of certain property which he described (being the property mortgaged to secure the debt, and seized and sold to pay the same): Now, there-

fore, he, the said Pagaud, thereby acknowledged, in the presence of the undersigned witnesses, that he had purchased said property and held the same for the account of the Whitney National Bank, of New Orleans, and he thereby bound himself to make it a deed and transfer of the same without further consideration whenever thereto requested. This act was signed by C. S. West and George Q. Whitney, as witnesses, and was acknowledged by Pagaud, on the 18th of January, 1897, before A. G. Lapice, notary. It does not appear to have been recorded. The sheriff's deed was signed by Frank Marquez, civil sheriff, in the presence of Ernest Ricker and C. H. Baudeau as witnesses, but was signed by neither Hall nor Pagaud. The bank having found a purchaser for the property, the recorder of mortgages, at the instance of parties, furnished a certificate of the mortgages affecting the property in the name of James M. Pagaud, from which it appeared that it was affected by general mortgage to secure \$83,218 in favor of his stepdaughter, the minor, Olive Manson, resulting from James M. Pagaud's being co-tutor with his wife of said minor, Olive Manson, said mortgage dating from 5th of April, 1897. Upon ascertaining this fact, the Whitney Bank took out the rule against Mrs. Lizzie D. Oliver, wife of James M. Pagaud, James M. Pagaud, co-tutor, and James J. Manson, undertutor of the minor, from the judgment upon which rule this appeal was taken. The bank propounded interrogatories on facts and articles to James M. Pagaud and his wife, who answered the same under oath, declaring that neither the minor, Olive Manson, nor the succession of Robert Manson, nor Mr. nor Mrs. James M. Pagaud had then, or ever had, the slightest interest, right, title, or ownership in or to said property, or any claim against the same. That true it was that the adjudication of the property was made to James M. Pagaud, cashier of the Whitney National Bank, but it was simply as a matter of convenience for account of such bank, and James M. Pagaud had not then, nor had he ever had in the said property, any claim thereto, nor the slightest interest in and to the notes by virtue of which said property was sold, said notes having belonged exclusively to the Whitney National Bank. Mr. Hall testified that the note and mortgage which were foreclosed were handed to him for that purpose; that he caused executory process to issue; that he was informed that the board of directors of the bank did not have a quorum by reason of the fever prevailing in New Orleans; that when the property was adjudicated he, of his own motion, simply as a matter of convenience, and acting solely as the attorney of the bank, the only party in interest, bid in the property in the name of James M. Pagaud, who was the cashier of the bank; that the title should have been made to the bank, and would have been made to the bank, but that he thought the lack of a quorum might throw an obsta-

cle in the way of a prompt sale; that he expected to be able to transfer the property from the bank to a Mr. Fisher as soon as it had title; that he was not, of course, aware that any judgment or mortgages of any kind were recorded against Mr. Pagaud, nor did Mr. Pagaud mention the matter to him; that Mr. Pagaud had no individual interest of any kind whatever either in the notes in question or in the property, nor did he (Mr. Hall) represent Mr. Pagaud; that the entire matter was intrusted to him (Mr. Hall) by the Whitney National Bank, the sole party in interest, and he acted exclusively for the bank; that he did not consult the Whitney National Bank in this adjudication. James M. Pagaud, on the stand as an ordinary witness, testified that the note which was foreclosed belonged to the Whitney National Bank; that it was given to it by Mitchell for a loan of money to him; that he (Pagaud) had no interest in the note; that he was not aware at the time of the adjudication of the property to him that the property was to be placed in his name; that he heard of it afterwards; that he had no interest whatever in this transaction from beginning to end, nor in the property purchased. Mr. Hayden, president of the Whitney National Bank, stated that on the 17th of June, 1896, the Whitney National Bank loaned W. G. Mitchell \$5,000, and, to secure said loan, he pledged to the bank the promissory note in question; that James M. Pagaud had no interest whatever in it, or in the property directly or indirectly; that at the time of the foreclosure of the mortgage the yellow fever was prevailing in New Orleans, and all the directors of the bank were absent but one or two; that there was not a quorum in the city; that the board of directors had no meeting at that time; that it was impossible.

The evidence is conclusive that at no time had James M. Pagaud, in point of fact, an interest either in the note foreclosed upon in the suit of Pagaud v. Mitchell, or in the property which was judicially sold in that suit, though the title to the same was, by direction of Mr. Hall, placed in his name. Mr. Pagaud was not aware when the adjudication was made that it was proposed to make him appear as adjudicatee, and on the very day of the adjudication, and before the sheriff's deed was made out or recorded, he had signed an instrument in which he explicitly stated that, though the title was in his name, he held it for account of the bank. Mr. Hall was not authorized by the bank to institute proceedings in the name of Mr. Pagaud, nor authorized to place the property in Mr. Pagaud's name either by the Whitney National Bank or by Mr. Pagaud himself. The sheriff's deed was not signed by Mr. Pagaud, and there is no evidence anywhere connecting him (to this day) with the adjudication besides the recitals of the deed to which he was not a party other than the counter letter, which, while recognizing that the title had been taken in his name, in the very same instrument disclosed that he

had never been the owner of the property, but that he held it for account of the Whitney Bank. He never consented to be the owner of the property, or to incur the liability on his part which would have resulted had he become the adjudicatee at the judicial sale. Had any one caused the counter letter to have been recorded with a view of attempting to show a written consent by Mr. Pagaud of Mr. Hall's action, the instrument would show a disclaimer of title, and not an acceptance of ownership or ratification of the adjudication as made. At all events, the first and only act of Mr. Pagaud himself, connecting him with the transaction, would, while showing the placing the title in his name, disclose simultaneously that he was not, and had not been, the owner. *Gaillard v. Nicolas*, 9 La. Ann. 176. Had the Whitney Bank, on ascertaining that the adjudication had been made in the name of Pagaud, called upon him for the price, and he had refused to pay, denying the authority of Mr. Hall to act for him in making the purchase, and refusing to take any action whatever in respect to the matter, and thereupon the bank had instituted a suit against him (making the tutor and co-tutor and undertutor of the minor, Olive Manson, parties), alleging that he had never paid the purchase price and disclaimed ownership under the adjudication, and had prayed in view of the premises that the adjudication be decreed to have been to the Whitney Bank, and that Pagaud was not the adjudicatee, and had never had any interest in the property, and had the court rendered a decree as prayed for, we think that that portion of the decree which declared that Pagaud was not the adjudicatee, and that he had never had any interest in the property, would have effectually barred and disposed of any claim made for or in behalf of the minor, Olive Manson, that the property was struck by the general mortgage in favor of that minor, securing the faithful administration of her property by her mother as natural tutor, and her stepfather, Pagaud, as co-tutor, by reason of the fact that the title had stood registered under such circumstances in the name of Pagaud. The effect of the mere registry would not have been so potent as to vest in her a mortgage, when, in point of fact, the property had never belonged to the co-tutor, and he not only had never assumed ownership in it, but had, *ab initio*, recognized the property as belonging to the bank. This suit, though not precisely in that form, is one substantially to the same effect. The undertutor contends that, under the decision in *Association v. Hall*, 33 La. Ann. 49, the minor's mortgage cannot be removed in the manner attempted here; that it can only be removed by the giving of a special mortgage to the minor on other property. The decision in that case has no bearing in this. We are not dealing now with a case where a mortgage existing, in point of fact, in favor of a mortgagee, an attempt is being made to get rid of it, but with one where it is denied that the mortgage

ever had any existence at all, and the prayer is for a decree to that effect. The undertutor further claims that actual ownership in property is not essential to the existence of a mortgage against it in the name of the person in whose name it stands registered; that if a person places property in the name of another, or permits him to appear on the public records as owner, when he is not the actual owner, he is estopped from claiming ownership, as against parties who have dealt in good faith with the apparent owner on the strength of the public records; that the apparent must be taken for all legal purposes as the actual owner; that when registry is once made in the name of a merely apparent owner, and rights spring into existence from that state of facts, counter letters acknowledging the actual facts avail nothing against them. He cites article 2239 of the Revised Civil Code, which declares that "counter letters can have no effect against creditors, or bona fide purchasers; they are valid as to all others"; and he refers the court to *Bach v. Abbott*, 6 La. Ann. 809, and to *Stockton v. Craddock*, 4 La. Ann. 282. There is no question that if the actual owner places the title of his property in another person, and permits property actually his to stand on the records as that of another person, he must respect the rights of parties who have dealt in good faith with the apparent owner on the faith of the public records, and by reason of a condition of things superinduced or permitted by himself, and that whatever rights he has must be subordinated to those of those innocent third parties. (*Mercier v. Canonge*, 8 La. Ann. 87), and there is doubt that, if this situation exists, it cannot be undone by means of counter letters subsequently placed of record. *Stewart v. Newton*, 12 La. Ann. 622; *Succession of Tabary*, 31 La. Ann. 415. But this case is presented to us under an exceptional state of facts and exceptional conditions, and also freed from all questions of fraud or wrongdoing; the good faith of all parties being conceded. There is no doubt that if the Whitney Bank should permit the title to this property to remain on the records as that of Pagaud, and he should sell or conventionally mortgage the same as his property to parties dealing bona fide with him as owner, such sale or such mortgages would prevail over any rights of the bank. So, also, if parties should enter into contracts with Pagaud, dealing with him in making the same on the strength of the real property supposed to be owned by him by reason of the public records, and these parties should obtain judgments, and record them prior to the recording of counter letter, then these judicial mortgages would prime the rights of the bank; but neither this minor, nor any one acting in her behalf, has dealt with Pagaud on the strength of the records, showing the latter to be the ostensible owner of the property. The mother of the minor was entitled absolutely to be confirmed her natural tutor, without reference to any question as to

whether she had, or had not, property. The subsequent marriage of Pagaud with the mother of the minor carried with it, as a consequence, his co-tutorship of his stepdaughter. The tutorship and the co-tutorship preceded by a number of months the judicial sale made in the proceedings against Mitchell, and therefore no action of any kind touching the minor's interests was, in point of fact, predicated upon Pagaud's being the owner of the property. If the minor's mortgage were to attach, it would not be by reason of any equities in favor of the minor, but by reason of the court's holding that the registry law carried with it the attaching of the mortgage as the inexorable and unavoidable consequence *ipso facto* of the fact of the registry of the adjudication in the name of Pagaud, independently of any question as to whether he was actually the owner or not, whether the adjudication made to him had been so made either with his knowledge and consent, or with that of the seizing creditor, and regardless of any special facts or circumstances connected with the transaction. We are not prepared to give to the registry laws the sweeping effect contended for. The mortgage in favor of minors is not the result of contracts or dealings of parties with each other. It is created and given by the law itself. By article 3314 of the Revised Civil Code it is declared that minors have a legal mortgage on the property of their tutors as a security for their administration, and by article 322 of the Revised Civil Code that "the recording of the tutor's bond, or the certificate of the clerk which the law requires in the case of the appointment of tutor, operates as a legal mortgage in favor of the minor for the amount therein stated on all the immovable property of the tutor." The object fixed by the law as that to be affected by this mortgage is not property apparently belonging to the tutor, but "the property of the tutor." There may be cases where property apparently belonging to tutors would and should be properly charged with such a mortgage, but there are others where, by reason of their special facts, the law should not be extended beyond its exact terms, and where the situation should be confined to the property designated by itself as to be affected,—that is, to the property actually belonging to the tutor,—and we think the present to be one of such cases. It would be unjust and inequitable, under the circumstances developed by the evidence, to hold this property to have ever been affected by the minor's mortgage. For the reasons assigned, it is hereby ordered, adjudged, and decreed that the judgment appealed from be affirmed.

(51 La. Ann. 1011)

JENKINS v. MAGINNIS COTTON MILLS.
(No. 12,929.)

(Supreme Court of Louisiana. April 3, 1899.)

INJURY TO EMPLOYE—CONTRIBUTORY NEGLIGENCE.

1. Damages are claimed by plaintiff on the ground of defendant's negligence. Plaintiff, a

card grinder, had never before alone undertaken to remove flats on the endless chain of a carding machine. He was sent by the overseer to do this work, and was severely injured while at work. There were safe ways—two, at least—of removing the flats. They were the usual ways followed in removing them. Plaintiff chose the third manner of removing these flats,—a manner unusual, and very hazardous, in view of the fact that, the day before the accident, he, under the orders of the overseer, had removed the back plate, and had stripped a fast revolving cylinder of its covering. Plaintiff having chosen the dangerous manner of removing the flats, under the circumstances defendant is not responsible in damages.

2. An employé of mature years, employed in a line of work, who had assisted in another line of work, and is removed from the regular line, and set to work on the latter, without the presence and direction, as previously, of the overseer, and is injured, while at work, because of the unusual manner followed by him in doing the work, is without right to damages.

3. The danger was not unknown to the employé. It was plainly visible.

4. While an employer is expected to provide a safe place for his workman, and safe machinery, the employé should not unnecessarily expose himself to a visible danger.

5. The two cases cited by plaintiff require that employers shall exercise due care, and they were held responsible, as it appeared that the employé had no previous knowledge or acquaintance with the defective machinery causing the accident.

6. Lack of supervision of the factory (if there was such a lack) was not the proximate cause of the accident.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Fred. D. King, Judge.

Action by Charles H. Jenkins against the Maginnis Cotton Mills. Judgment for defendant, and plaintiff appeals. Affirmed.

Olegg & Quintero, for appellant. Samuel L. Gilmore, for appellee.

BREAUX, J. This was an action by plaintiff, sounding in damages, for the loss of a hand and forearm while in the employment of defendant. The following is a summary of the statement of plaintiff's petition and of defendant's answer: The petition sets forth that plaintiff was working at the Maginnis Cotton Mills as a card grinder, and that, under the overseer's order, out of his usual employment, he undertook to "mill a ring" in the carding machine, which machine was new, unusual, and dangerous; and that the work undertaken by him, under an order, as just stated, was the work of an overseer, as it required an expert workman in that line of work. He alleges further that by the negligence of the overseer a fly plate, which protected the operatives on the card engine, had been removed; that in removing and in laying down flats, which he had been set to do by order of the overseer, his hand was caught and destroyed; that he suffered great pain in consequence. Plaintiff complains also of the lack of supervision in defendant's factory. He claims damages in the sum of \$10,000. Defendant filed a plea of general denial, and specially denied that plaintiff suffered injury through its negligence, or that of its over-

seers, agents, or servants. It also denies that plaintiff was required by them to do work out of plaintiff's usual employment. It denies any act of negligence on its part, and specially alleges, in answer to plaintiff's charge of lack of supervision, that it had overseers enough for all purposes; and, further, that its machinery is the latest, safest, and of most improved patents.

The following is a summary of the facts: Plaintiff's hand was caught between the cylinder and the flats of a card machine, which was running at the time, and it (the hand), together with the forearm, was mangled and lacerated, resulting in his losing his hand and forearm. The machine by which plaintiff was injured was a Brooks-Doxey revolving flat card machine. Grinding the card was the usual employment of plaintiff. The occupation of plaintiff was not dangerous, as it consisted in sharpening the steel points of a card, and in repairing and resetting the card when it required repairing and resetting. As to how the accident happened, plaintiff testified as follows: "I was employed in the Maginnis Cotton Mills as a card grinder. On Wednesday evening, Lucas, the overseer, said he wanted to 'mill the ring' down on this card. We sat the milling machine on the card. Some of the flats of the machine had been taken off the evening before,—the day preceding the accident. He directed me to let him know when the flats he desired to take up would be up, and at a proper place, in order to take them off himself." In the morning of the day of the accident the witness called on the overseer, and said to him that the flats were up, and in the proper place for removal. He replied that he was quite busy and directed plaintiff to go back to the machine, and take off the flats himself at the place he indicated; whereupon plaintiff returned, and, after two of the flats had been removed, his arm was caught between the flats and the cylinder. Plaintiff swears that "milling the ring" and "setting the flats" was the overseer's work. He also said that he had been working three years and a half at the defendant's works, and since about two years he ground the Brooks and Doxey cards; that he had nothing to do, under his contract of employment, with anything else. He also stated that he was standing, at the time of the accident, on the outside of the frame of the machine. It appears that the day preceding the accident the fly plates had been removed by plaintiff, under the immediate direction of the overseer. Ward, an ex-overseer of defendant, who was no longer in the service of the cotton mills on the day of the accident, testified that the removal of the plate rendered the machine dangerous; that it is not otherwise dangerous. We are informed that, in order to gauge the machine, it is necessary to remove the flats, and that these flats can be removed when the machine is in operation as well as when it is still. This ex-overseer, Ward, testified that while employed by defendant company he did

the setting of the milling machine himself; that the flats, under his direction, were taken off on the side of the mill, and usually plaintiff took off the flats for him, or he took them off himself, but that he was around while they were being taken off; that he always took them off while the machine was in motion. "Milling a card," he said, was the work of an expert mechanic. A man not instructed in it could not do it. Another witness (Charles Andell), a "card grinder," as was plaintiff, who was at one time employed at the Maginnis Cotton Mills, swears that he also sometimes took off the flats from the cylinder, but that he did not help to put in the mill apparatus or machinery, or to adjust it; that he took off the flats when the machine was stopped. Richard, the superintendent in charge of the operations of the factory, swore that the one "milling the ring" or "setting the ring" cannot be hurt at all if he be careful and cautious. This witness testified that there is no danger in taking off the flats; that they are turned by hand by a proper appliance provided for the purpose; that plaintiff knew of this appliance. He also testified that, while it is possible to take off the flats when the machine is running, he did not consider it safe, either for the operator or the card; and that in removing a flat ordinarily, to do so safely, more especially if the machine be running, the operator or person directed to remove the flat should have an assistant; the removal should be done from the side, and not from the back of the machine; that it would be always dangerous to undertake, as did the plaintiff, to remove it from the back without assistance, if the mill was in operation. As relates to the fly plate or back plate, which plaintiff asserts had been removed, the witness said that it is a plate at the back of the machine, placed there to regulate the amount of waste made by the card. He also said that plaintiff had an assistant whenever he wanted to take off a flat. All he had to do was to give the order to get the assistant. The superintendent also testified: That plaintiff was a second hand, a "head grinder," a "suboverseer." That there was a superintendent at the factory, who had control of the entire force; after him, six overseers, each in charge of a department. The next are the second hand or subofficers. That in the room in which plaintiff worked there were two second hands. One was the plaintiff, who had supervision of the card, and the other had charge of the frame, and under them were the ordinary employes, who had no distinctive rank. Lucas, who had charge as overseer when the accident happened, assisted plaintiff in releasing himself from the grasp of the machine. He swears that plaintiff was inside of the card, between the frame and the cylinder. He also swears that employes should not take off flats while the machine is running, that plaintiff had all the assistance he wanted, and that he could have called any one to take off the flats at any time. He testified in the same

line as the superintendent. Another witness (Pasmere) testified that plaintiff was not at the side of the machine at the time of the accident, but at the back of the machine; and that, if plaintiff had asked his assistance in taking off the flats, he certainly would have given it; that he considered the machine very dangerous in the condition in which it was on the day of the accident and the day before, but that there would have been no danger if the card had been stopped before attempting to remove the flats; that it was the duty of the overseer to have the fly plate put on, and that, if he had ordered it to be put on, no one would have gotten hurt. The remaining facts are embodied in our opinion. Judgment was pronounced for defendant in the district court. Plaintiff appeals.

The contention is, as we gather from the record, that the failure of the overseer to replace the fly plate that had been taken off the day before the accident, the failure of the overseer to give due warning, just prior to the accident, at the time that he directed plaintiff to repair to the card machine and take off the flats, and the failure of the defendant to provide for more complete supervision of the factory by employing another overseer in the place of one who had left a few days before, were the proximate causes of the injury. On the other hand, the defendant contends that the fly plate had been removed by the plaintiff himself, and that it was his duty to return the fly plate where it belonged; that special notice of the overseer was not to be expected, as the plaintiff had been employed in the factory for more than two years as "head grinder," and that he must have known how to perform the work as directed, without exposing himself as he did; that posted notice was given him not to touch machinery while in motion; that, as "head grinder," he could have called an assistant, and performed the work without exposing himself, or that he might have stopped the machine. Whether plaintiff was doing expert work out of the scope of his employment presents one of the issues before us for decision. It is evident, in our opinion, that the "overseer" and the "head grinder" (the position which the plaintiff held) had respective duties to perform. There is evidence of record going to show that it was part of the work of the "head grinder" to take off the flats, while, on the other hand, there is evidence to the contrary. The evidence upon this point was not as full as it might have been. The superintendent of defendant's mill swore that it is the part of the head grinder's work to "mill the ring," and that his duty is also to "grind the card" and "remove the flats." While this is denied by other witnesses, the superintendent's testimony does not stand alone. Taking into account the whole evidence on this point, we are of the opinion that this work was usually done by the overseer, assisted by the "head grinder," and that the latter was never left to do this work alone. We infer the orders

of the overseer just before the accident were given from his office, instead, as theretofore, at the card machine itself; he intending, after the removal of the flats by plaintiff, to go to the machine himself, and verify the gauge, or gauge the machine himself. There were three ways, it appears, of carrying out the orders of the overseer. One was to call an assistant, stop the machine by transferring the belt from a fast to a loose pulley,—an easy matter, it appears. In this there was no risk. The superintendent said that this was the usual way, or the rule, at defendant's mill. After the machine is stopped with an appliance, by hands, the endless chain of flats is turned until the flats to be removed are on top of the chain of flats at a place where they are usually removed. There was no reason, as we appreciate the evidence, not to stop the machine. The stopping of the "milling of the ring" was of no moment. Besides, stopping would have been unavoidable to gauge or set the cards, a work which was to be done by the overseer in a few minutes. Another way is to stand on the side of the machine; the operative on one side, and his assistant on the other. We do not find, from the evidence, that there was any danger in removing flats save when the fly plate is removed. The back part of the machine is stripped and in motion. When the machine is in the condition last described, removal of the flats from the back is very hazardous. We have not found that even skilled mechanics attempt to remove the flats from the rear of the machine when the fly plate is removed and the machine is stripped. In order to ascertain if ever mechanics removed flats when the machine is stripped and in operation, we read the record with close and painstaking care, and did not find that such risks were taken. The record does not disclose why the unsafe manner of removing the flats was resorted to. We have dwelt upon this point of the case,—it has given us much concern,—and several times we thought that plaintiff should recover damages if it appeared by the evidence that in meeting with an accident he had only failed in exercising the skill exercised by others whom he had seen in the act of removing flats, or with whom he himself had removed flats. We have not found it possible from the record to conclude that he had failed in doing that which he had seen others do, for the method he adopted was not the only method of removing flats. Not having seen others remove flats from the rear of machines stripped and in motion, he was not led into believing that he was safe in the attempt. His act is not sustained or defended by any preceding similar attempt made by any one. There were two methods of removing the flats, entirely safe. Plaintiff chose the third, although no one else ever, so far as the record discloses, made such an attempt; and, in the second place, the condition of the machine, as brought on by his own manipulation (under the overseer's order, it is true), was entirely unsafe. The rule applicable has a number of

times been declared by the courts. It has always been held that it must appear, in order to recover damages, that the employé did not know of the danger, or had no reason to know of the risk to which he was himself exposed. We take it that when a change is made in a machine, unusual and unknown in the ordinary use of the machine, plaintiff, an employé, called upon to operate the machine, should be notified of the change. If, however, the change is made by the employé himself, under orders, notice of the change is no longer necessary. The question here arises, should he have been notified of the increased danger? In the first place, the risk was visible. In the second place, as there were two safe ways of doing the work, each passed by plaintiff, to adopt the third,—an entirely unusual manner of removing flats,—we find no warrant in disturbing the judgment. This court said, in *Carey v. Sellers*, 41 La. Ann. 500, 6 South. 813: "To maintain an action by a servant against a master, two elements must concur, viz. fault or knowledge on the part of the master, innocence of fault or ignorance of the danger on the part of the servant." We have read with close and careful attention the cited cases. They do not do away with the rule that by knowledge of danger a plaintiff accepts the increased risk, and, further, that one is without cause if his injury was proximately caused by his failure to adopt the course which a prudent man would here follow. Even in the case of injury to a minor, in a well-considered case the supreme court of New Jersey held: "The danger, if it existed, was an obvious one. The plaintiff was familiar with the machine, and knew as well as any one else the danger to be apprehended from working it. The law is entirely settled that under such circumstances the servant takes upon himself the risks incident to the employment, and that no action will lie against the master for injuries to a servant in such cases,"—citing *Foley v. Light Co.* (N. J. Sup.) 24 Atl. 487; *Buckley v. Manufacturing Co.* (N. Y. App.) 21 N. E. 717; and *Sullivan v. Manufacturing Co.*, 113 Mass. 396. "Nor is the fact that plaintiff was a minor material. He was 19 years of age,—old enough to fully appreciate the danger of operating the machine, and, consequently, took upon himself the risk incident to his employment, the same as a person of mature years,"—citing *Hickey v. Taaffe* (N. Y. App.) 12 N. E. 286. Under the weight of judicial authority, an employer, properly, we think, is expected to concern himself about the safety of the place at which his workmen are employed, and the efficiency and good condition of the machinery placed in their hands. We have read all the decisions upon the subject we could get, and have not found one carrying the rule as far. We would have to extend it, should we sustain plaintiff's demand. Regarding our own, we carefully considered the cited case of *James v. Lumber Co.*, 50 La. Ann. 717, 23 South. 469, in which we find,

quoting from the syllabus, covering the principles laid down in the decision: "It is negligence on the part of a foreman to call on one of the employés suddenly to take a dangerous position, without warning him of the risk and hazard of the employment, with which the employé had neither a previous knowledge nor acquaintance." In the other cited case—*Stucke v. Railroad Co.*, 50 La. Ann. 189, 23 South. 342—we held, in substance, that one cannot be understood as contracting to take upon himself risks which he neither knows nor suspects. Here we have found that the danger was visible, and that plaintiff had been at work on the machine of the factory since a number of years, and had, before then, taken off the pieces from the machine, in a manner not dangerous.

With reference to the lack of supervision, one of the complaints of plaintiff, as we take it, it does not appear that the least fault was found before the accident regarding the insufficiency of supervision of defendant's works. While it is true that one of the overseers had left a few weeks previous to the accident, and that the remaining overseer in charge of the works had succeeded to his duties, it does not appear that it was more than the latter could do. Plaintiff did not trace the cause of the accident to the fact that only one overseer had charge, where previously there were two. This would be a most remote cause, and not one for which it is possible to hold defendant liable for damages. For reasons assigned, the judgment appealed from is affirmed.

MONROE, J., takes no part, as he was not a member of the court when the case was heard.

On Application for Rehearing.

(May 1, 1899.)

WATKINS, J. The application is made solely on the ground that the court erred in finding the facts in certain enumerated particulars, which are stated in the brief of complainant's counsel, from which we make the following extract, viz.: "And now into court comes the plaintiff, and moves the court to grant a rehearing in this case, for the reasons hereafter assigned, to wit: (1) Because the court has erred in finding the facts, in this: It is conceded that the plaintiff, Jenkins, was injured in the defendant's mill on the day stated in the petition, while in the performance of a duty out of the line of his usual employment, specifically imposed upon him at that moment by this special order of his master, and under the master's eye. The specific order was to remove the flats from a machine which had been rendered highly dangerous by a change in its condition, by the order of the master. The changed condition from one of safety to one of danger was known to the master. The court finds as a matter of fact that an unsafe manner was resorted to, and

uses these expressions, namely: 'We have not found that even skilled mechanics attempt to remove the flats from the rear of the machine when the fly plate is removed, and the machine is stripped. In order to ascertain if ever mechanics removed flats when the machine is stripped and in operation, we read the record with close and painstaking care, and did not find that such risks were taken. The record does not disclose why the unsafe manner of removing the flats was resorted to.' Here the court has overlooked the fact that never in the history of the mill was it attempted to remove a flat when the card was stripped, when the fly plate was gone. The situation was a new one never presented to Jenkins before, one created by the master, the overseer, Lucas, existing within his view under his immediate supervision and control, and yet he ordered Jenkins to perform an act out of his line of duty in connection with this machinery in this novel situation. (2) Because the court finds that there was adequate supervision of the mill, when every fact in the record points to a different conclusion, and the whole record is a mathematical demonstration to the contrary. (3) Because the court finds that there were safe ways of removing the flats. There could be no safe way with the machinery in the condition in which it was when Jenkins was sent to work upon it. (4) Because it was a non sequitur that, if Jenkins stripped the machine the day before, under the orders of the overseer, and knew that its condition had been changed, that, therefore, afterward, in obedience to any order that the overseer might give, Jenkins assumed any and all risks. Wherefore the plaintiff now humbly prays that this honorable court set aside its decree, and grant him a rehearing, and that the former decree be reversed, and that there be judgment for the plaintiff as in his petition prayed for."

The plaintiff was employed by the defendant as a card grinder, and had been engaged at the defendant's works for about 3½ years. Under his employment he had nothing to do with anything else. The fly plates had been removed by the plaintiff on the day preceding the accident, and under the immediate direction of the overseer. He admits, as a witness, that he was standing, at the time of the accident, on the outside of the frame of the machine. The plaintiff was quite accustomed to removing the flats. Other card grinders make similar statements. The plaintiff was a head-grinder, or suboverseer, and was always furnished with an assistant when one was required. The superintendent states that he assisted plaintiff from the grasp of the machine, after the accident happened, and that he was inside of the card frame, and between the frame and the cylinder. Another witness testified that the plaintiff, at the time of the accident, was not at the side of the machine, but at the back of it, where he should not have been. These, with other facts of the case, which are cited in our opinion, to say the least put the plain-

tiff partially in fault. He acted in a great measure upon his own judgment and responsibility.

Our investigation of this case has only served to reassure us of the correctness of the opinion at first entertained. Our attention has, however, been arrested by what appears to us to be some very censorious observations which are contained in the brief of plaintiff's counsel, and among the number are the following, viz: "This honorable court has attempted, and it does in its opinion seek, to exempt the company from the operation of this rule, and from the performance of a plain, simple duty. There is nothing occult or mysterious about this rule. It is not unjust or unphilosophical. It is good and right, and universally applicable. To avoid the force of this to find an avenue of escape for the defendant, this court says that it has not found that skilled mechanics attempt to remove flats from the machine when the fly plate is removed and the machine is stripped." Again: "Will the court presume that a sane man of ordinary endowments would deliberately thrust his right hand and forearm between revolving cylinders and flats clothed with steel wires, to have that hand and forearm torn into a space of seven one-thousandths of an inch, and shreaded as the cotton is carded?" Again: "The rule that a servant accepts the usual risks of his employment is by the court in this case stretched to cover not only usual employment, but unusual employment, because, forsooth, they say a skilled mechanic would have known of the danger." Again: "So, then, to say that at this moment there was adequate supervision of this mill is as if one standing under an August sky, in the open sunlight, while all about him was bathed in the brilliancy of the noonday sun, were to close his eyes, and declare that there was no evidence that the sun was shining."

While this court is at all times willing to accord the largest latitude—liberty, if you will—to the losing counsel in a cause to be heard on briefs upon application for rehearing, and approve and applaud their earnestness and eloquence in argument, yet it cannot permit them to pass the proper and legitimate bounds of criticism of its opinions. Knowing counsel as well as we do, and taking cognizance of the pleasant relations they have always sustained to the court, we feel impressed with the belief that the censure which is reasonably to be inferred from the foregoing remarks was, rather, the expression of undue zeal in the cause of their client. The friction thus brought about by counsel is equally unfortunate for them and the court, but we feel disposed to pass the matter by, in the earnest hope and belief that we shall have no occasion to mention the subject again. Rehearing refused.

MONROE, J., takes no part, as he was not a member of the court when the case was submitted.

(51 La. Ann. 785)

STATE ex rel. WEBB v. DEBAILLON,
Judge. (No. 13,126.)

(Supreme Court of Louisiana. April 5, 1899.)

TERMS OF COURT—DURATION.

The general assembly did not, in enacting Act No. 163 of 1898, have in view, in directing district judges to fix terms of court, to control them in the length of time during which they should actually hold court in the different parishes, but to have designated in advance certain periods as "terms of court," with a view of furnishing the basis to public officials for fixing dates for drawing juries, or doing other acts which, under existing laws, had to be done a certain number of days before sessions of court. (Syllabus by the Court.)

Application by the state, on the relation of Thomas F. Webb, Jr., for writs of mandamus and prohibition against C. Debaillon, judge of the Seventeenth judicial district court for the parish of Lafayette. Refused.

Plaintiff represents: That he instituted in the district court for the parish of Lafayette, several months ago, a suit against one Sam Mouton, coupled with writs of attachment. That said suit is still pending and undecided. That, in compliance with provisions of Act No. 163 of 1898, the judge of the Seventeenth judicial district court has fixed by rules of his court the sittings or terms thereof for the parishes of Lafayette and Vermillion, composing said district. That, according to said rules, the next regular terms of said court, after its present term at Lafayette, are to begin as follows: For the parish of Vermillion, on the first Tuesday of April; for the parish of Lafayette, on the fourth Monday of April. That the provisions of Act No. 163 of 1898 are mandatory. That under the same the general assembly has defined and fixed the ministerial duties of the judges of the several district courts, leaving no discretion in the exercise thereof as long as the terms or sittings remain unchanged by the rules fixing the terms, and it is the absolute duty of the judge of the Seventeenth judicial district court to hold a session of the court at Lafayette, in accordance with the terms fixed by said court under the provisions of Act No. 163 of 1898, and there to sit as the public business may require. That the Seventeenth district court is now in session (March 24, 1899) at Lafayette, and has been since the second Tuesday of March, 1899,—the date fixed under said rules. That said above-mentioned cause was fixed for trial for Thursday, March 16, 1899, since the preceding term of said court at Lafayette, under the rules of said court authorizing such a fixing for the next ensuing session. That, on account of other public business before said court taken up for trial, said cause could not be reached. That the remainder of the present session is already taken up for the trial of cases pending before said court, and fixed before Monday, the 20th of March, 1899. That, being unable to secure a trial of said cause at the present session of said court for causes beyond his control, and desiring to secure a

trial of same at the earliest time under the rules of said court fixing said terms as aforesaid under the laws and constitution of the state, he applied, by motion in open court, on Monday, the 20th of March, to fix the trial of said cause for the 24th of April, 1899, the first day of the next ensuing term being the fourth Monday of said month, but that the judge arbitrarily refused to allow said fixing, on the ground, among others, that Act No. 163 was unconstitutional, and that the business pending before the court in the parish of Vermillion would require a more extended term than that fixed, under the terms of said act, by the rules of court aforesaid, refusing thereby to hold any session of his said court as fixed by said rules, or before the public business of Vermillion parish was disposed of. That the question involved was one of public interest. That the refusal of the judge was a denial of justice, and furnished a proper occasion for the exercise of the supervisory powers of the supreme court. In view of the premises, petitioner prayed for a writ of mandamus, directed to the judge of the Seventeenth judicial district court, commanding him to allow the fixing of said cause as prayed for, and to hold court, and to try said cause at the April term, under the rules fixing said terms of court, and for a writ of prohibition prohibiting the said judge from holding court in the parish of Vermillion in contravention of said rules of court fixing said term in Lafayette, and of Act No. 163 of 1898. The district judge assigned as reasons why the applications should not be granted. That Act No. 163 of 1898 was unconstitutional and violative of article 117 of the constitution of 1898. That that article provides: "District courts shall hold continuous sessions during ten months of the year. That in districts composed of more than one parish the judge shall sit alternately in each parish as the public business might require, and that the provisions of the article should go into effect upon the adoption of the constitution." That the provisions of that article are mandatory on all district judges without the act of 1898; being self-operative, not requiring any action of the general assembly to give it force and effect. That Act No. 163 of 1898 further contravened article 117 of the constitution, in that the general assembly undertook without warrant of law, and in direct violation of the terms of said article, to prescribe the duration of the sessions of district courts composed of more than one parish, and denied to district judges the right to sit alternately in each parish as the public business might require. The judge admitted that he did fix the sessions of the Seventeenth judicial district court under Act No. 163 of 1898, and averred that he had used all due diligence to dispose of the public business in his district within the time limited for a duration of a term of court under that article, but he had been unable, through no fault of his, to accomplish results satisfactory to himself and parties in interest. He returned that he would

open a criminal and civil session of court in Vermillion parish on Tuesday, April 4, 1899; that he could not, with all due diligence, complete the public business in that parish in three weeks; that the court of appeals of the Third circuit would hold an adjourned meeting of that court in Vermillion parish on April 20, 1899, and would remain in session some three days; that, during the session of the court of appeals, the district court could not be in session; that, with one additional week of court in Vermillion parish, he could clear the jail and have his dockets, both criminal and civil, well in hand and in a satisfactory condition; that, through no fault of his or the district attorney, litigants or their counsel, and witnesses, the dockets were so congested that the public business required a prolongation of the session beginning in Vermillion on April 4, 1899, one week longer. He returned that the old system of fixing terms was suspended by the one continuous term of 10 months, and the general assembly was without warrant in law to adopt a system which had been rejected by the framers of the constitution, and in direct violation of the express provisions of the constitution; that, in adopting the course complained of, he was actuated solely by a deep sense of duty imposed upon him by law; and that he advised the bar in open court of his intended action, so as to enable them to invoke such remedy as they were entitled to, to protect the interests of their clients. He referred the court to Act No. 163 of 1898, Const. 1898, art. 117, and *State v. Voorhies* (La.; decided by it on June 24, 1898) 24 South. 132. Act No. 163 of 1898, referred to in the pleadings, was approved July 14, 1898. It is entitled: "An act relative to sessions of district courts throughout the state, the parish of Orleans excepted, and to carry out the provisions of article 117 of the constitution; to confer on district judges certain powers in relation to the conduct of business before said courts and regulating the practice and proceedings thereof." Its second section provides that "in districts composed of more than one parish the judge shall sit alternately in each parish and the sessions from one parish to the other parish shall be continuous, provided that no session in any parish of a district shall be fixed for less than one week, or more than three weeks as the public business may require. The district judge shall, by an order of court, fix a date for the holding of the sessions in each parish, which order shall be entered on the minutes of the court, and published at least three times in the official journal in each parish, and, after being so fixed, no change shall be made in such order within less than one year thereafter." Its third section provides that it is the intent and meaning of article 117 of the constitution that district courts shall always be open, and the proceedings held to be in open court while the judge is on the bench, and that the fixing of sessions in districts composed of more than one parish shall not affect the authority or duty of the

court to sit at any time in any of the parishes when the public interests may require it. Article 117 of the constitution, which it is the declared object of Act No. 163 to carry into effect, directs that district courts shall hold continuous sessions for ten months of the year for districts composed of more than one parish, and the judge shall sit alternately in each parish as the public business may require.

O. C. Mouton, for relator. C. Debaillon, pro se.

NICHOLLS, C. J. (after stating the facts). The district judge having returned to us that he cannot do justice in a three-weeks term in Vermillion parish to the public business therein, and that for that reason, availing himself of the provisions of article 117 of the constitution, he intended to prolong the session one week longer than the longest time fixed for a session by Act No. 163 of 1898, which session would terminate on April 20, 1899, and having assigned as a further reason for his course that three days at least of the April term in Vermillion would be taken up by the adjourned term of the court of appeals of the Third circuit, we do not feel ourselves justified to have issued the mandamus prayed for. Article 117 of the constitution directs that the district judges shall sit alternately in each parish as the public business may require. It is not claimed that the judge's statement that the condition of the public business in Vermillion is such as to require an extended term is not well founded. His action is not arbitrary because it may chance to work hardship or delay in some particular case or cases. It is the general public interest which has to be consulted. The legislature cannot control this matter by an iron-cast rule molded in advance to govern length of sessions; nor do we think that such was the intention of the general assembly. The fourth section of Act No. 163 declares expressly that the fixing of terms shall not affect the authority or duty of the district judge to sit at any time in any of the parishes of his district when the public interest may require. We think the general assembly did not have in view, in directing district judges to fix terms of court, to control them in the length of time during which they should actually hold court in the different parishes, but to designate in advance certain periods as "terms of court," with a view of furnishing the basis to public officials for fixing dates for drawing the venire, or doing other acts which, under existing laws, may have to be done so many days before sessions of court.

It does not follow that the fixing of such dates would carry with it the necessity of opening the sessions at the time fixed should public exigencies require the prolongation of a prior session in another parish. The judge could order an adjournment of the opening to a day fixed, of which all parties in interest would be informed and to which they should conform. In that way matters would not be left in a condition of constant uncertainty.

For the reasons assigned, it is ordered that relator's application for writs of mandamus and prohibition be, and is hereby, refused.

(61 La. Ann. 955)

SINCER et al. v. ALVERSON et al. (No. 13,091.)¹

(Supreme Court of Louisiana. April 3, 1899.)

CORPORATIONS—APPOINTMENT OF RECEIVERS.

1. The provisions of Act No. 159 of 1898 authorize the judges of the district court throughout the state and of the civil district court for the parish of Orleans to appoint receivers to take charge of the property and business of corporations at the instance of any stockholder or creditors, when the directors or other officers of the corporation are jeopardizing the rights of stockholders or creditors by grossly mismanaging the business, or by committing acts *ultra vires*, or by wasting, misusing, or misapplying the property or funds of the corporation.

2. As that statute is the most recent and pertinent expression of legislative will upon the subject, it is necessarily controlling.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; George H. Théard, Judge.

Action by Louis Sincer and others against W. D. Alverson and the W. D. Alverson Company, Limited. Judgment for defendants, and plaintiffs appeal. Reversed.

Lazarus & Luce, for appellants. Hornor & Godchaux (George W. Flynn, of counsel), for appellees.

WATKINS, J. This proceeding is one taken *ex parte* by stockholders of the defendant corporation for the appointment of a receiver, and the judge declined to make the appointment as proposed; but granted in lieu thereof an order for the respondents to show cause upon a designated day why a receiver should not be appointed. On the day designated the rule was tried, and on the proof administered pro and con the judge a quo refused to make the appointment, and the plaintiffs have appealed.

The grounds upon which the plaintiffs demand the appointment of a receiver are as follows, substantially, viz.: That they are the owners and holders of a majority of the shares of the capital stock of the corporation, as follows, viz.: Louis Sincer, 20 shares; William Hanna, 15 shares; E. H. Hatry, 5 shares; M. Kenney, 3 shares; Otto Walther, as owner, 5 shares; Otto Walther, as pledgee, 23 shares; George O'Connor, 5 shares; Thomas O'Connor, Jr., 2 shares. That they represent 55 shares of the capital stock, aggregating 100 in all, of \$100 each,—that is to say, \$10,000; and that one of the plaintiffs holds in pledge 23 shares in addition, making 78 shares in all. That, while Louis Sincer is the president of said corporation, and a member of the board of directors, which is charged with the administration of its affairs, he has been practically excluded therefrom by the action of the

defendant W. D. Alverson, who is the secretary and treasurer; said Alverson having assumed and exercised control and conduct of the business of said company. That he has so conducted its affairs, in the management aforesaid, as "to have entailed heavy and severe losses upon the corporation, defaulting upon its credit, and impairing its capital stock." That, against the protest of petitioners as stockholders, said Alverson has issued obligations in the name of the corporation, and has made use of same for his personal benefit, and applied the proceeds of the discount of same to his own advantage, and to the detriment of the corporation. That, being in possession of the assets of the corporation, he has secreted same, and is making an effort to make way with and remove the same. That they have made repeated efforts, but in vain, to obtain from said Alverson a statement of the business of the corporation, as well as an accounting of its resources and disbursements, its assets and its liabilities; but that he has refused and declined to do, assigning as his reason therefor that petitioners had no right to make a demand of him. That, if said defendant is allowed to continue to manage and administer the affairs and business of the corporation, it will result in the loss and destruction of its property, and "entail upon petitioners, as stockholders, a loss of their investments in the capital stock of said company." (Our italics.) The answer of the defendant is that the company's affairs have been well managed by said Alverson, and that no complaint has been made to him or to the board of directors as to any mismanagement on his part; that there are no pressing creditors demanding payment of their claims; that the annual meeting of the stockholders of the corporation is to be held under the charter on the 6th day of February next, and, if the plaintiffs then desire to change the management of the corporation, a majority of the stockholders can then do so. They aver that, if a receiver is appointed, the credit of the corporation will be destroyed, and, if said Alverson is enjoined from managing the affairs of the corporation, great loss will be entailed, "which will result in the corporation being unable to pay its creditors." They specially deny "that plaintiffs hold a majority of the shares of the capital stock of said corporation; and they aver that a majority of the holders of the capital stock are well satisfied with the administration of its affairs by W. D. Alverson, and are willing that he should be retained in the management of the corporation." Taking the statement of the answer as absolutely true for the purpose of the argument, it is evident that the plaintiffs would obtain no relief from the grievances of which they complain at the contemplated stockholders' meeting.

It further appears from the statement of the assets and liabilities of the corporation which is appended to the transcript that it is in-

¹ Rehearing denied May 1, 1899.

solvent. The showing made is as follows, viz.:

By invoice of stock in hand.....	\$4,049 00
Open accounts due.....	1,493 93
Cash on hand.....	225 09
Total	\$5,778 02
To bills payable, etc.....	2,848 24
Balance credit	\$2,929 78

But this showing does not take into account the capital stock of \$10,000; and if a settlement were effected on that basis,—accepting all of the bills payable, as well as the \$500 of small open accounts, as equivalent to cash,—a loss of \$7,070.22, to the stockholders in the aggregate, results; or, in other words, the stockholders would realize about 25 per cent. on the dollar of their investment.

As further illustrating the situation of affairs, W. D. Alverson places himself upon the aforesaid statement as a creditor of the corporation for \$1,189, balance due him on salary. Not only so, but he enters upon said statement the following list of the shareholders of the corporation, viz.: W. D. Alverson, shares 53; F. J. Matthews, shares 2; E. E. Hatry, shares 5; W. J. Kane, shares 2; O. Walther, shares 5; M. Kenney, shares 3; George W. O'Connor, shares 5; L. Sincer, shares 20; Mr. K. Alverson, shares 5. On this representation of W. D. Alverson's holding of stock, it is quite apparent why he should be well satisfied with the administration of the affairs of the corporation, the whole of which was under his control. By comparing the two statements with respect to the shareholders, it will be observed that the only holdings of the plaintiffs which the defendants dispute are those of William Hanna, 15 shares, and Thomas O'Connor, Jr., 2 shares; and it further appears that all the stockholders enumerated on the defendants' list are plaintiffs in this suit, except four, viz.: W. D. Alverson, F. J. Matthews, W. J. Kane, and Mr. K. Alverson. W. D. Alverson, as a witness, gave to the court the following information as to the 15 shares of stock of William Hanna which were omitted from his (witness') list, viz.: "Q. How many shares has Mr. William Hanna? A. None. Q. Did you not sell William Hanna fifteen shares of this stock, and then transfer them to him, and didn't he subsequently deliver them to you for the purpose of having the transfer recorded? A. I sold him thirty shares. Q. You sold him thirty shares? A. Yes, thirty shares. Q. Did you deliver the certificates to him? A. No, sir. Q. In whose possession are those certificates? A. Mine, sir. Q. How many of them belonged to him? A. He has paid on account of that stock— Q. How much has he paid on account? A. He has paid \$1,000.00. Q. Did you deliver fifteen shares to him, and indorse on the reverse of it your delivery of stock to Mr. Hanna,—stock in the W. D. Alverson Company, Limited? A. I did, sir. Q. Have you that stock? A. Yes, sir. Q. Is it in your possession? A. Yes, sir; it is at the office of the company. Q. It was turned over

to you for the purpose of making a transfer on the books of the company, was it not? A. No, sir; it was returned to me as security until he paid the balance due on it. Q. How much did you sell it for? A. Seventy-five cents on the dollar. Q. Fifteen shares was (worth) \$1,000.00? A. No, sir; \$1,125.00." But this witness had just answered that he had already paid him \$1,000, and, consequently, there remained due only \$125, for which he held the whole amount as security. The following is the further evidence of said witness, viz.: "Q. Leaving Mr. Hanna's fifteen shares out, how many shares would you have? A. Well, the difference between fifteen and sixty. Q. Then you would have forty-five shares? A. Yes, sir. * * * Q. Mr. Louis Sincer has twenty shares? A. Yes, sir. Q. Mr. William Hanna has fifteen shares, if they are his? A. Yes, sir. Q. Mr. E. E. Hatry has five shares? A. Yes, sir. Q. And Mr. Maurice Kenney has three shares? A. Yes, sir. Q. And Mr. Otto Walther has five shares? A. Yes, sir. Q. And Mr. George O'Connor has five shares? A. Yes, sir. Q. And Mr. Thomas O'Connor has two shares? A. Yes, sir. Q. And Mr. Matthews two shares? A. Yes, sir. Q. That makes fifty-seven shares of stock? A. Yes, if there is no mistake in solution. Q. Then you would not have forty-five shares of stock, if Mr. Hanna's stock was his stock,—you would only have forty-three? A. Yes, sir; that is correct, as you counted it." The result of that investigation is that the defendant W. D. Alverson, as a witness, testified that the list of stockholders as given in the plaintiffs' petition is absolutely correct, and that they are the owners of 55 shares of stock,—a clear majority of 5, not counting the 23 shares which are claimed by Otto Walther, as being in pledge to him. That being his sworn testimony, the further result is that the representation made in his statement of assets and liabilities of the corporation as to its shareholders is incorrect. Instead of his having 53, as stated, he had that number less the 15 shares of William Hanna he had erroneously claimed; and, after deducting them, he would have only 38. The following interrogation of that witness shows in a very clear light the absolute control W. D. Alverson had of the affairs of the corporation, and the great difficulty there was in removing him from the management of the corporation: "Q. And that was brought to the attention of the stockholders and officers of the corporation, was it? A. It was very seldom that we got the board of directors together. Q. Wasn't the reason of that because you had assumed exclusive control and management of the business, and was indifferent to their wishes or request? A. No, sir. Q. That is not so? A. That is not so, sir. Q. When was the last statement that you rendered an accounting to stockholders of the company? A. On the 11th of January. Q. On the 11th of January, this year? A. Yes, sir; 1899. Q. Who was present? A. Myself and Mr. Sincer, the president. Q. Was

anybody else present? A. No, sir. Q. Who else was on the board of directors? A. Mr. Matthews. Q. Hasn't he resigned from the board? A. His resignation was not accepted. Q. Who didn't accept the resignation? A. The board of directors. Q. Who is the board of directors? A. Myself, Mr. Sincer, and Mr. Matthews. Q. Mr. Matthews resigned, and you refused to accept his resignation? A. He sent in his resignation resigning as an officer of the board, but there was no quorum to act on his resignation. Q. How many shares has Mr. Matthews? A. He owns two shares. Q. Two shares? A. Yes, sir." Now, conceding W. D. Alverson to be the owner of 43 shares, and Matthews 2,—45 for the two,—and Louis Sincer only 20 shares, the acceptance of the resignation of Matthews depended entirely on the pleasure of Alverson; and, as there were but three members in the board, and Matthews not acting, a deadlock was brought about, and gave Alverson absolute control of the corporation. And, as matters stood when this suit was filed, and upon the showing made upon the books of the company accrediting Alverson with 53 shares of the stock, he would have held as complete control over a meeting of stockholders as he had over the company's board of directors.

There is another subject of discussion which is deserving of mention, and to which we will make reference by quoting the testimony, viz.: "Q. Did you execute to Mr. Otto Walther three notes for \$100, each in the name of W. D. Alverson Company, Limited, and give your stock as collateral security, and use the proceeds realized from those notes for your own personal benefit and advantage? A. I pledged to Mr. Walther three or four notes in connection with the stock certificates as collateral on a *personal loan*. (Our italics.) Q. Whose notes did you execute in order to obtain the loan? A. The notes were executed by the W. D. Alverson Company, Limited, to W. D. Alverson. Q. You executed notes of the corporation to your own order? A. No, sir; the corporation executed them. Q. Who executed and authorized the execution of those notes? A. The board of directors. Q. How was that done? A. That was done under a resolution of the board of directors. Q. Who participated in that proceeding? A. The president, Mr. Louis Sincer, and Mr. F. J. Matthews. Q. You have those notes in your possession? A. Yes, sir. Q. Will you produce them? A. No, sir; I can't now. But they are at the office of the company. Q. You took them up this morning? A. Yes, I took them up this morning. Q. Would you recognize a copy of those notes if you were shown them? Look here. (Witness shown a document.) A. This is correct, sir. Q. Did the president of the company sign those notes? A. No, sir. (The notes were then offered in evidence.) Q. These are the four notes which you executed in the name of the W. D. Alverson Company, Limited? A. The W. D. Alverson Company did it. Q. *Who drew the notes?*

A. The secretary and treasurer, per resolution of the board of directors. Q. That is you? A. Yes, sir. (Our italics). Q. You say that Mr. Louis Sincer, the president, voted for that resolution? A. Yes, sir. Q. Are you positive of that? A. Yes, sir. Q. Well, if he voted for the resolution, why is it that he didn't sign the note? A. There was a resolution passed by the board of directors empowering the secretary and treasurer to sign checks and notes only for the benefit of the company. Q. That resolution was passed? A. Yes, sir. Q. Didn't you call upon Mr. Sincer, your president, within the past thirty days, and request him to sign a note of \$500, and didn't he decline to sign it? A. Yes, sir. Q. Why, then, if the resolution existed, did you call on Mr. Sincer, the president, to sign the note? A. I gave the note to Mr. Walther, and Mr. Walther said that he took the note, and they refused to discount the note unless the president would put his name on it as an indorser," etc. From the foregoing, it is quite evident that the defendant did, as secretary and treasurer of the corporation, execute notes in the name of the corporation, and pledge the same, with his certificate of stock attached as collateral, to Otto Walther, one of the plaintiffs in this suit, and used the proceeds for a personal loan to him; that he drew these notes as secretary and treasurer of the company, without having procured the signature of the president, and notwithstanding he declined to sign same upon application made to him; and that the resolution of the board of directors, on the authority of which he claimed to have acted, only authorized the issuance of notes "for the benefit of the company," as he states in his testimony. It is further noticeable that, notwithstanding W. D. Alverson, as a witness, admits that he had taken up those notes on the day on which he testified, they find no place in the statement of assets and liabilities of the corporation which he produced in court, and which is annexed to the transcript, and brought up in the original. Considering the fact that the stock of the company, on the defendant's own showing, is not worth more than 25 cents on the dollar; that the management of the company's affairs by the defendant, as secretary and treasurer, has been unsatisfactory and injurious, and that he has confessedly disposed of shares of its stock at 75 cents on the dollar; that the board of directors is practically composed of two directors,—the third having tendered his resignation,—and those two unable to agree upon any proposition; that the defendant W. D. Alverson having obtained possession, as secretary and treasurer, of 15 shares of the capital stock of the corporation in trust for another, employed and used same as his own, with the apparent purpose of having it appear, as it is alleged in his answer, that he was the holder of the majority of stock, and exercised same to the detriment of the corporation,—we are of opinion that plaintiffs, as stockholders, have made out a case entitling them to have a re-

ceiver appointed for the purpose of taking charge of its assets and affairs, and winding up the business of the corporation according to law. The law seems to contemplate just such a case as this record discloses. The "civil district court of the parish of Orleans [is] empowered to appoint receivers to take charge of the property and business of corporations * * * at the instance of any stockholder or creditor when the directors or other officers of the corporation are jeopardizing the rights of stockholders or creditors by grossly mismanaging the business, or by committing acts ultra vires, or by wasting, misusing, or misapplying the property or funds of the corporation." Acts 1898, No. 159, § 1, par. 2. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled and reversed; and it is further ordered and decreed that a receiver be appointed to take charge of all the property, rights, and credits of the W. D. Alverson Company, Limited, with full power and authority under the law to wind up and liquidate its business and affairs, and that W. D. Alverson individually be adjudged to pay all costs of both courts.

NICHOLLS, C. J., absent from the argument, and MONROE, J., who became a member of the court after its submission, took no part in the decision of this case.

(51 La. Ann. 880)

POLICE JURY OF POINTE COUPEE PARISH et al. v. BOUANCHAND et al.
(No. 12,643.)

(Supreme Court of Louisiana. April 3, 1899.)

SUPREME COURT—JURISDICTION—TAXATION—BUDGET—LIQUOR LICENSE—PARISH EXPENDITURES—PUBLICATION OF ESTIMATE.

1. A fact not reviewable on appeal. The amount involved was less than \$2,000. Questions regarding facts were not considered, as they were not within the court's jurisdiction on an appeal.

2. Budget. As a question of law, the court finds that there was no forming of the budget as required by statute, and, it follows, no advertisement. The statute requires the publicity of the finances of the parish, and one of the first steps towards publicity is the forming of a budget and its advertisement.

3. Admission. Giving effect to an admission on record, the court amends the judgment by reducing the amount of the license from \$100 to \$50.

On Rehearing.

1. Essential that the estimate of parish expenditures required by Rev. St. § 2745, should be published at least 80 days before the tax predicated upon it is levied.

2. Requisites of the estimate or budget pointed out, and the same held deficient in instant case because not naming the year for which made.

3. Not necessary this estimate should be more than a statement of probable expenses. Not required to embrace anything relating to parish resources or revenues.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Pointe Coupée; E. B. Talbot, Judge.

Action by the police jury of Pointe Coupée parish and E. G. Beuker, sheriff and tax collector, against L. Bouanchand & Co. and others. Judgment for plaintiffs, and defendants appeal. Amended and affirmed.

Olivier O. Provosty, for appellants. Albin Provosty (Francis C. Zacharie, of counsel), for appellees.

BREAUX, J. Plaintiffs brought this suit to recover \$100, with interest and attorney's fee, for the parish retail liquor license for the year 1897. The demand of the parish was dismissed, and the sheriff and tax collector remains as the plaintiff, having the right to stand in judgment in the case. Defendants set forth as reasons for not paying the tax: (1) That the police jury did not levy the license tax for the year 1897; (2) that the police jury did not adopt and publish the estimates of expenses as the law requires; (3) that that body did not grade the license, and that the ordinance was not adopted with reference to grade as required; (4) that it, after the license ordinance had been adopted, reduced the amount of the license from \$100 to \$50. It appears as a fact that defendants sold liquor at retail in 1897, as alleged by plaintiff. At a meeting of the police jury, held some time after, at which the license was imposed, the police jury, defendants contend, reduced the ordinance imposing a license from \$100 to \$50. With reference to the adoption of the ordinance imposing licenses, we do not deem it necessary to make further statement than that the question turned entirely upon the facts. The only facts with reference to the budget are that the publication of the police jury's proceedings show, as relates to the budget, that immediately preceding the list, which we will insert in a moment, the following is set forth: "It was moved and seconded that the public printing be awarded to the paper elected as the official organ," a matter not connected with the budget. Immediately after, we found the following:

Parish Schedule.

Coroner's inquest	\$ 500
Constable's fees	295
Justice of the peace	210
Parish printing	800
Clerk of the police jury	200
Bridges, dykes, and roads	2,500
Road syndic	890
Parish advisory	100
Contingent expenses	2,000
Jail	8,500
	\$10,495

The record of the minutes of the police jury, as printed in the official journal, is followed by reference to another matter not connected with the budget. We do not deem it necessary to make a further statement of the facts relating to the other grounds of defense, as the case is disposed of without passing upon them. The judge of the court a qua found that the ordinance levying the license had been adopted as alleged, and held that the defendants are responsible for the amount

claimed. From this judgment, defendants appeal.

As relates to defendants' position that the license claimed by plaintiff was never levied, and that no ordinance upon the subject was adopted by the police jury, even if it be a fact, we do not think, under our jurisprudence, that it presents a question which we should consider and decide on appeal from the judgment of the district court. The judge of that court found as a fact that a license tax was levied. This ends the matter, as relates to appeal, though it may be that it would be possible to have it considered under our supervisory jurisdiction. Weighing evidence, and ascertaining on which side is the preponderance, whether for the plaintiff or defendants, does not present a question of law. We think that our conclusion on this point finds support in the following cases: *State v. Callac*, 45 La. Ann. 29, 12 South. 119; *State v. Dean*, 45 La. Ann. 441, 12 South. 489; *Board v. Norman*, 51 La. Ann. —, 25 South. 401 (recently decided).

2. We pass to the next question presented, to wit, that the facts do not sustain plaintiff's averment that a budget was adopted, and it does not appear that a budget was published. As this involves a public question, and is not limited to facts exclusively, we think it should be considered on appeal. In order to arrive at a satisfactory conclusion on this point, it is necessary, in the first place, to determine what are the principal requisites of a budget. In the language of the statute, police juries are required, before deciding on the amount of taxes to be assessed, to make out an estimate exhibiting the various items of expense, and cause them to be published. In other words, they should prepare the budget. Now, it is well understood that a budget is intended to show the basis of the finances of the year and resources relied upon for the payment of the debts. Clearness and satisfactory order are dependent, in a great part, at least, upon a somewhat accurate estimate of expenses and resources. While some of the resources may be in excess, and while there may be unforeseen expenses at the time of the adoption of the budget, yet, as far as possible, the estimates should be made with a view to present the complete tableau of revenues and expenses. We are confident that a budget would not be objectionable, even though some of the estimates were more or less than the amount realized from taxation or parochial revenues. But it should be made to appear that some estimate has been made to get as near as possible to a correct basis. While it is true that a budget may be binding, though wanting in some respects, here there is nothing to show that certain important items were considered at all, and one of the items among those left out is licenses. In our judgment, the resources of the parish, as relates to revenues for 12 months, should be well considered, and something in the minutes should indicate that they have been con-

sidered, and that, after consideration, the budget was adopted; otherwise, we do not see how it can be concluded that a budget has been adopted, such as made requisite under the words of the statute. It should certainly be voted upon, to show that it has met with the approval of the police jury. Here no vote appears to have been taken. It should also indicate, inferentially at least, that, after having received the approval of the body, it was submitted to the taxpayers. We have found no such approval, and nothing upon which to base a conclusive inference, save that the list was found in the public minutes, but an incomplete list, without indicating the purpose in view in inserting it in the public report. The question is not *res nova*. It received the consideration of this court in a well-considered decision years ago, in which the court took occasion to say, in substance, that the formality was not intended to be perfunctorily observed, but that it was the essential step in the administration of parochial finances. The reason for the levying of the tax and the license is service to be gotten in return, and the reason for the expense of the tax is the same; that is, service. Thus service is the first and last purpose of taxation, both as relates to the state and the parishes; and all statutes requiring that information should be given to the taxpayer, both as relates to the imposition of the tax and the expense of the disbursements of the taxes, should be given, that all may know, if they choose to inform themselves, that the levying of taxes and expenditures have received required attention. We think that in this case there was not sufficient compliance with the statute, and therefore we are compelled to reverse the judgment appealed from.

3. Defendants averred that they are not tax resistors, and that they desire to pay the amount of \$50, instead of the \$100, as ordained at the last meeting, at which they say the amount of license was fixed at \$50. We have naught to do with this matter save to enter up a judgment in accordance with their prayer. It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by reducing the license from \$100 to \$50, and, as thus amended, the judgment appealed from is hereby affirmed. Costs of appeal to be paid by appellees.

MONROE, J., takes no part, as he was not a member of the court when this case was heard.

On Defendants' Application for Rehearing.
(April 10, 1899.)

PER CURIAM. We took as basis for our decree an ordinance of the parish of Pointe Coupée reducing licenses (as had been fixed by an ordinance of a prior date) from \$100 to \$50, and upon that basis we condemned the defendants to pay a license of \$50 penalties and the fee of attorney who represented the

tax collector. Upon a re-examination of the ordinance we concluded that it could have no effect save to the extent that the appellants and defendants chose to give it effect by an admission. Without the admission it could not possibly, in our view, have any effect. We adhere to our previous decision that defendants must pay the licenses fixed in that amount (\$50), but we do not think that they should be condemned to pay the penalty and attorney's fee. The proposition being a plain one, we amend the judgment without granting a rehearing, as we do not consider argument necessary. It is therefore ordered, adjudged, and decreed that our original decree be, and is hereby, amended by leaving unchanged the amount as heretofore from \$100 to \$50, and by striking from the judgment all amounts heretofore decreed due for penalty and attorney's fee. Sole amount due by each of the taxpayers will now be \$50. As thus amended, the original decree is affirmed. Appellees shall pay the cost of appeal.

This amendment is made, without prejudice to the rights of plaintiffs should they apply for a rehearing.

Application by Plaintiff for Rehearing.

(May 1, 1899.)

BLANCHARD, J. Section 2745, Rev. St., lays it down precisely that, before the police juries of the several parishes of the state shall fix and decide on the amount of parish taxes to be assessed for the current year, they must cause to be made out an estimate exhibiting the various items of expenditure for such year, and shall cause the same to be published in the official newspaper of the parish (if there be one) at least 30 days before the meeting of the jury is held at which the amount of taxes to be assessed for the year is agreed on, and the assessment ordered. This estimate may be called by any appropriate name, such as "schedule," "budget," "statement," "tableau," "estimate," etc. It should be prepared with care, and with reasonable attention to detail. It should be formally adopted by the requisite vote of the police jury, should be inscribed in the book of minutes, and should be published in the official organ of the parish at least 30 days previous to action by the jury fixing the amount of parish taxes for the year, and ordering its levy and collection. We do not think the statute merely requires one publication 30 days in advance of the action of the jury. We think the law rather means that the publication shall be made several times, — say four or five times during the 30 days, or at least once a week during that time. But we do not here decide that it must be published more than once during the 30 days. It is not necessary to the determination of the instant case to so decide. We leave that, therefore, as an open question. But this estimate, or schedule, or statement, or budget, or tableau should state the year for which it is made, and the publication of the same should

name the year for which it is adopted; that is to say, if it is the schedule of expenditures for 1897, the advertisement of it inserted in the official organ should so state. In the instant case there was but one insertion in the official organ of anything approaching to an estimate of parish expenditures. This was on June 6, 1896. It was merely headed, "Parish Schedule." It did not recite for what year it was intended. There was nothing in it or about it to indicate that the police jury had ever adopted it as an estimate of parish expenditures for the year 1896 or the year 1897. Nor did the minutes of the jury with which it was incorporated supply this information. As an estimate of parish expenditures, therefore, for either of the years named, it was a dismal failure. It was not a compliance with the law, and this license tax sought to be imposed herein, predicated upon it, is not enforceable. It is not necessary, however, in preparing and publishing the annual budget or estimate of parish expenditures, to include in it anything relating to the parish resources or revenues. This is not required by the statute. The decree of this court heretofore handed down entering up judgment for \$50 license against each of the defendants is based upon their statement in argument and brief that they conceded a liability to that extent, based upon action of the police jury subsequent to the formal levying of the license tax sued for. It was therefore immaterial whether what the jury did in this regard was or was not properly and legally done, so far as the license for \$50 is concerned. Defendants admit their liability to this extent, and agree to judgment against them therefor. This is ample warrant for such judgment. Rehearing refused.

MONROE, J., takes no part, as he was not a member of this court when the case was submitted.

(51 La. Ann. 780)

L'HOTE et al. v. FULHAM. (No. 12,955.)
(Supreme Court of Louisiana. April 17, 1899.)

FIXTURES—FORECLOSURE.

The purchaser of property sold at sheriff's sale in foreclosure of a mortgage does not acquire, under his purchase, the chandeliers and brackets placed in the dwelling house thereon by the owner. They are movables, not immobilized by destination.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Nicholas H. Rightor, Judge.

Action by L'Hote & Co. against William C. Fulham. Judgment for plaintiffs. On levy of execution D. G. Baldwin filed interpleas and third opposition. Judgment for plaintiff, and third opponent appeals. Affirmed.

The plaintiffs, having obtained judgment against the defendant, issued execution thereon, and seized certain chandeliers, mantel ornaments, and other articles alleged to belong to W. C. Fulham, but which were in the posses-

sion of D. G. Baldwin. The latter filed his intervention and third opposition, alleging that he was the owner of the articles seized, inasmuch as he had purchased at foreclosure sales the buildings in which they were situated, and, as they were immovable by destination, they were subject to the mortgage foreclosed, and passed by the sheriff's sale to the purchaser of the real estate. L'Hote & Co. answered, pleading the general issue. The district court rendered judgment in favor of L'Hote & Co., the seizing creditors, and third opponent appealed.

Appellant, in his brief, presents the following as the statement of his case: "In June, 1895, the defendant mortgaged in favor of the estates of D. C. and H. C. McCan various lots of ground in New Orleans, with all the buildings, improvements, rights, privileges, advantages, and servitudes thereon. Mrs. Stemple, as tutrix of the minor heirs of McCan, owners of the mortgage notes, caused executory process to issue. After the writs of seizure and sale were in the sheriff's hands, the parties agreed that 'the property herein seized under executory process should be sold for cash, the defendant hereby waiving the prematurity of the principal mortgage note held by plaintiffs; and it is further agreed that the civil sheriff be authorized to cause plans of the property to be made, so that each house embraced in the mortgage property may be sold separately.' The properties sold under these foreclosure proceedings were duly advertised by the sheriff: No. 1817 Napoleon avenue was described as being 'a handsome two-story and attic frame residence, containing ten rooms, bath, pantry, etc., also four rooms in attic. All modern conveniences.' No. 1910 Berlin street was described in the advertisement as follows: 'The buildings thereon, bearing the new municipal number 1910 Berlin street, being modern two-story frame residence, containing nine rooms, galleries, bath, and all modern conveniences.' No. 1838 Berlin street, as being 'modern, handsome, two-story and attic frame residence, containing ten rooms, bath, pantries, and three rooms in attic; all conveniences.' No. 1925 Berlin street, as 'containing reception hall, four bedrooms, closet outhouse, curtains, bedroom, and woodshed, and bath room, electric bells, speaking tubes, etc.' No. 1922 Berlin street, as 'being modern two-story frame residence, nine rooms, halls, galleries, baths, pantries, etc., walls handsomely papered, hardwood mantels, electric bells, etc., banquettes and yard paved with schillinger, gas, waterworks, etc.' No. 1829 Napoleon avenue, as 'being modern two-story frame residence, containing twelve rooms, galleries, bath, all modern conveniences.' These properties, together with all the improvements, were leased by Fulham to different parties before the time of the seizure in this case. Defendant Fulham was present at the sale, and made no objection to the adjudication of the several properties to the opponent. The things seized in No. 1829

Napoleon avenue were contained in the property occupied by Thomas J. Duggan as tenant. He had been there five or six years. They were put in by W. C. Fulham. Those in No. 1929 Napoleon avenue, occupied by Mrs. Woeste, were put in there by the owner, Fulham. Those in No. 1817 Napoleon avenue, occupied by Mrs. Rice, who had been living there as tenant for seven years, were in the house since she had lived there. Those in No. 1817 Berlin street, occupied by S. H. Kennedy, were all there when the tenant took possession, except the brass lights in the fourth bedroom, which had been there for three years. The third opponent, as purchaser, took possession of the properties as well as the things contained within, and remained in continuous possession until the articles were seized on October 17, 1896, following the sale." Opponent, in his brief, laid considerable stress upon the terms of the advertisement of the property, upon defendant's consent that "the houses should be sold separately," the presence of the owner at the sale, his making no opposition thereat, nor to the purchaser's taking possession, and upon article 480 of the Revised Civil Code, which provides that "the sale or gift of a house with all that is in it does not include the money nor the credits nor other rights which may be in the house; all other movable effects are included." He referred the court to articles 468, 2489, 2490, Id.; to Merlin, Repertoire de Jurisprudence, verbo "Accessoire," p. 109; to Funk v. Brigaldi, 4 Daly, 359; to Sewall v. Angerstein, 18 Law T. (N. S.) 300; to Johnson's Ex'r v. Wiseman's Ex'r, 4 Metc. (Ky.) 357; to 2 Marcade, p. 333 et seq., and to Mackie v. Smith, 5 La. Ann. 717. Appellee referred the court to articles 468, 469, Rev. Civ. Code; 5 Laurent, pp. 539, 540, 543, § 434; also Id. p. 547, par. 441, "Cassation," 17, Jan., 1859; Id., 578; Sacre v. Klein, Sirey, 80—I—406; Sirey, 59—I—519; Id. 78—I—353; Id. 80—2—332; Jarechi v. Society, 79 Pa. St. 403; Vaughan v. Haldeman, 33 Pa. St. 522; Rogers v. Crow, 40 Mo. 91; Towne v. Fiske, 127 Mass. 125; Guthrie v. Jones, 108 Mass. 191; McKeage v. Insurance Co., 81 N. Y. 38; Montague v. Dent, 10 Rich. Law, 135; Funk v. Brigaldi, 4 Daly, 359; Harper v. Bank, 15 La. Ann. 136; and Lapene v. McCan, 28 La. Ann. 749.

E. Howard McCaleb, for appellant. Howe, Spencer & Cocke, for appellees.

NICHOLLS, C. J. (after stating the facts). The third opponent's claim to the ownership of the articles seized in this case by the plaintiffs is by virtue of having become the owner of certain real estate sold at sheriff's sale under executory process at the suit of holders of notes bearing mortgage upon the same. The properties sold belonged, some of them, to W. C. Fulham; others to his son, W. F. Fulham. Some of the articles seized by L'Hote & Co. were at the time of the sheriff's sale in the houses belonging to the son, but all of

them belonged to the father. The properties were at the time of the sheriff's sale under lease to different persons. They are not before the court, and the case is submitted to us freed from examination as to what their rights as lessees are or would be in the premises. The only parties before us are the third opponent and the seizing creditors, and the only issue raised and to be decided is one of ownership. The rights of the third opponent are to be tested by what he acquired at the sheriff's sale, made in enforcement of the two sets of mortgages. We find nothing in the record which would estop either W. C. Fulham or his creditors from claiming the actual ownership to be in the former, if such was the actual fact. The circumstance that the different properties were, by consent, sold separately from the others covered by the same mortgage does not broaden the mortgage, and make it include more on each separate property than would have been included in it had the property mortgaged been sold in entirety as mortgaged; nor does the presence of W. C. Fulham at the sale cause any difference in the rights and obligations of parties from what they would have been had he been absent. If the purchaser at the sale obtained everything that the mortgage legally called for, he can have no grounds of complaint. The case is not one showing a sale of house "with all that is in it," and therefore article 480 of the Revised Civil Code has no bearing upon the rights of parties. The third opponent relies upon the provisions of articles 468, 469, *Id.* The first (article 468) declares that "things which the owner of a tract of land has placed upon it for its service and improvement are immovable by destination. Thus the following things are immovable by destination, when they have been placed by the owner for the service and improvement of a tract of land, to wit: * * * All such movables as the owner has attached permanently to the tenement or the building are likewise immovable by destination." The second (article 469) declares that "the owner is supposed to have attached to his tenement or building forever such movables as are affixed to the same with plaster or mortar, or such as cannot be taken off without being broken or injured, or without breaking or injuring the part of the building to which they are attached." The cabinet mantelpieces seized are movable beyond question, not being attached to the building. The chandeliers and brackets placed in the houses of W. F. Fulham are also movables, not having been placed therein by the owner of the property itself. The only articles seized as to the ownership of which there can be any serious question are the chandeliers and the brass brackets in the houses which belonged to W. C. Fulham. Opponent's counsel refers us to the case of *Mackie v. Smith*, 5 La. Ann. 717, as holding that the cases specified in article 460 of the present Code cannot be construed as limiting the general disposition of the law, but that the article "embraces all

cases in which the movables have been placed by the owner *ad integrandum domum*." The questions propounded by him to the different witnesses were directed to showing that there were gas pipes connected with the different buildings; that the chandeliers and brackets were attached to these pipes, and gas could not be used in the buildings without them; that the chandeliers and brackets were placed in the buildings for their use and improvement, and most of them were in the leased premises before they were leased, and placed there for the use of the tenants. The evidence showed that the chandeliers were screwed on to the gas pipes as usual and customary, but they were capable of being detached by unscrewing, and taken away, without breaking or taking away the pipes or defacing the walls. Two of the witnesses stated that the chandeliers were necessary for the use of the buildings, in order to use gas, while another stated that drop lights might be substituted for them, that these particular chandeliers might be replaced by others. Counsel for the seizing creditors insists that, in order to immobilize movables in a dwelling house by means of destination, it is necessary that there should be a permanent attachment of the same to the buildings; that the Revised Civil Code, in article 480, had declared what was considered a permanent attachment; that it said, in substance, that things permanently attached are: (1) Those which are affixed to the building with plaster or mortar; (2) such as cannot be taken off without being broken or injured; (3) such as could not be taken off without breaking or injuring the part of the building to which they are attached. He contends that, even if this law be not restricted (as contended by Laurent, and other commentators) to the exact kind of attachment specifically declared by it, it could not be construed so as to cover any sort of attachment less durable or permanent than those it did specify. The syllabus in the case of *Mackie v. Smith*, referred to by opponent, is to the effect that, "where mirrors have been set in the wall by making recesses therein, which recesses would be left in their rough state if the mirrors were removed, they would be considered attached permanently to the building, and are included in a sale of the building." The property in that case had been sold at a judicial sale for the purpose of making a partition among the heirs in the succession of Benjamin Story. The report of the case shows that, after Mr. Story had purchased the mirrors, recesses $4\frac{1}{2}$ inches deep were cut in the walls of the room to receive them; that they were placed in these recesses, and secured in their places by means of architraves, or large wooden frames, which were nailed to plugs of hard wood fastened to the wall. The frames of the mirrors had grooves in them corresponding to a tongue in the architrave, and nails were driven from one to the other to make the glass more secure. The recesses were left rough and unfinished, the glasses

and architraves clearly intended as a permanent furnishing of the wall. The court, in its opinion, said it had only to inquire whether, under article 459 of the Code (new article 468), the mirrors had been attached permanently to the building by the deceased; that, if they were, the purchaser had acquired them; that it was shown that they could be removed without being broken or injured; that it was contended that they might have been removed without breaking or injuring the part of the building to which they were attached; and that, as the case came under none of the provisions of article 460 of the Code (new article 469), the judgment of the district court adverse to the claimed rights of the purchaser should be affirmed. The court said that on this latter question of fact the testimony was conflicting, and that, if the cases specified in article 460 could be construed as limiting the general disposition of the preceding article, it would have paid great deference to the opinion of the district judge, but it did not think that interpretation could be sustained; that article 459 provided that all such movables as the owner had attached permanently to the building are immovable by destination; that it embraced all cases in which the movables had been placed by the owner *ad integrandum domum*, and, when none of the presumptions established by article 460 exist, the fact might be shown by any competent evidence,—citing 2 Toullier, p. 8, No. 16; 4 Duranton, p. 63, No. 68. The court said it was difficult to find a case more strictly falling within the letter and spirit of article 459 of the Code; that the Code of France provided that, if a niche is made in a wall to receive a statue placed there, though in no manner attached to the building, it became immovable by destination; and such, it thought, was the Roman law; that the case presented was a stronger one for the application of the rule. Holding that the mirrors passed to the purchaser of the building, the supreme court reversed the judgment below. The facts of the cited case were much stronger for the purchaser than are those of the present one. The mirrors, as placed in the rough recesses made in the wall, were practically embodied in, and formed part of, the building itself, and the court not only reached that conclusion, but also the conclusion that such had been the intention of Mr. Story; that he had not contemplated a removal of the mirrors from their assigned place, but fixed them there as a permanency. We do not think there is a fair parallelism between that case and the one at bar, either as to the intentions of the owner in placing the movables in the building, in the mode which they were attached thereto, or their situation after they were so attached. Chandeliers and brackets, so far from being attached to gas pipes and to the walls of buildings with reference to their remaining there permanently, are prepared with direct reference to facility of detachment and removal. It is true that when

there are gas pipes connected with a building, and the occupants of the house desire to make use thereof, some means have to be resorted to to make use of the same; but chandeliers are not the only means of doing so, and when they are used they are so arranged as to be susceptible of easy change or alteration. Neither the chandeliers themselves, the pipes with which they are connected, nor the walls through which the pipes are passed, are in the slightest degree injured by their removal. The only object for their attachment to the pipes to which they are joined is to enable them to be utilized for the time being, just as fastenings of various kinds have to be resorted to to hold different movable objects temporarily in position for present use. We think that jurisprudence generally recognizes that chandeliers placed in a dwelling house by the owner thereof are movables, though, in order to be made use of, they have to be connected with pipes which are themselves considered immovable by destination. That is our own interpretation of the law. For the reasons assigned, the judgment appealed from is hereby affirmed.

(76 Miss. 955)

PRATT et al. v. HARGREAVES et al.

(Supreme Court of Mississippi. May 8, 1890.)

WILLS—PROBATE—INJUNCTION.

1. Devisees of a will cannot enjoin real actions by the heirs at law until the will is duly probated in state where the action is brought.
2. Pending proceedings for the probate of a will, the devisees cannot test its validity in another proceeding.

Appeal from chancery court, Harrison county; N. C. Hill, Chancellor.

Bill by George King Pratt and others against Bella P. Hargreaves and others. There was a decree for defendants, and complainants appeal. Affirmed.

Plaintiffs filed their bill against defendants alleging that on June 4, 1890, one Mrs. Louisa J. Bidwell, who was then a citizen and resident of New Orleans, La., made, published, and declared, in the presence of Felix J. Puig, Thomas H. Lavogue, George F. Wharton, and George O. Preot, her last will, whereby, after making a small specific bequest to Mrs. Louisa Moore Pratt, she devised and bequeathed all the rest of her property and estate to the children of George K. Pratt and Mrs. Louisa Moore Pratt, who were then living, and such other children of said Pratt and his wife as might thereafter be born, and appointed said George K. Pratt as executor of the will; that said will was executed pursuant to the laws of Louisiana, and was made in the form known in that state as a "nuncupative will," by notarial act,—that is, the original will was written out at length on the record of notarial acts of George O. Preot, a notary public of New Orleans, and was subscribed on said notarial record by said Mrs. Louisa J. Bidwell and said witnesses on said

record, and that such will became and is a part of the public records of Louisiana; that on the 19th day of May, 1897, said George K. Pratt, executor, presented said will, pursuant to the laws of Louisiana, to the civil district court of the parish of Orleans, in said state, for probate, and said will was duly admitted to probate in said court; that thereafter, on August 6, 1897, said Pratt, executor, filed his petition in the chancery court of Harrison county, Miss., setting forth the facts in regard to the execution of the will, and of the action of the civil district court in admitting same to probate, and obtained and presented with said petition the sheets of the record containing said will, which said Preet, notary public, permitted to be temporarily detached for the purpose, but that on account of said sheets of paper containing said will being a part of the notarial record of said notary public, and as such public record of Louisiana, the chancery court of Harrison county ordered and decreed that the clerk make and file in the record of said proceeding for the probate of said will a duly-certified copy of said will, which was accordingly done, and said original will was then delivered back to said George C. Preet; that the defendants to this bill entered their appearance in said cause, filing a caveat against the probate of said will, asserting that it was procured by undue influence exercised by said George K. Pratt, father of complainants, and also that said Louisa J. Bidwell was a citizen of Mississippi at the time of her decease; that at the February term, 1898, of said court, the question as to the domicile of said testatrix at the time of her decease was submitted to the court by agreement, and the court found, from the facts offered, that said Louisa J. Bidwell was, at the time of her decease, a citizen of Harrison county, Miss., and denying the said petitioner, Pratt, the right to probate said will or the authenticated copy; that an appeal was prosecuted by said Pratt from said decision of the chancellor, and the action of the court, in its finding as to the domicile of said testatrix, was affirmed, but the case reversed on the other issues involved; that since the domicile of said testatrix has been determined by the court to have been, at the time of her decease, in Harrison county, Miss.; that complainants, the devisees named in the will, have exhausted every resource in their power to obtain from said George Preet, notary public, the said original will, without avail; that the certified copy of the will filed with the bill, and the copy made by the clerk of Harrison county circuit court, are true, faithful, and exact copies of said will; that said testatrix left real and personal property in Harrison county, and that complainants are the children of said George K. Pratt and Mrs. Louisa Moore Pratt; that on March 29, 1898, the defendants began, in the circuit court of Harrison county, an action of ejectment against one Caton, a tenant of complainants, for the possession of a parcel of land

belonging to said testatrix at the time of her decease, which is now pending; that subsequently said defendants instituted an action of unlawful entry and detainer before a justice of the peace for the same land, and obtained a judgment therefor, from which judgment complainants took an appeal to the circuit court, where the cause is now pending; that said suits for possession have been begun by defendants as heirs at law of said Louisa J. Bidwell, and by threatening said Preet with prosecutions, and preventing the production and probate of the will until the action for the possession is tried, and thereby prevent and render impossible the introduction and use of said will as evidence of title in complainants; that, upon the probate of said will, the title of complainants will relate back to the death of said testatrix, and that said defendants are wholly insolvent, and, if permitted to recover said property under said possessory actions, the entire rental value of said lands would be lost to complainants. The bill prays that said defendants, Bella P. Hargreaves and Agnes E. Cary, may be restrained from interfering with said Preet to prevent the production of said will, and that Preet may be compelled to produce it, and that, in case the court is unable to compel its production, said will may be established by secondary evidence, and admitted to probate; that pending the hearing of the cause, and for the purpose of protecting and preserving the rights of all parties, the prosecution of said possessory actions may be restrained; and for general relief. Defendants demurred to this bill, principally on the grounds that it presented no ground for relief, and that the action of the testatrix in changing her domicile to Mississippi, after executing her will in this form, operated as a revocation of the will in so far as it affected property in Mississippi. Upon the hearing, the demurrer was sustained, and the bill dismissed. From this decree an appeal was prosecuted.

J. I. Ford and Frank Johnston, for appellants. T. M. Miller and T. V. Noland, for appellees.

WOODS, C. J. The demurrer to the bill of appellants was properly sustained. Until the will under which appellants claim has been probated, the devisees could not introduce it in evidence to show title. It is true that, when probated, the will must relate back to the death of the testatrix, but until probated the devisees have no standing in court authorizing them to enjoin the prosecution of suits at law by the heirs at law. The title to the property is cast upon them by law, and there it will remain until probate of the will, when first the devisees will have the only evidence admissible to show their title. Mr. Pomeroy, in his work on Equity Jurisprudence (volume 3, § 1158), says: "The doctrine seems to be general, if not universal, throughout the states, that a court of equity will not recog-

nize nor act upon a will of land or of personalty until it has been admitted to probate." The author shows why the contrary doctrine formerly prevailed in England, and why it no longer prevails there. And in *Schouler, Ex'r's*, § 58, this language is used: "In general, the necessity for a probate is fully sustained by modern practice in England and in this country, * * * and neither the temporal courts in England, nor the courts of law and equity in the United States, will take cognizance of the testamentary papers, or of the rights dependent on them, until after their proper probate." In our own state, it has been held that a foreign executor cannot maintain an action of ejectment to recover land in this state without first taking out letters testamentary here; and that, though the will had been probated here. *Sims v. Hodges*, 65 Miss. 211, 3 South. 457. And in *Fotherree v. Lawrence*, 30 Miss. 416, this court said: "In order to entitle a party to offer in evidence a will under which he claims title, it is incumbent on him to show that it has been regularly admitted to probate."

The appellants could not have defended the two actions at law, whose prosecution they enjoined, because they could not have offered in evidence the will under which alone they claim title; nor can they maintain their injunction against the prosecution of those suits for the same reason, viz. until the will shall have been properly probated, they have no evidence of title which will give them standing in a court of equity. Plainly, as a bill purely for the probate of the will of Mrs. Bidwell, nothing is shown by which any necessity exists for a second proceeding in the same court to effect the same end.

The issue devisavit vel non on the petition presented in the former proceedings for probate of this will yet remains in the court, and should be proceeded with. That proceeding was the proper one for testing the validity of the will, and appellees should not be harassed by a second and unnecessary suit. Affirmed.

(76 Miss. 329)

YOUNG et al. v. WARK et al.

(Supreme Court of Mississippi. May 8, 1899.)

WILLS—VALIDITY—PROBATE—RES JUDICATA.

1. Probating a will in common form, without making all heirs at law parties, does not conclude the question of its validity as against such heirs.

2. Testator inherited nearly all his property from his wife, and prior to his death he had expressed the intention of leaving it to her next of kin. In the room where he died was found a paper stating that he wanted "Sarah" (his wife's name) relatives to have all his property, signed by him, but not dated. *Held*, that the paper was not a will.

Appeal from chancery court, Monroe county; Baxter McFarland, Chancellor.

Bill by M. E. Wark and others against John R. Young and others to cancel a will. There was a decree for complainants, and defendants appeal. Affirmed.

Walker & Tubb and Clifton & Eckford, for appellants. Houston & Reynolds and Gilleylen & Leftwich, for appellees.

TERRAL, J. S. A. M. Saddler, at the time of his death, occupied a room at the house of Mr. Blake, his tenant, where he died about 12 o'clock p. m. on the last Saturday of January, 1897. He was carried to his burial on the following Monday, and on the evening of that day some papers belonging to him were taken from a table drawer used by him, and other of his papers were taken from his trunk, which were found at the Blake place; and in the room in which he died, upon the mantelpiece, behind a vase, a piece of paper, folded, was found, upon which, unfolded, was written these words: "Want Sarah relatives have all property. S. A. M. Saddler." This instrument, for the purposes of this suit, is admitted to have been wholly written and subscribed by said S. A. M. Saddler; and it was, upon the ex parte petition of John R. Young, probated in common form in the chancery court of Monroe county, before the clerk thereof, as the last will and testament of S. A. M. Saddler, deceased, and letters testamentary thereon were granted to said Young. S. A. M. Saddler died possessed of a real and personal estate of the value of several thousand dollars. Young, the administrator cum testamento annexo, had disposed of all the personal property of the decedent, and this suit involves only the real property of which he died seised. After the clerk of the chancery court of Monroe county had admitted said instrument to probate, and before his action was confirmed by said court in session, Mrs. Wark and W. H. Saddler, two of the present complainants, filed objections to the probate of said instrument, but before taking any other steps therein withdrew said objections, when the probate in common form of said instrument as to the last will and testament of S. A. M. Saddler, deceased, was completed. Thereafter said M. E. Wark, and W. H. Saddler, and 10 others, the complainants, heirs at law of said S. A. M. Saddler, deceased, filed this bill against John R. Young and five others, devisees claiming under said alleged will, and seeking to cancel said instrument as a will as forming a cloud upon their title to the property described in the bill and claimed by them as the heirs at law of said decedent, praying for an issue devisavit vel non, if necessary, or any other appropriate relief. The respondents claimed, as to Mrs. Wark and W. H. Saddler, that the matter was res judicata by reason of the probate of said instrument as hereinbefore stated, and specially set up and pleaded said instrument as being the last will and testament of said decedent. The proof showed that S. A. M. Saddler, deceased, inherited all, or nearly all, of the property in controversy from his wife, Sarah, who died February 7, 1895; that his wife, in her lifetime, was desirous of making a will, and of devising the property to her

own blood kin, in exclusion of the relatives of her husband, and had been dissuaded therefrom by a promise from her husband that at his death the property should go as she wished. It was also shown that Saddler, intervening the death of his wife and his own, had several times expressed an intention of giving the property to his late wife's relatives. The chancery court canceled the document as a will, and annulled the probate thereof.

1. We think the plea of *res judicata* was rightly overruled. It was optional with Mrs. Wark and W. H. Saddler whether they would make the contest in limine or after the instrument had been probated in common form. Unless all the heirs at law of Saddler had been made parties to the proceeding to establish the instrument of his will, the action of the court thereon would not bar them of making any contest they might choose concerning it.

2. The instrument probated in common form as the last will and testament of S. A. M. Saddler, deceased, is neither in form nor substance a will. It does not purport on its face to be a declaration of what he intends shall be the disposition of his property after his death. There is not a word in the instrument of a dispositive character, nor was any collateral evidence given of the intention of the writer in respect to the instrument. If he had written on this paper, or said of it, "This is my will," or other like words, it would be taken as a legal will. The paper is not dated, and, except from its being found within the room in which he died, there is nothing to indicate that it was recently written. There was ample evidence that the decedent intended that his property should go to his wife's relatives. He had several times declared such to be his intention; but there is not a scintilla of evidence that he meant this paper to be an expression of such intention. We might readily conjecture that such was his purpose, but we cannot proceed upon mere conjecture, and the evidence (even a particle of evidence) that Saddler meant the paper to have effect as his will is wanting. "It is not for the courts to declare that to be a testamentary disposition of his estate where it does not clearly appear that such was the intention of the individual executing it." *In re Richardson's Estate*, 94 Cal. 65, 29 Pac. 485. "If the instrument was not testamentary either in form or substance (none of the gifts in it being expressed in testamentary language, or being in terms postponed to the death of the maker), and if no collateral evidence is adduced to show that it was intended as a will, probate will not be granted of it as a testamentary document." 1 Jarm. Wills, *24. Inasmuch as there is nothing on the face of the paper nor in the evidence to show that this identical instrument was meant by Saddler to be a disposition of his property after his death, we think the court rightly adjudged it to be annulled. Affirmed.

POLK v. SEAL.

(Supreme Court of Mississippi. May 8, 1899.)

REPLEVIN — TITLE OF PLAINTIFF — EVIDENCE — QUESTION FOR JURY.

The question of plaintiff's ownership of cattle sought to be replevied is for the jury, where the evidence tends to show that the cattle in question were formerly owned by a third person, who sold them to plaintiff, and that only a part of the price had been paid, and that there had been no rescission for failure to pay the balance.

Appeal from circuit court, Hancock county; T. A. Wood, Judge.

Replevin by James Polk against J. A. Seal. There was a judgment for defendant, and plaintiff appeals. Reversed.

Calhoon & Green, for appellant. Bowers, Chaffe & McDonald, for appellee.

TERRAL, J. James Polk sued J. A. Seal in replevin for 60 head of stock cattle, branded with the figures "12," and having certain earmarks, described in the complaint. The cattle were levied on in the possession of the defendant, and he gave bond to have said cattle forthcoming to abide the judgment of the circuit court of Hancock county, where a trial was had at the November term, 1898, thereof. Upon the trial of the suit, the plaintiff introduced evidence tending to show that the 60 head of cattle found in the possession of the defendant were on the 7th day of February, 1898, the property of Warren Jordan, and a part of a stock of cattle then owned by him, of about 100 head; that on that day they were sold by Jordan to James Polk, at range delivery, for \$800. Only \$100 of the purchase price had been paid at the trial, and that sum was paid some time after the day of the alleged purchase. A bill of sale of said stock of cattle was made by Jordan to Polk some days after the making of the verbal contract, which was acknowledged by Jordan before a justice of the peace, and was delivered to Polk. Warren Jordan himself testified that he had sold his stock of cattle at range delivery, and on credit, to James Polk; that he had given to Polk a bill of sale of the cattle, and that he was living with Polk in Louisiana, who had paid him something on them; and that he was still content with the sale. The court excluded the plaintiff's evidence, and directed a verdict for the defendant. We think the record discloses a *prima facie* case for the appellant, and that he should have been permitted to place his contention before the jury. Reversed and remanded.

DORROH et al. v. HOLBERG et al.

(Supreme Court of Mississippi. April 24, 1899.)

FRAUDULENT CONVEYANCES—MORTGAGES.

A mortgage executed to defraud the mortgagor's creditors will be set aside in favor of

creditors of his heir, where the latter colluded with the mortgagee to keep it alive to defraud his creditors; the property being the homestead of the mortgagor, and descending to the heir free from the former's debt.

Appeal from chancery court, Noxubee county; A. M. Byrd, Chancellor.

Bill by Z. T. Dorroh and another against Jacob Holberg and others. There was a decree for defendants, and complainants appeal. Reversed.

J. E. Rives, for appellants. A. C. Bogle, for appellees.

TERRAL, J. Z. T. Dorroh and S. J. Feibleman, creditors of Jacob Holberg in the sum of \$200, with interest from July, 1896, filed their bill against said Jacob Holberg and others, the heirs at law of Mrs. F. M. Holberg, deceased, and against her administrator, and against W. G. Selleck, trustee, and M. L. Gans, beneficiary in a certain deed of trust executed by Mrs. Holberg upon her homestead in Macon, of the value of \$3,500, to secure a note of \$3,500 of M. L. Gans, due November 1, 1896. The bill alleges that Mrs. Holberg died intestate, owning said homestead, upon which she had executed a deed of trust for \$3,500, apparently to secure a note of that amount to M. L. Gans, her brother, but that in fact she owed Gans nothing, and that the trust deed to Selleck to secure said pretended debt to Gans was intended to prevent her creditors from subjecting any part of said homestead to the payment of their debts; and that, since the death of Mrs. Holberg, the said Jacob Holberg, who had inherited one-eleventh interest in said homestead, had colluded with Gans to keep said trust deed apparently alive, with a view to prevent his creditors from subjecting his interest therein to the payment of his debts. The bill prays that said trust deed may be canceled, as casting a cloud, doubt, or suspicion upon the title, and that the interest of said Jacob Holberg therein be subjected to their said debt of \$200 and interest. Mrs. F. M. Holberg, it was alleged, owed debts that were unpaid, and which it would require the value of the homestead, in excess of \$2,000, to pay; and the object of the bill is to reach the interest of Jacob Holberg in the homestead of his mother, which is exempted from the payment of her debts, and which descended to him at her death, to the payment of the said debt due by him to complainants. A demurrer to their bill was sustained, and the complainants appeal.

If the note of Gans is without consideration, and Gans and Jacob Holberg have colluded to pretend this void trust deed to be a valid security in order to defraud the creditors of Jacob Holberg, as is alleged in the bill and as is admitted by the demurrer, we think the appellants may seek the redress claimed by them. The decree of the court below is reversed, the demurrer to the bill

is overruled, and the case is remanded, with leave to the defendants to answer the bill within 30 days.

(76 Miss. 753)

DAVIS et al. v. PATTY et al.

(Supreme Court of Mississippi. April 24, 1899.)

PARTITION—DOWER—ASSIGNMENT.

The fact that dower has not been assigned will not prevent partition, since, under the prayer for general relief, the dower interest of the widow may be set off to her assignee, and the remainder of the land divided according to the interests of the parties.

Appeal from chancery court, Noxubee county; A. M. Byrd, Chancellor.

Bill by Lena Davis and others against Danelia Patty and others. There was a decree for defendants, and plaintiffs appeal. Reversed.

A. C. Bogle, for appellants. J. E. Rives, for appellees.

TERRAL, J. In 1877, Austin Martin died intestate, seised of an undivided one-half interest in fee in 53 acres of land, more or less, situated in Noxubee county, and leaving a widow, Charity, and seven children, surviving him. Dower has never been assigned to the widow, Charity Martin, who is still alive; but by means of a trust deed executed by said widow, and by James and Simon Robinson, two of the children of the decedent, to Cavett, trustee for J. W. Patty & Co., and a sale thereunder in June, 1892, Mrs. Danelia Patty became the owner of the quarantine rights and of the dower rights of said Charity, and of the interests of the said James and Simon Robinson, in said land, and she has been in the sole possession thereof since June, 1890, receiving the profits thereof, which are alleged to be \$50 per annum. The children of Austin Martin, deceased, and those claiming through them, filed the bill in this case against Mrs. Patty and Joshua Martin, who owns the other undivided half interest in said parcel of land, to recover their several interests in said land, and to have a decree for their respective shares and of their portion of the profits thereof since it has been in the possession of Mrs. Patty. The bill alleges a waiver of her dower rights by Charity Martin, and her forfeiture of quarantine rights by the sale under the trust deed, and it also prays for general relief. The bill was demurred to, the demurrer was sustained, the bill was dismissed, and the complainants appeal.

Mrs. Patty undoubtedly has acquired the dower interest of Charity Martin, which interest vested in her at the death of her husband, as well as the interests of James and Simon Robinson, and also the quarantine rights of Charity Martin, whatever they may be; but as to the nature and character of the quarantine right, whether it was personal, entitling her personally to the enjoyment of

the rents of the land until her dower was assigned to her, or whether it was a property right capable of transfer by sale, and so passed to Mrs. Patty, and she thereby acquired the land free of rent, we do not decide, as that question has not been discussed, nor was it passed upon by the court below. But all the parties to this suit have, undoubtedly, an interest in this parcel of land, and they are entitled to have their several interests adjudicated and set off by metes and bounds to them, and to be put in possession of their respective parts. The rule that partition cannot be had until dower is assigned is not a difficulty to the relief sought, because, under the prayer for general relief, the dower of Charity Martin may be set off to Mrs. Patty, the purchaser thereof, and the other part of the land may be divided according to the rights of the several parties holding such rights. Reversed and remanded.

GRUBBS v. GRIFFIN et al.

(Supreme Court of Mississippi. April 24, 1899.)

INTOXICATING LIQUORS—LOCAL OPTION ELECTION—VALIDITY.

On a petition to hold an election under the local option law on the question required by the law to be submitted, whether intoxicating liquors should be sold in a county, the question "whether or not local option shall prevail in this county for two years," etc., was submitted, and the commissioners' report of the election was not sworn to, as required. *Held*, that the election was void, since the proceeding is statutory, and must be strictly pursued.

Appeal from circuit court, Issaquena county; W. K. McLaurin, Judge.

Petition by William Grubbs to the board of supervisors of Issaquena county for a liquor license. W. T. Griffin and others filed objections thereto. The objections were overruled, and the license granted, and the objectors appealed to the circuit court. The license was revoked, and petitioner appeals. Reversed.

Calhoon & Green, for appellant.

TERRAL, J. The appellant, William Grubbs, at the November special term, 1898, of the board of supervisors of Issaquena county, obtained a license to retail vinous and spirituous liquors at his place of business at Valley Park, district No. 1 of said county. The petition of William Grubbs for said license purported to be signed by a majority of the legally qualified electors of said district, and in its averments in this respect, as well as in its averments in all other respects, it conformed to the requirements of the Code of 1892 in that regard, and upon the hearing of the application all these matters were admitted or proven, and the proceedings to obtain said license appear in all respects to be in conformity with the law on this subject. W. T. Griffin and 20 other persons,

claiming to be qualified electors of Issaquena county, employed Dabney & McCabe, attorneys, to oppose the granting of said license. No counter petition was filed in the case, but said attorneys filed sundry objections to the granting of said license, which it is immaterial to set out. The board, however, overruled said objections, and granted license to Grubbs. The objectors appealed to the circuit court, and there, with leave of the court, they proceeded to the trial of said cause in the absence of Grubbs, and without notice to him of said appeal. Upon said trial said Griffin and others introduced in evidence some attempted proceedings for a vote of the county upon the question whether vinous, alcoholic, malt, intoxicating, or spirituous liquors in a less quantity than one gallon should be sold in said county. A petition for that purpose was filed before the board of supervisors, but the board, in making their order thereon, instead of submitting the question of the sale of the liquors mentioned in the petition and in the dramshop chapter of the Code, submitted to the voters of said county "whether or not local option shall prevail in this county for two years," etc., and the board appointed commissioners for the holding of said election. The commissioners, the election being held, reported, but without oath, that the election under the local option law had been held, and that 44 votes were cast for sale and 71 votes cast against sale. This was all the evidence for the appellants, whereupon the court revoked the license of Grubbs, and the latter appeals.

The local option election, or, rather, the pretense of a local option election, in Issaquena county, as presented in this record, is a void proceeding. On its face it appears to have been either a studied effort on the part of all concerned to infect the proceedings with invalidity, or a wanton disregard of all the requirements imposed by the legislature upon it. The board of supervisors did not submit to the voters of the county the question whether intoxicating liquors should be sold, which was required by law, but submitted to them the question whether local option should prevail in the county, which condition prevails by law everywhere in the state. The commissioners of the election, in their report of the result of it to the board of supervisors, refused or failed to append their affidavit to the report, which is required by law. It has been held by this court that a proceeding of this character is a naked statutory proceeding, and that the requirements of the statute in regard to it must be strictly pursued. *McCreary v. Rhodes*, 63 Miss. 308. Many like announcements might be referred to, but it is unnecessary to cite them here. The record is too devoid of merit to require discussion.

This cause was not triable at the November special term, 1898, as the appeal was taken to the next regular term of the court thereafter to be held, and causes are not tri-

able at a special term of court unless they were triable at the preceding regular term. Judgment of circuit court is reversed.

(76 Miss. 810)

NIXON v. CITY OF BILOXI.

(Supreme Court of Mississippi. May 1, 1899.)

INJUNCTION—DAMAGES—COUNSEL FEES—MUNICIPAL TAXATION—ASSESSMENT—REVIEW—SALE.

1. On a decree in favor of a city, dissolving an injunction, no counsel fees should be awarded it as damages, where its attorney is retained at an annual salary.

2. A sale of property for municipal taxes should not be made where the mayor and aldermen have not directed the tax collector at what place to sell, as required by Ann. Code 1892, § 3022.

3. It is no objection to the validity of the act of the mayor and aldermen in raising an assessment for municipal taxes that it was done at an adjourned regular meeting, the required notice of an intention to review the assessment having been given before the regular meeting, though Ann. Code 1892, § 2989, providing for regular meetings, does not make any express provision for a recess or adjournment.

Appeal from chancery court, Harrison county; N. C. Hill, Chancellor.

Bill by R. L. M. Nixon against the city of Biloxi. From a decree in favor of defendant, complainant appeals. Reversed.

The bill was filed to restrain appellee from selling appellant's property for the collection of the municipal taxes. The bill alleged that the assessment and the levy were both invalid, and tendered the amount of taxes admitted to be due. The proof showed that the mayor and board of aldermen of Biloxi gave notice, as required by law, that at its regular meeting to be held on the 5th day of October, 1897, they would proceed to examine the property assessed, and increase or diminish the valuation of property assessed for taxes; that the board met on that day, and adjourned to the 6th of October, and, after transacting some business, adjourned to the 11th of October, 1897, when it again met, and transacted some business, and then adjourned to the 12th of October, 1897, and on that day complainant's property was increased in valuation from \$2,000 to \$3,000, and, after transacting other business, it took a recess until October 15, 1897, when it again met, and made the levy of the taxes for that year. The proof showed, further, that the town of Biloxi had, by election, come under the laws governing municipalities in chapter 93 of the Code of 1892, and that the assessment had been made of the city property by the tax assessor of the city by copying the assessment made by the county under section 3018 of the Code of 1892, and that complainant's property was there assessed at \$2,000. It was contended by complainant that section 2989 of the Code of 1892 fixes the day for the meeting of the mayor and board of aldermen, but grants them no power to take a recess or adjournment; and that as the question of raising or lowering the valuation of property was not

gone into on the day for the regular meeting, on the 5th of October, and as no further notice had been given to property owners, the action of the board in raising the assessed valuation of complainant's property on the 12th of October, 1897, was illegal and void, and the action of the board in fixing the levy on the 15th of October, was illegal and void, because not made at a regular meeting, as the board had no power to adjourn to that day. From a decree dismissing the bill, and dissolving the injunction and awarding damages, complainant appealed.

E. M. Barber, for appellant. White & Neville, for appellee.

WHITFIELD, J. No counsel fees should have been allowed as damages. The attorney of the city was a salaried officer, under annual contract. The city suffered no damage as to fees. This is settled law. 2 High, Inj. § 1688. Counsel for appellee, anticipating this ruling, offer to remit, and ask us to affirm. Ordinarily, we would do so, but cannot in this case, because of the allegation in the sworn bill that the mayor and board of aldermen had not directed the tax collector at what place to sell, as required by section 3022, Ann. Code 1892. This allegation, strangely, is not denied by the answer, nor in any way referred to. Nor is there anything in the testimony referring to it. We regret the necessity of reversing the case on this ground, since all the other contentions of the bill are untenable; the assessment and the increase in valuation being perfectly valid. But we feel safer in reversing the decree for the two errors indicated, and reinstating the injunction, with leave to both parties to amend, so that the matter may be fully investigated, and full justice done. So ordered.

BOARD OF MISSISSIPPI LEVEE COM'RS v. YAZOO & M. V. R. CO.

(Supreme Court of Mississippi. May 1, 1899.)

RECOVERY OF TAXES—COMPLAINANT.

A complaint for the recovery of taxes levied during a series of years must allege the amount of the taxes due, when they were payable, and, where the levy was not the same each year, the amount thereof for each respective year.

Appeal from chancery court, Bolivar county; A. H. Longino, Chancellor.

Suit by the board of Mississippi levee commissioners against the Yazoo & Mississippi Valley Railroad Company. There was a decree for complainant, and defendant appeals. Reversed.

Sillers, Jones & Owen, for appellant. Mayes & Harris, for appellee.

TERRAL, J. The board of Mississippi levee commissioners filed its bill in this case against the defendant railroad company to establish its title to something over 100,000

acres of land lying in Bolivar county. The bill alleges that complainant's title to said lands accrued under tax sales made in the years 1867, 1868, 1869, 1870, 1871, 1872, 1873, and 1874; but it does not state the particular lands that were sold in the several years of said period. It seeks to recover the titles to said parcels of land, and to cancel the title deeds held by the defendant company to the same lands; and, if this relief should be denied, then the bill seeks to recover of and from the defendant the sum of the levee taxes levied upon said lands by the act of the legislature of the state of Mississippi approved November 27, 1865, and which taxes, the bill alleges, should have been paid by the defendant when it purchased said lands of the state. It is apparent that if the complainant is entitled to recover of the railroad company the taxes imposed by the act of November 27, 1865, the amount that may be recovered will vary according to the year in which the sale was made; for if the lands were sold in 1874 the levee taxes would be 70 cents per acre less than if sold in 1867, aggregating a difference of some \$80,000. The bill of complaint with respect to the levee taxes which it seeks to recover of the defendant is indefinite. No particular sum is averred to be due, nor is there any statement when the taxes were payable. The complainant, however, sought to amend its bill, and we think it should have been permitted to have made the amendment. The decree of the chancery court is reversed, and the case is remanded, with leave to the complainant to amend its bill, as it may be advised, within 60 days.

ROTHARS et al. v. ILLINOIS CENT. R. CO.
(Supreme Court of Mississippi. May 8, 1899.)
RAILROADS — ACCIDENTS AT CROSSINGS — NEGLIGENCE — PLEADING.

In a complaint against a railroad company for running over a person at a crossing, the negligence of the railroad company's servants is sufficiently charged by an averment that at that hour of the day the crossing was always used by a great number of people, and that the locomotive was being handled without warning and without any lookout being kept, and that the intestate attempted to go over the crossing just as it had passed, and when it was about 25 feet away, when it suddenly started back, causing the accident complained of.

Appeal from circuit court, Pike county; Jeff. Truly, Judge.

Action by Mary E. Rothars and another against the Illinois Central Railroad Company. From a judgment of dismissal, plaintiffs appeal. Reversed.

Calhoon & Green and Govan & Quin, for appellants. Mayes & Harris, for appellee.

TERRAL, J. This suit is by the widow and child of Frederick J. Rothars for compensation for personal injuries inflicted upon

him, as it is alleged, by the gross negligence of the servants of the defendant company in running one of its trains over a public crossing of its roadbed. The declaration was demurred to, and the suit was dismissed by the court as showing no cause of action. The declaration alleges that the railroad crossing at which the injury was inflicted was prepared by the defendant company for the use of the public, and that hundreds (specifically how many hundreds is not stated) of persons were in the habit of going over said crossing every hour of the day, and especially at the hour within which the injury was inflicted upon Rothars; that the locomotive which inflicted the injury was operated by a grossly incompetent person, who recklessly handled and moved the locomotive without warning of any sort, and without any lookout being kept; and that Rothars, seeing the locomotive pass up beyond the crossing 25 feet, attempted to cross over, when the locomotive was suddenly darted back at a rapid rate of speed, and was run upon and over him, from which death soon ensued. The negligence of the defendant's servants, as set out in the declaration, was apparently so wanton and reckless that we think that the defendant should make some reply to the charge. Reversed and remanded.

(76 Miss. 794)

DIXON et al. v. GREENE COUNTY et al.

(Supreme Court of Mississippi. May 8, 1899.)

INJUNCTION — DISSOLUTION — CONSTRUCTION OF COURT HOUSE — NOTION FOR BIDS — CONTRACT — COUNTY SUPERVISORS — DELEGATION OF POWERS.

1. An injunction against acts accomplished before defendants had notice that the writ was issued was properly dissolved.

2. Filed plans and specifications for building a court house were sufficiently made a part of the notice for bids for the work, and of the contract therefor, where they were referred to in the notice, and were made a part of the contract by a reference thereto in the minutes of an order of the county board of supervisors for the work, in which form the contract was made.

3. A stipulation in a contract for building a court house reserving to a superintending board the right to make any alterations or additions to the drawings they might see proper, without affecting the validity of the contract, is a nullity, since the right to alter is to be exercised by the county board of supervisors, and such power cannot be delegated.

4. Where a contract for building a court house provided for a roof of the best Bangor slate, and a tin roof was put on, apparently in fulfillment of the contract, the county board of supervisors should be enjoined from paying for the building until the contract is amended to provide for such substitution, and to make a proper allowance to the county therefor, or until the contractors have been required to perform their contract as agreed.

Appeal from chancery court, Greene county; N. C. Hill, Chancellor.

Bill of injunction by J. I. Dixon and others against Greene county and others. An order of a supreme court justice, to whom the bill was sent, directed the issuance of the injunction as prayed for in the bill.

Complainants moved to strike out a motion by defendants to dissolve the same. Complainants' motion to strike was denied, and a decree rendered dissolving the injunction as to defendants F. B. & W. S. Hull, and overruling the motion to strike as to the defendant board of supervisors of Greene county, and complainants appeal. Reversed and remanded, with instructions.

On the first Monday of June, 1898, the board of supervisors of Greene county entered into a contract with W. S. & F. B. Hull, as evidenced by an order on its minutes, for the building of a new court house in said county. Subsequent to that date J. I. Dixon and others, as complainants, filed a bill of injunction, praying for the cancellation of the contract made on the first Monday in June, 1898, and that the board be enjoined from making any payment or payments under said contract. This they asked for the following reasons: (1) That the contract was illegally made, in that the notice as published, calling for bids, was not full enough, and did not state that the contract would be let to the lowest bidder; (2) that the contract was obtained by fraud and collusion between the Hulls and the board; (3) that the board gave the contract when the needs and resources of the county did not justify the erection of a new court house; (4) because, under a written memorandum afterwards signed by the Hulls and certain individuals of Greene county, the right was reserved to the board to make alterations in said building as the work progressed; (5) because said written memoranda provided for the submission to a board of arbitration of any differences that might arise between the Hulls and the board as to the character and quality of the work done. The contention of complainants is that the subject of court houses is regulated by sections 294 and 340 of the Code of 1892. The chancellor with whom this bill was filed made an order refusing the injunction. The bill was then sent to Hon. S. H. Terral, of the supreme court, who made an order directing the issuance of the injunction according to the prayer of the bill. In the meantime the defendants F. B. & W. S. Hull, while the bill was in possession of the chancellor, entered upon the work of removing the old court house and the construction of the new building. On the 25th day of February, 1899, defendants made a motion to dissolve the injunction on bill and answer. The complainants filed a motion to strike out the motion to dissolve by defendants, because they were in contempt of the order of the judge of the supreme court in prosecuting the work of erecting the court house on the court-house lot at Leakesville after knowledge of the order and issuance of the writ of injunction, and after they had filed an answer. The chancellor denied the motion, and rendered a decree dissolving the injunction as to F. B. &

W. S. Hull, but overruling same as to the board of supervisors of Greene county, and awarding them attorney's fees as damages. From this decree, complainants appeal.

McIntosh & Rich and C. H. Wood, for appellants. Calhoon & Green, for appellees Hulls & J. E. Alderman. Denny & Woods, for appellee Greene county.

WHITFIELD, J. We notice only what seems necessary to decision. The Hulls were not enjoined from building, but from removing the old court house and interfering with it. Their removal of it and interference with it had been accomplished before they had any notice that the writ had issued. The decree dissolving the injunction as to them is for that reason affirmed.

We do not deem it necessary to decide whether section 294, Code 1892, is to be construed by itself, or in connection with sections 340-344, though the language of the court in *Board v. Patrick*, 54 Miss. 240, and *Paxton v. Baum*, 59 Miss. 539, would seem to indicate that they should be construed together. The notice is substantially sufficient. The plans and specifications were on file, and were referred to, from which all detailed information could have been obtained. The only express contract made by the board was to be found in the order on its minutes, and the plans and specifications made part thereof by reference. The arbitration clause is in the memorandum, and is no part of the contract. But in the contract it is stipulated as follows: "The superintending board reserves the right of making any alterations or additions to the drawings they may see proper, without in any way affecting the validity of the contract; the value of such alterations to be added to or deducted from the amount to be paid, at market prices. The contractor will not be allowed any additional compensation unless he receives written authority from the superintending board." This provision is a nullity, not as violative of any statute, but as violating the general principle of law that the board of supervisors cannot delegate powers intrusted to that board, to be by that board alone exercised, to any superintending board. *Board v. Patrick*, 54 Miss. 240. It is clearly shown that the roof was the most important single item in the contract, and was to be of the best Bangor slate. The contractors themselves say that it, "above all," must be dealt with as per contract. And yet a tin roof is shown to be put on, and there is nothing in the evidence to warrant the argument that it was merely provisional. But we think there is a failure to show any fraud in the case, and we do not see why the way to a just settlement of the differences between the parties is not plain and easy. We think the chancellor, under all the facts in evidence, acted wisely in retaining the injunction against the board

of supervisors, prohibiting them from making any payment to the Hulls under the contract as it stands. But, under the law as announced in *Board v. Patrick*, the board and the Hulls can make an amendment of their original contract, substituting a tin roof for a slate roof, on such terms as they may wisely deem just, such contract amendment to be spread on the minutes of the board; or the board may require the Hulls to go forward and complete their contract as they agreed to do, as to a slate roof, if this is by the board deemed best for the county. The Hulls cannot complain of being made to put on the very roof their contract called for.

We do not think the form of the decree, which practically perpetuates the injunction, is correct. We therefore reverse the decree retaining the injunction against the board of supervisors, in so far only as it is made perpetual, and remand the case, with instructions to the court below to discharge the injunction whenever either of the two things indicated above shall have been done. So ordered.

(76 Miss. 714)

ADAMS, State Revenue Agent, v. NATCHEZ, J. & C. R. CO. et al.

(Supreme Court of Mississippi. May 8, 1899.)

COUNTIES—OWNERSHIP OF RAILROAD STOCK—NATURE OF INTEREST.

A county holding stock in a railroad company by authority of a legislative act not restricting the nature of its ownership, holds it as a private corporation, and not for a public governmental purpose, and hence the interests of the county therein are not subject to Laws 1894, p. 29, authorizing the state revenue agent to sue on obligations or debts to a county.

Appeal from chancery court, Hinds county; H. C. Conn, Chancellor.

Bill by Wirt Adams, state revenue agent, against the Natchez, Jackson & Columbus Railroad Company and others. A demurrer to the bill was sustained, and complainant appeals. Affirmed.

Calhoun & Green, for appellant. Mayes & Harris, for appellees.

TERRAL, J. Wirt Adams, state revenue agent, filed this bill in his own name as revenue agent, alleging that Hinds, Adams, and Jefferson counties, under authority conferred upon them for that purpose by an act of the legislature of the state of Mississippi, subscribed and paid for shares of stock in the Natchez, Jackson & Columbus Railroad Company, which was duly issued to them; that Hinds county acquired stock in said company in the sum of \$200,000, that Adams county acquired stock in said company in the sum of \$300,000, and that Jefferson county acquired stock in said company in the sum of \$100,000; that after the construction and equipment of said railroad, and while the said counties were stockholders therein, the prop-

erty of said Natchez, Jackson & Columbus Railroad Company of every sort and kind whatever was acquired by the Yazoo & Mississippi Valley Railroad Company through the Louisville, New Orleans & Texas Railway Company, by such fraudulent methods set out in the bill as gave said counties a right of action, for which this suit is brought. The Yazoo & Mississippi Valley Railroad Company demurred to the bill. The chancery court sustained the demurrer, and the revenue agent appeals.

By agreement of the parties, the only question decided by the chancery court or discussed here is whether the state revenue agent may maintain this suit in his own name. The act of the legislature under which this suit is brought, so far as it relates to his power so to do, is as follows: "He [state revenue agent] shall have power and it shall be his duty to proceed by suit in the proper court against all officers, county contractors, persons, corporations, companies and associations of persons for all past due and unpaid taxes of any kind whatsoever, for all penalties or forfeitures, for all past due obligations and indebtedness of any character whatever owing to the state or any county, municipality or levee board, and for damages growing out of the violation of any contract with the state or any county, municipality or levee board. He shall have a right of action and may sue at law or in equity in all cases where the state or any county, municipality or levee board has the right of action or may sue." Laws 1894, p. 29. If the counties whose rights are involved in this suit hold such rights in a public capacity, or if such rights are affected with a public governmental trust, the legislature may well appoint the agency for the control of such rights and interests (2 Kent, Comm. § 305); but if the rights and estates of these several counties in the shares of stock of the railroad company, acquired by direct legislative authority, are interests of a private character, the legislature may not interfere with their management. Unquestionably, a county ordinarily holds its property in trust for the public composing the county. Its court house, jail, and other buildings, as well as all other property held by it under the constitution and general laws on the subject, are held by it charged with a trust to apply these properties to the public use. They could not, perhaps, be diverted from such use, nor can we suppose that the legislature would desire to do so; but undoubtedly the legislature might name the officers who shall have charge of such property, and change them at its pleasure. But it is not difficult to perceive that a county might own and hold the legal title to property or rights in action not affected with any such public trust as attaches to the property above specified. The shares of stock of a railroad company held by a county are certainly not held for any governmental purpose, and it would seem that a county holding such

rights would own and hold them in the same way and character as an ordinary corporation or other person might hold them. The benefits to be derived from the holding of shares of stock of a railroad company are the same when held by a county as when held by an individual or by an ordinary trading corporation, to wit, their money value. The building of the railroad would afford facilities for general commerce and intercourse, and to that extent, and in a limited sense, the railroad would be for public use; but that incident would not make the shares of the capital stock in the railroad company of the nature of public property. If the legislature had, in the act authorizing the counties to subscribe to the capital stock of the proposed railroad company, indicated that the shares of stock taken by the counties should be held for public governmental purposes, that would have ended the matter; but there is nothing in the act restricting the nature of the holding of such shares by the counties. We are inclined to think it was the legislative mind that the counties might acquire and hold the shares of stock in said company as a private corporation in that respect. The authorities on the subject are conflicting. We follow those approved by Judge Cooley in his work on Constitutional Limitations (section *235 et seq.). If the estates here involved are not affected with a public governmental trust, the legislature can neither dispose of such estates nor appoint an agent for their management, for to appoint an agent to manage or sue for property pertains alone to the owner thereof. Story, Ag. § 2. Certainly whatever rights the counties may have against the defendant railroad company may be asserted by suit, but the suit should be brought in the names of the several counties or of the boards of supervisors thereof. The decree of the chancery court is affirmed.

WALTON v. FORSDICK.

(Supreme Court of Mississippi. May 8, 1899.)

EVIDENCE—CONTENTS OF TAX RECEIPTS—ADMISSIBILITY.

In an action by a complainant claiming under a tax title to cancel conveyances under which defendant claimed as a cloud on his title, defendant offered evidence that the taxes were paid prior to the tax sale; that the tax receipts were regularly issued; that they were in witness' possession for some time; and that search had been made, but they could not be found, and it was admitted that they were lost. Held a sufficient predicate for the admission of secondary evidence of the contents of the receipts.

Appeal from chancery court, Tallahatchie county; A. H. Longino, Chancellor.

Bill by H. J. Forsdick against J. D. Walton. Forsdick filed his bill setting up title in himself to lots 3, 4, 5, and 6, section 11, township 22, range 1 E., by tax title derived through sale to the state for taxes, and deraigned title to himself; alleging that appel-

lant, Walton, claimed said land under certain conveyances, which he alleged to be void, and asked to have them canceled as clouds upon his (Forsdick's) title. To this bill Walton answered, denying the sale to the state, and alleging, if such sale was made, that it was void, as the taxes for which said land is alleged to have been sold were fully paid, and that the tax collector had receipted therefor to one A. A. Acker, who owned said land at the time it is alleged to have been sold, and from whom appellant bought it, and under whom he still held and claimed it. Defendant in his answer further denied the legality of said tax sale, on the ground that the assessment under which it is alleged to have been sold was void, because the roll was not returned to and filed with the clerk of the board of supervisors within the time prescribed by law; that the tax receipt of 1879, showing the payment of the taxes for which said land is alleged to have been sold, had been duly and legally issued to said A. A. Acker, but that the same had been lost or destroyed, and that he would not be able to produce it. Upon the trial plaintiff introduced the list of lands sold to the state on Monday, March 1, 1889, and deed from the state to Williams and others, trustees, and from them through several persons, up to himself. He then introduced the certified copy, that was exhibited with defendant's answer, of so much of the assessment roll of 1879 as showed the assessment of said lands, and the affidavit of the assessor showing the date of its return and filing. Two orders of the board of supervisors, passed in 1879, were then introduced,—one showing that the assessor filed and presented to the board his assessment rolls, both for land and personality, for the year 1879, and that these rolls were received by the board, and ordered to remain on file for exception until the first Monday in August; the other showing that the assessment rolls for the year 1879, as returned by the assessor, after being corrected by the board, were received and confirmed. Defendant, Walton, then introduced an agreement of counsel which shows that, if the taxes on said land were paid for the year 1879, and receipted for, the tax receipt had been lost or destroyed; and then the deposition of N. J. McMullen, who testified that he paid the taxes on said land for the year 1879 at the request of Acker, the owner, prior to the tax sale in March, 1889, and that the tax receipts were duly and regularly issued therefor, and were in his hands for some time. With this proof defendant rested, and complainant introduced and read the deposition of J. A. Dogan, sheriff and tax collector of Tallahatchie county for the year 1879, who testified that he had examined the stubs of tax receipts for the year 1879, and that he could find no stub indicating that the taxes on said land for the year 1879 were paid. After the proof was all in, complainant filed

exception to the deposition of N. J. McMullen, on the ground that it was incompetent, and urged that defendant should have introduced proof to show that no "stub" tax receipt was in existence before offering proof of loss of the tax receipt. The court sustained the exception to the deposition of McMullen, and rendered its final decree in favor of complainant, and defendant appeals. Reversed.

Dinkins & Caldwell, for appellant. St. John Waddell, for appellee.

WHITFIELD, J. McMullen's testimony was competent. He testified that the tax receipt issued for the year 1879 was "the regular tax-receipt form," made the evidence of the payment of taxes by section 37 of the statute involved; that he had it for some years; and had looked diligently for it everywhere, and it could not be found. The agreement of counsel was that A. A. Acker and Parson Acker were both dead, and that, if they "ever had the said receipt, it was lost or destroyed." The existence of the very tax receipt required by law having thus been shown, and its loss established, and diligent search for it shown, secondary evidence of its contents was admissible. Reversed and remanded.

ADAMS, State Revenue Agent, v. CARTER, Tax Collector, et al.

(Supreme Court of Mississippi. April 24, 1899.)

ACTION AGAINST TAX COLLECTOR—EVIDENCE.

In an action by the state revenue agent against a tax collector, the minutes of the board of supervisors allowing insolvencies under Code 1892, § 3832, and the assessment roll, cannot be contradicted by proof aliunde that they were not correct.

Appeal from chancery court, Kemper county; A. M. Byrd, Chancellor.

Action by Wirt Adams, state revenue agent, against J. W. Carter, tax collector, and others. There was a judgment for complainant for less than the relief demanded, and he appeals. Reversed.

Suit in chancery to recover the sum of \$2,535.40, taxes due the state and county for the years from 1891 to 1894, inclusive, that were collected, or should have been collected, by the tax collector. All the defendants answered the bill denying the indebtedness sought to be recovered. On the trial, complainant read in evidence the original books of the auditor and the board of supervisors, which showed the indebtedness claimed. The defendants were permitted to introduce evidence to show that minutes of the board of supervisors allowing insolvencies under section 3832 of the Code of 1892 were incorrect, and that the amount actually allowed was much greater than the minutes showed, and that the assessment rolls approved by the board of supervisors were not correct. J. W.

Carter testified that, if he was allowed the amount of his insolvent list, he would not be due the state and county anything for the year 1891, and that the land roll as it appeared was not correct, and that he had a paper on which was marked "Allowed" by Grantham, the president of the board of supervisors, showing an allowance of \$215, and that, if this credit was allowed, he would not be due anything for the year 1892, and that the same would be true of 1893. There was a decree for complainant for the sum of \$237.60, from which decree complainant appealed.

Calhoun & Green and T. O. Bell, for appellant. T. W. Brame and Brame & Brame, for appellees.

WHITFIELD, J. The testimony of Carter and others, and the papers called "insolvent lists" marked "Allowed" by Grantham, in contradiction of the minutes of the board of supervisors and of the assessment rolls, should have been excluded. Reversed and remanded.

(76 Miss. 783)

WHITMAN v. OWEN, County Superintendent. (Supreme Court of Mississippi. May 1, 1899.)

SCHOOLS—TRUSTEES—ELECTIONS—CONTRACTS.

1. The election of a school trustee, though made after the day set therefor by statute, gave him color or right to the office, and a teacher's contract made by the board of which he thus became a de facto member was valid.

2. Though his election gave him color of right, and validated his acts, it was also competent, in an action to enforce the contract, to show that he was recognized as trustee by the county superintendent and others.

Appeal from circuit court, Bolivar county; F. A. Montgomery, Judge.

Mandamus by Lily Whitman against T. S. Owen, county superintendent, etc. There was judgment for defendant, and plaintiff appeals. Reversed.

N. B. Scott, for appellant. Sellers, Jones & Owen and Alexander & Alexander, for appellee.

TERRAL, J. On the 8d of October, 1898, Lily Whitman was selected by T. J. Yarbrough, U. G. Griffin, and P. Blanchard, the acting trustees of Gunnison White Public School, as teacher of said school for the scholastic year then beginning; and her selection as such teacher was duly notified to T. S. Owen, the superintendent of education of Bolivar county. Miss Whitman was a licensed teacher of said county, and applied in due time to said superintendent of education for a contract for the teaching of said school. It appears from the proceedings in the case that the patrons of the school had met on the 19th day of September, 1898, and had selected P. Blanchard a trustee of said school in the place of the trustee whose term was about to expire. Supt. Owen assumed the election of Blanchard as trustee to be void, and he ignor-

ed the action of the trustees in the selection of Miss Whitman. In effect, without charge or trial the superintendent removed Blanchard from said office of trustee, and appointed J. B. Pease in his place. Yarbrough, Griffin, and Pease selected Miss Whitman as teacher, and she declined the office, whereupon the county superintendent, of his sole authority, without consulting trustees or patrons, appointed and contracted with Miss Ray to teach said Gunnison White Public School; and Miss Whitman, feeling aggrieved at the action of the county superintendent of education, brought against him in the circuit court her action of mandamus to enforce her right, and, failing there to receive the desired relief, she asks the judgment of this court upon the premises.

Blanchard, by his election to the office of trustee of Gunnison White Public School by the patrons thereof on the 19th of September, was clothed with the powers of that office. Whether he was an officer de jure, or de facto only, it is immaterial to consider. His election as trustee by the patrons of the school, though made after the day set by the statute for the election of trustees, gave him color of right to said office of trustee, and he became thereby at least a trustee de facto; and his acts, in respect to the public and third persons interested therein, are valid, and cannot be collaterally attacked. *Am. & Eng. Enc. Law* (2d Ed.) 816; *Brame & A. Dig. Miss.* 876 et seq. The selection of Miss Whitman as teacher of said school by Blanchard, Griffin, and Yarbrough entitled her, in our opinion, to a contract for teaching said school.

The evidence offered tending to show the recognition of Blanchard as trustee by the superintendent and others, though his election by the patrons as trustee gave him color of right and validated his acts, was also competent evidence, and should have been received. Reversed and remanded.

(76 Miss. 730)

HECKLER v. FRANKENBUSH.

(Supreme Court of Mississippi. May 1, 1899.)
EQUITY—JURISDICTION—NOTES—NEGOTIABILITY.

1. Where notes are made payable out of the maker's share of the profits which may accrue from a partnership business, equity has jurisdiction of a bill to compel a disclosure of what profits have been made, and that the maker's share thereof be paid into court, and to decree a lien thereon for the amount due on the notes, where a decree for the sale and partition of the partnership property has been obtained, and the maker is insolvent.

2. A note made payable from the maker's share of profits from a partnership business in which he is interested is negotiable under Code 1892, § 3503, providing that all notes and other writings for payment of money may be assigned by indorsement, whether payable to order or assignee or not, and that the latter may maintain such action thereon in his own name as the assignor could have maintained.

Appeal from chancery court, Jefferson county; Claude Puitard, Chancellor.

Bill by J. M. Frankensbush against Julia C. Heckler and others. From a decree overruling a demurrer to the bill, defendant Julia C. Heckler appeals. Affirmed.

The bill alleged that defendant had made, executed, and delivered to Frankensbush and Borland, co-partners doing business under the firm name of Frankensbush & Borland, five promissory notes for \$500 each, due and payable, respectively, January 1, 1896, 1897, 1898, 1899, and 1900. The payment of these notes is conditioned upon, and payable out of, the net profits of the Rodney Oil Mill, if any there should be, of which mill Mrs. Heckler owned an undivided one-fourth interest; the same to be paid out of the share of the said Mrs. Heckler in the profits of said mill. Appellee claims in his bill of complaint to be the assignee of the said promissory notes, and brings suit in his own name as such, and alleges further that the Rodney Oil Mill made profits in each of the respective seasons of 1895-96, 1896-97, and 1897-98 largely exceeding the respective amounts named in said notes respectively falling due in each of said seasons; that said Julia C. Heckler has in each of said seasons converted to her own special use all of the profits made by the said Rodney Oil Mill, constituting her share of same; that in 1897 a decree was rendered by the chancery court of Jefferson county in the suit of August Reitze for the partition of all of said Rodney Oil Mill property, and that the same was advertised to be sold; that if said sale should take place, and the funds arising therefrom be distributed, complainant would be unable to collect the said three promissory notes now due, as the said Julia C. Heckler was insolvent. The bill charges that the Rodney Oil Mill made profit during the season of 1897-98 of \$2,500, and that the amount of said Julia Heckler's portion was \$1,875; that one August Reitze and the said Julia C. Heckler are in possession of all of the books and accounts belonging to the said Rodney Oil Mill, and that they are in possession of all the facts going to show that profits were made by said oil mill; that complainant is entitled to have disclosed to him a full statement and account of the business of said oil mill. The prayer of the bill was for the court to compel the said Julia C. Heckler and August Reitze, her partner, to make full disclosure what were the profits of the business, and what was the share of Julia C. Heckler in said profits; that the court decree that said Julia C. Heckler pay unto him, immediately upon the rendition of such judgment, the amount named in said notes respectively due to him as aforesaid, together with interest on each at the rate of 6 per cent. per annum from the maturity of each until paid; that the court decree that the said co-partnership known as the Rodney Oil Mill pay into court all of the said Julia C. Heckler's share of the profits of said oil mill for the season of 1897-98, and that the court fix a lien on the said

Julia C. Heckler's interest in said Rodney Oil Mill for the amount due complainant on said notes, and for general relief. To this bill Julia C. Heckler and August Reitz demurred, setting forth the following grounds: (1) There is no equity on the face of the bill; (2) complainant has an adequate and complete remedy at law; (3) complainant seeks to establish a lien on property where the instruments sued on entitle him to no lien; (4) the suit was brought by the purported assignee of nonassignable instruments. From a decree overruling the demurrer, defendant Julia C. Heckler appeals.

Jeff Truly and J. A. Ramsay, for appellant.
Martin & Anderson, for appellee.

WOODS, C. J. The averments of the bill show clearly that the case is of equity cognizance. The notes are not nonnegotiable. While not, properly speaking, promissory notes, because payment was conditioned upon a future contingency, which contingency had occurred before the beginning of this suit, as averred in the bill and admitted by the demurrer, they are, nevertheless, writings for the payment of money, and are negotiable, under section 3603, Code 1892. This section declares that "all promissory notes, and other writings for the payment of money or other thing, may be assigned by indorsement, whether the same be payable to order or assignee or not, and the assignee or indorsee may maintain such action thereon, in his own name, as the assignor or indorser could have maintained," etc. This statute received judicial interpretation in *Shields v. Taylor*, 25 Miss. 13. In that case suit was brought by the assignee upon a writing for the conditional payment of money, and the court held that the writing, though a conditional contract for the payment of money, was within the statute, and that the quality of negotiability had been imparted to it thereby, and that an action in the name of the assignee was maintainable. At common law, however, the assignee of a nonnegotiable note might maintain a suit in equity in his own name against the maker. Story, *Prom. Notes*, § 128, and 2 *Rand. Com. Paper*, § 656.

Affirmed.

MCCRORY v. STATE.

(Supreme Court of Mississippi. April 24, 1899.)

HOMICIDE—SELF-DEFENSE—INSTRUCTIONS.

1. An instruction on a trial for murder that accused could not invoke the aid of the doctrine of self-defense, for acts done after he had disabled deceased with a pistol shot, is erroneous, as it assumes that deceased was disabled, which was for the jury.

2. On a trial for murder an instruction that if, at the time of the shooting, deceased's conduct was such as to excite in the mind of accused the belief that he had the means and proposed to kill him, accused was justified in anticipating the attack and protecting his own life

by taking that of his adversary, though the jury believed from after developments that the danger was only apparent, is not erroneous, since an accused is justified in acting on the facts as they reasonably appear to him.

Appeal from circuit court, Kemper county; G. B. Huddleston, Judge.

Sam McCrory was convicted of murder, and he appeals. Reversed.

J. H. Currie, Geo. H. Ethridge, and E. C. McMichael, for appellant. Wiley N. Nash, Atty. Gen., for the State.

TERRAL, J. Sam McCrory was convicted in the circuit court of Kemper county, and was sentenced to be hanged. He alleges several grounds of complaint in the proceedings of the circuit court. The second instruction for the state, which he claims to be erroneous, is as follows: "(2) The court charges the jury, by the state, if they believe from the evidence beyond a reasonable doubt that the defendant, after shooting deceased with his pistol, thereby disabling him, and while in no danger, real or apparent, of any harm at the hands of the deceased, he took a shotgun from the child of deceased, and pursued deceased and maliciously shot him, and after knocking him down with the gun, and while deceased was down, brained him with the gun, he is guilty of murder, and the jury should so find." The instructions which the defendant requested for himself, and which were refused, are as follows: "The court instructs the jury that the law does not make actual or impending danger indispensable to the exercise of the right of self-defense, but that the law considers that, when threatened with danger, one is obliged to judge from appearances and to determine therefrom as to the actual state of things surrounding him, and in such case if one act from hurried consideration, induced by reasonable evidence, he will not be held responsible criminally for a mistake as to the extent of the actual danger; but if the jury believe from the evidence that, at the time of the shooting, the conduct of the deceased was such as to excite in the mind of a reasonably prudent man the belief that the deceased then had the means and purposed then to kill the defendant, or to do him some great bodily harm, he was justified in anticipating the attack, if it was present, urgent, and otherwise unavoidable, except by flight, and protecting his own life or limb by taking the life of his adversary, even though the jury in the light of subsequent developments may believe that the danger was not real, but only apparent; and if the jury so believe, it is their duty to acquit." "The court charges the jury that, in passing upon the action of the accused, the jury should not try him by the light of after-developed events, nor hold him to the same cool and correct judgment which they are able to form. They should put themselves in his place, and judge of his act by the facts and circumstances by which he was surrounded." The second instruction for the state assumes that the de-

ceased was disabled by pistol shots at the hands of the defendant, and that the defendant could not, for his acts thereafter done, invoke the doctrine of self-defense on his part; but whether the deceased had been disabled by defendant's pistol shots should, we think, have been submitted to the jury. We also think that the defendant should have been permitted to claim the benefit of any apparent, as well as of any real, danger that the evidence afforded him, and that he might have acted upon the facts of the case as they reasonably appeared to him, and was justified in so doing. Reversed and remanded.

(76 Miss. 855)

YAZOO & M. V. R. CO. v. MILLSAPS et al.
(Supreme Court of Mississippi. May 1, 1899.)

CARRIERS—LOSS BY FIRE—PROXIMATE CAUSE—DAMAGES.

1. Where a carrier negligently delays the transportation of freight, and it is destroyed by fire, for which the carrier is in no way responsible, the fire, and not the negligence, is the proximate cause of the injury.

2. Where freight is injured by fire, for which the carrier is not responsible, it is liable to the shipper only for the value of the freight in its damaged condition.

Appeal from circuit court, Claiborne county;
W. K. McLaurin, Judge.

Action by J. D. Millsaps & Co. against the Yazoo & Mississippi Valley Railroad Company to recover damages for certain cotton which was burned while the same was on the railroad company's platform, in the town of Carlisle, awaiting shipment. On December 7, 1897, Millsaps & Co. delivered to the railroad company at Carlisle, Miss., 20 bales of cotton, consigned to J. Weiss & Co., of New Orleans, La. On the 12th day of December, 1897, 13 bales of this cotton were destroyed, and 7 bales damaged, by fire which originated in a store in the town of Carlisle. Complainants, in their declaration, charge that, by reason of the negligence of the railroad company in wrongfully and negligently having left the cotton exposed upon its platform, it negligently and wrongfully permitted the same to be destroyed by fire, and at the trial introduced evidence to show that trains were passing Carlisle daily during the time between the delivery of the cotton to the railroad company and its destruction. The contention of defendant was that it was powerless to get the cotton off its platform before it was burned; that, owing to the exceptional conditions and the great amount of cotton to be hauled from Carlisle and other points over its line, the railroad did not have sufficient facilities for moving the cotton rapidly. At the trial in the court below the following instruction was asked by defendant, and refused by the court: "(1) The court instructs the jury for the defendant that in this case the railroad is not liable for any of the cotton actually destroyed by the fire, but only for the cash value of the seven bales damaged by the fire, in the condi-

tion in which it was after it was damaged; and if they believe from the evidence that the fair market value of the seven bales damaged, after they were damaged, was \$129.01, then their verdict will be for said sum of \$129.01, with interest at 6 per cent. per annum from 11th December, 1897, to the 21st May, 1898; or, if they believe from the evidence that the value of the seven damaged bales, after they were damaged, was more or less than \$129.01, then their verdict shall be for that sum, with 6 per cent. per annum from 11th December, 1897, to 21st May, 1898." From a judgment in favor of complainants, defendant appealed. Reversed.

Mayes & Harris, for appellant. Martin & Anderson, for appellees.

WHITFIELD, J. Going directly to the heart of the matter, the inquiry, on the answer to which this case must turn, is, was the fire, in this particular case, the intervening, independent, proximate cause of the loss, accidental and nonnegligent as to the appellant's employees? Grant, as we think is shown, that the delay in transportation was negligent, was there any causal connection between such delay as the proximate cause and the loss? Or was the loss due wholly to a fire purely accidental, as to which fire, in its origin and progress, the appellant was wholly free from blame,—the fire being the independent, intervening, proximate cause of the loss? As to this it is said in 1 Shear. & R. Neg. (5th Ed. 1898) § 40, under the head of "Superior Force Concurring with Defendant's Delay": "In the application of this principle, a serious difference of opinion has arisen as to what is a natural sequence of negligence exposing the property of another to injury. In Pennsylvania, Massachusetts, Ohio, Iowa, Nebraska, and Arkansas, as well as in the United States supreme court, it is held that where a carrier, by negligent delay, exposes goods to injury by the act of God, or other cause for which he is not responsible, and which he could not naturally foresee, he is not liable for injuries arising from such a cause, although they would not have affected the goods if he had not negligently delayed their transportation. This decision is put upon the ground that he could not reasonably have anticipated such a result of his delay, and that, for aught he could possibly foresee, promptness might have exposed the goods to the risk quite as much as delay. In New York, New Hampshire, Missouri, and Tennessee, the very opposite doctrine is firmly settled,"—citing the authorities on both sides. We observe, curiously enough, the failure of the learned authors to cite, in support of the nonliability of the carrier in such case, the case of *Association v. Wood*, 64 Miss. 661, 2 South. 76, wherein is a masterly opinion by Cooper, C. J., on this subject. We note that the cases cited for nonliability by the learned authors are those cited and relied on by the counsel for

the appellant and the court in 64 Miss. 661, 2 South. 76. So that, in this state, the question is settled against the liability of the carrier in such case. One of the cases relied on by learned counsel for appellees (Thomas v. Lancaster Mills, 19 C. C. A. 88, 71 Fed. 481) is a striking illustration of this very doctrine. See page 91, 19 C. C. A., and page 484, 71 Fed., where the court say, citing many authorities: "This delay [of 17 days] was not of itself a proximate cause of the destruction of the cotton by fire. * * * The negligent delay was, standing alone, a remote, and not a proximate cause, remotely contributing to the injury as an occasion or condition." See note to Morrison v. Davis, 57 Am. Dec. 701. The appellant, so far as this record discloses, could not reasonably have anticipated loss from this fire originating half a mile from the depot platform. It may be that, on another trial, the appellees may be able to establish facts which would show that the appellant ought to have anticipated probable loss from such fire, and hence was negligent as to that. And whether it ought to have reasonably so anticipated such fire is, as held in 64 Miss. at page 678, 2 South. 81, a question of fact for the jury. But, unless the case of appellees is most materially strengthened on that point, we feel it our duty to say that the first instruction asked by the defendant, and refused, corrections as to dates touching interest being made, should be given as the full measure of appellees' rights. Reversed and remanded.

(41 Fla. 120)

CHAPMAN, Sheriff, v. REDDICK.

(Supreme Court of Florida. March 7, 1899.)

COURTS — JURISDICTION — SHERIFFS — CUSTODY OF GOODS.

1. The legislature has power to authorize the circuit courts to issue writs to be executed in any part of the state, where such writs merely enable the court to fully exercise its rightful, constitutional jurisdiction, by giving notice to the party defendant, or by securing his property, or a lien thereon, as an auxiliary, incidental, or conservatory measure, in suits where such courts have jurisdiction over the subject-matter of the action granted by the constitution; and the exercise of such power does not confer extraterritorial jurisdiction upon the circuit courts, in violation of the constitution.

2. The provisions of sections 998, 1014, Rev. St., authorizing summons ad respondendum to issue from a circuit court, to be served upon defendants in another county or circuit, in actions rightfully instituted in such court upon a subject-matter within its constitutional jurisdiction, though none of the defendants are served in the county or circuit wherein the court issuing it sits, are valid legislative enactments, and confer no extraterritorial jurisdiction upon circuit courts in violation of the constitution.

3. The provisions of chapter 3721, Acts 1887, authorizing writs of attachment to issue from a circuit court of one circuit, to be executed by levy upon defendant's property in another county or circuit, in actions rightfully brought in such court, the subject-matter of which is within the constitutional jurisdiction of such court, are valid legislative enactments, and confer no ex-

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traterritorial jurisdiction upon circuit courts, in violation of the constitution.

4. The circuit courts of this state are superior courts of general jurisdiction, and nothing is intended to be out of the jurisdiction of a superior court, except that which specially appears so to be.

5. Where an officer places attached property in the hands of another person for safe-keeping, without the consent of the plaintiff in attachment, he is liable for the failure of such other person to exercise ordinary care to preserve it; and, if the property is lost or stolen by reason of the failure of such other person to exercise such care, the officer will be liable to the plaintiff in attachment, after such plaintiff shall have obtained a valid judgment preserving the attachment lien, for the value of the attached property,—not to exceed, however, the amount of his judgment.

(Syllabus by the Court.)

Error to circuit court, Sumter county; William A. Hocker, Judge.

Action by John M. Reddick against W. T. Chapman, sheriff of Sumter county. There was a judgment for plaintiff, and defendant brings error. Affirmed.

J. O. Langley, for plaintiff in error. T. M. Shackelford, for defendant in error.

CARTER, J. On July 22, 1889, defendant in error began an action against plaintiff in error in the circuit court of Sumter county to recover damages for defendant's failure and refusal to levy and collect an execution. The defendant filed a demurrer to the declaration, which was overruled, and thereafter several pleas to the declaration to which demurrers were sustained; and, having failed to file other pleas within the time allowed by the court, a default was entered against him on the rule day in October, 1892. Thereafter plaintiff's damages were assessed by a jury at \$300, and on the same day (March 6, 1894) judgment was entered in favor of plaintiff for said sum, from which defendant sued out this writ of error.

We shall not attempt to give the pleadings in full, but confine ourselves to a brief statement of the facts alleged upon which errors are assigned in this court. It appears from the declaration that on November 21, 1887, in a suit instituted by defendant in error against one William Edgar in the circuit court of Hernando county, then in the Sixth judicial circuit, a writ of attachment was issued, addressed to the sheriff of Sumter county (Sumter county being then in the Fifth judicial circuit), commanding him to attach, and take into his custody and control, so much of the lands, tenements, goods, and chattels of said William Edgar as would be sufficient to satisfy John M. Reddick, the plaintiff, in a debt of \$231.05, with costs of suit, and requiring him to have same before the judge of the circuit court for Hernando county at the court house in Brooksville on December 5, 1887, together with the writ. This writ duly came to the hands of plaintiff in error as sheriff of Sumter county, and on November 25, 1887, he levied same upon an engine and boiler, and certain other goods and chattels, in Sumter

county; indorsing a return of his levy upon the writ. On February 5, 1880, judgment was recovered by Reddick against Edgar in the suit pending in Hernando county for \$250.88 and costs, upon which execution issued May 18, 1889, in ordinary form, addressed to, all and singular, the sheriffs of the state. This execution duly came to the hands of plaintiff in error, and the present action was instituted to recover damages for his alleged failure and refusal to levy same upon the attached property, and collect by sale thereof.

One of the pleas filed by defendant, omitting formal parts, was as follows: "That after the levy of the writ of attachment upon the property of said William Edgar as in plaintiff's declaration alleged, the said property being ponderous, and difficult of removal by defendant, and being situated a considerable distance from the residence of the defendant, to wit, about fifteen miles, the defendant put the same in the care and charge of one W. W. Hammack, of whose probity and diligence in the premises defendant was well satisfied, but that, by some means and by some person or persons unknown to defendant, the said property was removed, between the time of the levy of said attachment and the coming into defendant's hands of the *fiel facias* in plaintiff's declaration mentioned, to some place unknown to defendant, and the whereabouts of which said property is still unknown to defendant; that more than a year elapsed from the levy of the said writ of attachment to the coming into defendant's hands of the said writ of *fiel facias*."

The plaintiff in error confines his argument in this court to his assignments of error based upon the rulings upon defendant's demurrer to the declaration, and plaintiff's demurrer to defendant's plea which we have just quoted. The only point of law noted for argument upon the margin of the demurrer to the declaration is that the statute authorizing the issuance of the writ of attachment is unconstitutional, and therefore void. Perhaps the constitutional question does not properly arise upon the demurrer to the declaration, but it does arise upon the demurrer to the plea. We shall therefore proceed to consider the constitutional question, and then the merits of the plea as a defense.

I. The first, second, and fourth sections of chapter 3721, Laws approved May 19, 1887, entitled "An act to provide for the issuing and service of writs, process and notices in civil suits and proceedings at law in certain cases," provide as follows:

"Section 1. That hereafter when in any civil suit or proceeding at law in any of the courts of this state, for any purpose whatever, the defendant, defendants, or any one of them therein, resides or is in any county of this state other than the one in which said suit or proceeding is commenced or is pending, any writ, writs, process or notices as authorized by law in civil suits or proceedings, when the defendant or defendants

reside in the county where the suit or proceeding is commenced, shall be issued and appropriately directed, and the sheriff or other proper officer of said county in which said defendant, defendants or any one of them resides or may be found, shall execute and serve such writs, process or notices; and return thereof shall be made to the court from which the same emanated, and such execution or service and return shall be valid to all intents and purposes, and the defendant or defendants so served legally bound thereby; provided, however, that before any writ, process or notice shall issue by virtue of this section, the plaintiff, or some one in his behalf, shall make affidavit before some officer of this state authorized to administer oaths that said suit or proceeding is, or was, instituted in good faith and with no intention on the part of the plaintiff or plaintiffs, as the case may be, to annoy or defraud said defendant or defendants.

"Sec. 2. That hereafter, when in any proceedings in attachment in any of the courts of this state, the plaintiff, or some one in his behalf, shall, in addition to the affidavit now required in attachment proceedings, make affidavit that the defendant or defendants, or any one of them, has real or personal property in some county of this state other than the one in which said proceedings were instituted, a writ of attachment, original or ancillary, as the case may be, shall be issued and directed to the sheriff or other proper officer of said county where said property is, as aforesaid; and said officer shall execute said writ and hold the property levied on by virtue thereof subject to the order of the court from which said writ emanated, which said court shall have the power to order the delivery thereof to the sheriff or other proper officer of the county where the said proceedings were instituted, or order said officer so executing the writ to hold and dispose of the same in his county according to law, as in other cases. And when any real property is levied upon by virtue of this section, it shall be the duty of the officer levying said writ to file a written notice of said levy with the clerk of the circuit court for the county in which said property is situated, which notice shall contain a description of the property so levied upon, and the clerk shall record said notice in the book kept for the record of foreign judgments, for which he shall receive a fee of twenty-five cents, and said record shall be notice to all persons of said levy; and in case of the dissolution of the attachment, or dismissal of the suit, or if for any cause the property ceases to be bound by said attachment, upon due proof thereof the clerk shall note such fact on the record of the levy."

"Sec. 4. That nothing in this act shall authorize the bringing of any civil suit or proceeding at law in any other county than the one in which the property in litigation is or in which the cause of action accrued. But

when there is nothing local in the suit it may be brought in any county where the defendant or any one of the defendants, if there be more than one, shall reside."

Section 3 has reference to distress warrants, and section 5 simply repeals all laws in conflict with the provisions of the act.

The writ of attachment mentioned in the declaration was issued under the authority of section 2 of the above act; and as it issued from the circuit court of a county in the Sixth judicial circuit to the sheriff of a county constituting a part of the Fifth judicial circuit, to be there executed, the contention is that the act is void, because it confers extraterritorial jurisdiction upon the circuit courts.

Section 2 of this act, with some changes in the language, has been carried forward as a part of section 1650, Rev. St. 1892, and substantial parts of sections 1 and 4 of the act became incorporated into sections 998, 1014, Rev. St., which read as follows:

"Sec. 998. Suits shall be begun only in the county (or if the suit is in a justice of the peace court in the justice's district) where the defendant resides, or where the cause of action accrued, or where the property in litigation is. If brought in any county or justice's district where the defendant does not reside, the plaintiff, or some person in his behalf, shall make and file with the praecipe or bill in chancery, an affidavit that the suit is brought in good faith, and with no intention to annoy the defendant. This section shall not apply to suits against non-residents."

"Sec. 1014. All process, except that issuing from a justice of the peace court, shall be served by the sheriff of the county in which it is to be served. Process of a justice of the peace court may be served by a sheriff of the county or by a constable. In cases where the sheriff is interested, and in case of necessity, the judge of the circuit court may appoint an elisor to act instead of the sheriff. All writs or process issued upon the institution of a suit which may be begun in a county where the defendant does not reside, and all writs, process or notices requiring service upon a defendant not in the county where the suit is pending, may be served by the sheriff of the county in which the defendant is to be found."

The case at bar arose prior to the adoption of the Revised Statutes, but other cases pending before us, originating after the adoption of those statutes, involve the constitutionality of sections 998 and 1014, in so far as they permit summons ad respondendum to issue from a circuit court of one circuit to be served upon defendants in another circuit, in actions of assumpsit, where the cause of action appears from the record to have arisen in the counties where the suits are brought, though none of the defendants are served in that county, or in the circuit in which that county is situated. The consti-

tutional objections urged are the same as those suggested in the present case; and as we have considered all these cases together, and reached the conclusion that the legislation attacked is within the legislative competency, we are disposing of the other cases without written opinions, and shall state the reasons which impel us to the conclusion reached, both as to the summons and the attachment, in this opinion.

By the constitution of 1885 the judicial power of the state is vested in the supreme court, circuit courts, criminal courts, county courts, county judges, and justices of the peace. Const. art. 5, § 1. Section 8 of the same article provides that there shall be seven circuit judges, to be appointed by the governor and confirmed by the senate, who shall hold their offices for six years. "The state shall be divided into seven judicial circuits, and one judge shall be assigned to each circuit. Such judge shall hold at least two terms of his court in each county within his circuit every year, at such times and places as shall be prescribed by law, and may hold special terms. The governor may * * * order a temporary exchange of circuits by the respective judges, or order any judge to hold one or more terms or parts of terms in any other circuit than that to which he is assigned. The judge shall reside in the circuit of which he is judge. Successors to the judges of the circuit courts in office at the ratification of this constitution shall be appointed and confirmed at the first session of the legislature after such ratification."

Section 9 fixes the salaries of the supreme and circuit judges. Section 10 provides that, "until otherwise defined by the legislature, the several judicial circuits of the state shall be as follows: The First judicial circuit shall be composed of the counties of" (naming them), with like provisions as to each of the other judicial circuits.

Section 11 provides: "The circuit courts shall have exclusive original jurisdiction in all cases in equity, also in all cases at law, not cognizable by inferior courts, and in all cases involving the legality of any tax, assessment, or toll; of the action of ejectment and of all actions involving the titles or boundaries of real estate, and of all criminal cases not cognizable by inferior courts; and original jurisdiction of actions of forcible entry and unlawful detainer, and of such other matters as the legislature may provide. They shall have final appellate jurisdiction in all civil and criminal cases arising in the county court, or before the county judge, of all misdemeanors tried in criminal courts, of judgments or sentences of any mayor's court, and of all cases arising before justices of the peace in counties in which there is no county court; and supervision and appellate jurisdiction of matters arising before county judges pertaining to their probate jurisdiction, or to the estates and interests of minors, and of such other matters as

the legislature may provide. The circuit courts and judges shall have power to issue writs of mandamus, injunction, quo warranto, certiorari, prohibition, habeas corpus and all writs proper and necessary to the complete exercise of their jurisdiction."

Section 12 provides: "The circuit courts and circuit judges may have such extraterritorial jurisdiction in chancery cases as may be prescribed by law."

Section 14 authorizes a circuit judge to appoint in each county in his circuit one or more court commissioners, who are given power, in the absence from the county of the judge, to allow certain writs, returnable before themselves or the circuit judge; and their orders are reviewable by the circuit judge.

Section 15 requires the governor, by and with the consent of the senate, to appoint a state attorney in each judicial circuit, and requires that there be elected in each county a sheriff and a clerk of the circuit court.

Sections 19 and 20 authorize the selection of judges ad litem, the transfer of causes, and the appointment of referees in the manner therein specified.

It is urged upon us that these provisions of the constitution, particularly in view of section 12, quoted, and the rule of construction, "*Expressio unius est exclusio alterius*," limit the authority of each circuit court to the territory composed of the counties embraced within the circuit, and that in such territory the jurisdiction of each of the circuit judges is exclusive of all other circuit courts; that the issuance of process is the exercise of jurisdiction, and, when issued beyond the territorial limits of the court, it becomes the exercise of extraterritorial jurisdiction, within the meaning of the constitution.

In *Sanchez v. Haynes*, 35 Fla. 619, 18 South. 27, the first and fourth sections of the act of 1887 were construed; and it was there held that they only authorized service of summons ad respondendum outside the county in which the suit was instituted, where the suit is properly brought in the county where the property in litigation is located, or in which the cause of action accrued, or where one of the defendants resides, where there is more than one. In other words, that the statute did not pretend to give jurisdiction over a subject-matter as to which the court was before the act without jurisdiction, but gave authority merely to issue a writ beyond its territorial limits, but within the limits of the state, whereby to acquire jurisdiction over the person of the defendant, and thereby enable it to exercise its rightful jurisdiction over the subject-matter. This construction of the statute is obviously correct and applies as well to the second as to the first section thereof, and to those sections of the Revised Statutes which we have quoted. The writ, whether summons ad rem or attachment, when sent and executed beyond the territorial limits of the court issu-

ing it, must, in order to be valid, be issued by a court having jurisdiction over the cause in which it is issued, either by reason of the accrual of the cause of action, the residence of the defendants, or some of them, or because of the situation of property in litigation or attached on mesne process. In the *Sanchez-Haynes* Case the entire record was before the court, from which it appeared that the cause of action was transitory; that the default and final judgment were both entered by the clerk, and not by the judge, nor by his order; and this court found that there was nothing shown in the declaration, or elsewhere in the proceeding, to indicate that the cause of action accrued in the county where the suit was brought, while it did appear affirmatively that the defendant resided and was served beyond the limits of the circuit. It was accordingly held that the service of the writ was a nullity, not because of constitutional infirmity, but because it was not authorized by the statute. In other states we find statutes authorizing summons and writs of attachments to be issued to other counties, and the language of those statutes, or their uniform construction, confines their operation to cases where such writs are issued by courts having jurisdiction over the subject-matter of the action, to enable them to fully exercise such jurisdiction. *Sparks v. Beyer*, 5 Kan. App. 721, 46 Pac. 980; *Ellis v. State*, 92 Tenn. 85, 20 S. W. 500; *Porter v. Young*, 85 Va. 49, 6 S. E. 803; *Pendleton v. Smith*, 1 W. Va. 16; *Chase v. Ostrom*, 50 Wis. 640, 7 N. W. 667; *Hinman v. Rushmore*, 27 Ill. 509; *Fuller v. Langford*, 31 Ill. 248; *Buck v. Coy*, 73 Ill. App. 160; *Carney v. Taylor*, 4 Kan. 178, 542; *Huxley v. Harrold*, 62 Mo. 516; *Carter v. Arbutnot*, Id. 582; and particularly *Laird v. Dickerson*, 40 Iowa, 665; *Kentzler v. Railway Co.*, 47 Wis. 641, 3 N. W. 369; *Kenney v. Greer*, 13 Ill. 432.

The circuit courts of this state are superior courts of general jurisdiction, and it requires no citation of authority to show that nothing is intended to be out of the jurisdiction of a superior court, except that which specially appears so to be. It is true that, as held in the *Sanchez-Haynes* Case, where the whole proceeding is before the court, and it affirmatively appears from the record that the default and final judgment were entered by a clerk upon a service perfected beyond the territorial limits of the court, and there is nothing in the record to indicate that the court had jurisdiction of the subject-matter, this presumption is overturned. This results from the fact that the clerk in such cases acts in a ministerial capacity, as a mere agent of the law, and the facts authorizing him to act must therefore specially appear. But in this case there is nothing to show that the circuit court of Hernando county did not have jurisdiction of the person of the defendant and of the subject-matter of the action in which the attachment was issued, or to indicate that the clerk was without authority to issue the attachment, or that the judgment in that suit was not entered

by the court; and, the writ appearing to be fair and regular upon its face, we must presume that it was properly issued by a court having jurisdiction of the action and of the defendant, or of his property in that county by the levy of an attachment thereon. We are therefore required to decide whether the statute authorizing this writ to be issued by a court exercising its constitutional jurisdiction within its territorial limits conferred extraterritorial jurisdiction upon the court.

A careful reading of the constitution fails to show that it anywhere expressly or impliedly gives to any particular circuit court jurisdiction over particular persons. It grants exclusive original jurisdiction generally to the circuit courts of all cases in equity, and all cases at law not cognizable by inferior courts, and then specifically of all cases involving the legality of any tax, assessment, or toll, of the action of ejectment, and all actions involving the title or boundaries of real estate, and original jurisdiction of actions of forcible entry and unlawful detainer, and of such other matters as the legislature may provide. It speaks of "cases" and "actions," and not of "persons," showing clearly a design to grant jurisdiction of certain subject-matters, but with no express or implied prohibition upon the powers of the legislature to provide process to enable them to exercise the jurisdiction conferred, by requiring persons in distant parts of the state to appear and defend actions rightfully instituted in circuit courts held in other parts of the state. The expression "extraterritorial jurisdiction," used in section 12, art. 5, must be construed in connection with the term "jurisdiction" in other sections of the same article; and, so construed, it is clear that it has no reference to persons, so as to prohibit the legislature from authorizing process to reach the person of a defendant anywhere within the limits of the state. Our state constitution is a limitation upon power, and, unless legislation duly passed be clearly contrary to some express or implied prohibition contained therein, the courts have no authority to pronounce it invalid. *Sharpless v. Mayor, etc.*, 21 Pa. St. 147; *State v. McAllister*, 38 W. Va. 485, 18 S. E. 770; *Cotten v. Commissioners*, 6 Fla. 610. While constitutional jurisdiction cannot be restricted or taken away, it can be enlarged by the legislature in all cases where such enlargement does not result in a diminution of the constitutional jurisdiction of some other court, or where such enlargement is not forbidden by the constitution. *State v. Hocker*, 35 Fla. 19, 16 South. 614; *Harris v. Vanderveer's Ex'r*, 21 N. J. Eq. 424. It certainly cannot for a moment be pretended that it interferes with the jurisdiction of any court to authorize another court of the same state to require one domiciled within the territorial limits of the former to appear and defend a suit properly instituted in the latter. The courts are merely agencies of the same sovereignty, established for administering jus-

tice; and there is nothing in the constitution which forbids the sovereign, through the legislative department, requiring every person domiciled within its jurisdiction to appear and submit to an adjudication of his rights in any judicial tribunal of the state which has power under the constitution to adjudicate them. It is true that at common law no court, even if it had jurisdiction of the subject-matter, could send its process beyond its territorial limits without express legislative authority. And this rule of the common law was of force in this state, so that prior to the enactment of the statute of 1887 no court could, except in special cases, send its process beyond its territorial limits; but this result was not caused by any prohibition in the constitution, but by the rule of the common law mentioned. The legislature has seen fit to give the authority, and to that extent has repealed the common law, and it is not perceived why the legislature cannot repeal any common-law rule not imbedded in the constitution, or secured from repeal by that instrument. In *State v. Jacksonville, P. & M. R. Co.*, 15 Fla. 201 (text, 284), it was held that without legislative authority a circuit court could not, through its own receiver, take possession of property situated beyond its territorial jurisdiction. This conclusion was reached by the application of the common-law principle above stated. The court there expressed a doubt if the legislature could constitutionally authorize such process, but the point was not decided. In the case of *State v. Jacksonville, P. & M. R. Co.*, 16 Fla. 708 (text, 722), it was held that the circuit court, if it had jurisdiction of the parties, could establish the rights in, and declare or define liens upon, property in another circuit, though it could not decree a sale by its own officers of such property. In the case cited from 15 Fla. 201 (text, 284), a decision from the supreme court of Arkansas was relied upon as sustaining the conclusion reached, and the constitution of that state organizing its circuit courts was very much like our constitution of 1868. In a subsequent case (*Tucker v. Bank*, 4 Ark. 431) it was held that the legislature possessed the power to authorize process from the circuit court of one county to run into another county, and be executed there; and in a later case the same court affirmed the power of the legislature to enact a statute providing that, "where a defendant in a suit instituted by attachment has property in several counties, separate writs of attachment may be issued to each county." See, also, *Hickman v. O'Neal*, 10 Cal. 292; *Trust Co. v. Bond*, 91 Wis. 204, 64 N. W. 854; *Ellis v. State*, 92 Tenn. 85, 20 S. W. 500. Our statute authorizing the attachment does not undertake to transfer to another circuit court any subject-matter of litigation properly belonging to the court into whose territorial limits such process is authorized to run and be executed. It goes no further than to authorize the court, by its process, to fasten

a lien upon real estate, or to secure custody of personal property situated in such other circuit, to answer the judgment to be obtained in the suit in which its process is issued. Its purpose is to give each of the circuit courts power to exercise fully and completely their legitimate constitutional jurisdiction by means of process returnable to any part of the state; and we find nothing in the constitution which expressly or impliedly prohibits the legislature from giving them authority to issue such writs in aid of, and to enforce, their rightful jurisdiction. Some courts affirm the incidental jurisdiction in broad terms (*Favrot v. Plane*, 4 La. Ann. 584; *Kahn v. Sippill*, 35 La. Ann. 1039; *Webb v. Wright*, 2 Bush, 126; *Tinsley v. Savage*, 50 Mo. 141), and the powers of the legislature to confer it even when it withdraws from that of another court (*Hunt v. Potter*, 58 Miss. 96; *Wright's Heirs v. Ware*, 50 Ala. 549; *Dunbar v. Frazer*, 78 Ala. 529); but we assume, without deciding the direct question, that the legislature cannot, in this state, grant authority to one circuit court to issue extraterritorial writs of any kind for the purpose of acquiring jurisdiction of a case wherein the cause of action did not accrue, and the defendant, or defendants, if more than one, do not reside within its territorial limits, or wherein the property in a local action is situated beyond its territorial limits. But where the writ merely enables the court to fully exercise its rightful jurisdiction, by giving notice to the party defendant, or by securing his property, or a lien thereon, as an auxiliary, incidental, or conservatory measure, in suits wherein the court has jurisdiction over the subject-matter of the action, granted by the constitution, we think the legislature has the power to authorize its execution in any part of the state, and that the exercise of such power does not confer extraterritorial jurisdiction upon the circuit courts, in violation of any express or implied prohibition in the constitution.

II. The law is that where an officer places attached property in the hands of another person for safe-keeping, without the consent of the plaintiff in attachment, he is liable for the failure of such other person to exercise ordinary care to preserve it, and, if the property is lost or stolen by reason of the failure of such other person to exercise such care, the officer will be liable to the plaintiff in attachment after such plaintiff has obtained a valid judgment preserving the attachment lien for the value of the attached property, —not to exceed, however, the amount of his judgment. *Drake*, Attachm. § 294; *Wap. Attachm.* § 971; *Wade*, Attachm. § 230; 2 *Freem. Ex'ns*, § 270. The plea in this case did not allege that Hammock exercised any care whatever to preserve the property levied upon. It did not allege that the property was not lost or removed by reason of a failure to exercise ordinary care. It alleged only that defendant placed the property in charge of a person "of whose probity and diligence

defendant was well satisfied," and that the property was removed by some unknown person to some unknown place. These allegations were insufficient to relieve the defendant from liability, and the demurrer to the plea was properly sustained.

The judgment of the circuit court is affirmed.

(41 Fla. 241)

WATSON v. JONES.

(Supreme Court of Florida. March 7, 1899.)

DECEIT—KNOWLEDGE—DECLARATION—EVIDENCE—
JUDGMENT—MORTGAGES—CAVEAT EMTOR
—DEFICIENCY.

1. Wherever a party makes a false representation of a material fact to a person ignorant thereof, with intention that it shall be acted upon, followed by reliance upon and by action thereon, amounting to a substantial change of position, and the special situation or means of knowledge of the party making the statement were such that it was his duty to know as to the truth or falsity of the representation, such party is in law guilty of fraud as much so as if he actually knew that his statement was false, and an action for deceit based thereon is not, under our statute (*Rev. St. § 1294*), barred until three years from "the discovery by the aggrieved party of the facts constituting the fraud."

2. Averments in a declaration for deceit, to the effect that defendant well knew his statements to be untrue, and that his special situation or means of knowledge were such as made it his duty to know whether his representations were true or false, are but different methods of alleging the same ultimate fact,—knowledge,—and a declaration containing both averments is not bad for duplicity, nor can it be said to be so framed as to prejudice or embarrass the defendant in preparing his defense.

3. When the only relevant fact in issue is whether a judgment has in fact been rendered, nothing need be produced but the judgment entry; but where it becomes necessary to prove that a valid judgment has been rendered by which the party offering it has acquired, or his adversary has lost, some right or title, either by the judgment alone or by it and proceedings taken for its enforcement, the whole record, so far as it concerns the formal stages, must be produced, or its absence properly accounted for.

4. The rule caveat emptor applies to sales under mortgage foreclosure as well as to other judicial sales; the purchaser at foreclosure sale only takes what title the parties to the suit have; a prior judgment creditor, not a party to the foreclosure proceedings, can enforce his lien by selling the property under his execution, even in the hands of the purchaser at such a sale; and such judgment creditor has no such right to, or interest in, the proceeds of such a sale as will entitle him to demand, or the master to pay, or the purchaser to require the payment of, any portion of such proceeds in satisfaction of such judgment lien, in the absence of a valid order of the court to that effect.

5. Where a master sells property under a decree of foreclosure for more than sufficient to pay the decree, and the decree does not authorize him to sell subject to prior incumbrances, and prior incumbrancers are not parties to the foreclosure suit, and after the sale, but before payment of the purchase money, it is discovered that there are prior incumbrances upon the property, and the purchaser, prior incumbrancer, mortgagee, and master, without the consent of the defendant in foreclosure, and without an order of the court to that effect,

agree that a sufficient amount of the purchase money be paid over to such prior incumbrancer to satisfy his claim, and the surplus only is credited upon the foreclosure decree, and this action of the parties is never ratified by the mortgagor or the court, and no judgment for deficiency is ever entered against the mortgagor, the mortgagee has no standing upon which to enforce a claim for a balance asserted by him to be due upon his decree.

6. In actions for deceit, the scienter can be established by either one of three phases of proof, showing—First, that the party made the representation with actual knowledge of its falsity; second, that the party, having no knowledge whether the statement was true or false, made the statement as of his own knowledge, or in such absolute, unqualified, and positive terms as to imply knowledge on his part; or, third, that from the party's special situation or means of knowledge it was his duty to know as to the truth or falsity of the statement made; and where there is evidence tending to prove the scienter in the second phase, as well as in the first and third, it is not error to refuse an instruction to the effect that defendant will be entitled to a verdict unless it is proven that he had actual knowledge of the falsity of his statement at the time he made it, or that from his special situation or means of knowledge it was his duty to know as to the truth or falsity of the statement made by him. (Syllabus by the Court.)

Error to circuit court, Escambia county; William D. Barnes, Judge.

Action by Allen R. Jones against Thomas C. Watson. There was a judgment for plaintiff, and defendant brings error. Reversed.

On February 10, 1894, defendant in error began an action on the case for deceit against plaintiff in error in the circuit court of Escambia county. The seventh or additional count added to the declaration as an amendment by leave of court alleges: "And because, to wit, on the 18th day of August, 1885, the defendant, then and there being the agent of one John D. Gray, and for the benefit and advantage of him, the said defendant, as agent of John D. Gray, craftily and fraudulently procured and induced the plaintiff to make a loan of two thousand dollars to said John D. Gray on a mortgage upon certain real estate, which real estate the said defendant falsely and fraudulently represented to be free of incumbrances, whereas, as defendant well knew or ought to have known, the said real estate was subject to the prior lien of a judgment of this honorable court, of which plaintiff was ignorant, and which would have prevented plaintiff from making said loan had he had knowledge of it, and the said defendant concealed and continued to conceal the same, and the plaintiff remained in ignorance of it until after the foreclosing of the said mortgage, to wit, on the 24th day of November, 1891, and by reason of the said judgment lien plaintiff realized from the said security upon the foreclosure thereof one thousand and fifteen and $\frac{4}{100}$ dollars, less than amount to which he was entitled under the provisions of the decree of foreclosure, whereby the said one thousand and fifteen and $\frac{4}{100}$ dollars has been lost to the plaintiff."

The defendant moved to strike this count,

because—First, it states two causes of action; second, it is double; third, the defendant cannot properly set forth his defenses thereto as framed. Defendant also filed a special demurrer to this count, the grounds thereof being the same as the motion to strike. The motion and demurrer being overruled, defendant filed two pleas, as follows: "(1) That he is not guilty; (2) that said count is based on transaction connected with the loan by plaintiff to J. D. Gray of \$2,000 on the 19th day of August, 1885, and was completed on said date, at which time the alleged causes of action, if any there were, accrued to plaintiff, and this was more than three years before the institution of this suit." Plaintiff replied to the second plea "that, by reason of the matters and things stated in the seventh count of the declaration, he did not discover the existence of said judgment until within three years before the institution of this suit." The defendant demurred to this replication as being "bad in law and substance, and insufficient answer to said plea." The demurrer being overruled, defendant joined issue on the replication, plaintiff joined issue on defendant's plea of not guilty, and the parties proceeded to trial, which resulted in verdict and judgment for plaintiff in the sum of \$1,273.51 and costs. Defendant's motion for a new trial being refused, he sued out the present writ of error from the judgment rendered against him.

There was evidence on behalf of plaintiff tending to prove the following facts: In 1885 defendant was agent for John D. Gray, and in August of that year he approached plaintiff with a view of procuring a loan of \$2,000 for Gray upon the security of a mortgage upon certain real estate in Pensacola. Plaintiff asked him if there were any liens upon the property, and defendant replied there was a mortgage to a building and loan association which would be paid from the loan. Plaintiff told defendant he must have the records examined, and an abstract made of the title to the property, so as to be sure that the title was good and unincumbered, as he wanted a first lien if he made the loan. Subsequently the defendant, by representing to plaintiff that he had examined the title to the property, and that the title was good and unincumbered, procured from plaintiff for Gray \$2,000, which was secured by a mortgage upon the property executed by Gray and wife, dated August 18, 1885. Defendant, as Gray's agent, paid the interest on the mortgage until December, 1890, when he ceased to be agent for Gray, and plaintiff in March, 1891, began suit to foreclose his mortgage. The foreclosure suit was brought against John D. Gray individually and as administrator of Margaret E. Gray, his wife, who died after the execution of the mortgage, and Thomas C. Watson, the defendant, who was alleged to have purchased all the interest of John D. Gray as an heir of his wife in the property embraced in the mortgage from one J. J. McCaskill, who had

purchased such interest at a public sale under execution against John D. Gray. Decrees pro confesso were entered against the defendants in the foreclosure suit, and thereupon the court entered a decree of foreclosure for the sum of \$2,177.66 for principal and interest, and \$217.76 for attorney's fees, and directed: That the mortgaged property be sold by Hunt Chipley, special master, at public sale, to the highest bidder. That he execute to the purchaser a due and formal conveyance, upon production of which the purchaser should be let into possession. That from the proceeds of sale there be paid—First, the costs of sale; second, the costs of the foreclosure suit; third, the amount decreed to complainant, principal and interest; fourth, the surplus into the registry of the court to abide the further order of the court. And that the master report to the court his proceedings under the decree. On March 8, 1892, the special master filed his report showing the following facts: That in accordance with the decree of foreclosure, and in the manner therein described, he, on January 4, 1892, sold the mortgaged property at public auction for the sum of \$2,525, to Louis Boley, and executed to said Boley a deed, and received said sum as purchase price. He accounts for the disposition of said sum by stating that there appeared on the records of the circuit court of Escambia county a judgment against John D. Gray in favor of L. Bear & Co. of a date prior to the mortgage foreclosed, which constituted a prior lien against the property, amounting, with interest, to \$1,015.90; that there was a contention between L. Bear & Co. and complainant as to the payment of said judgment, and, by agreement of complainant's solicitors, he accepted from Boley a written agreement obligating himself to pay said sum of \$1,015.90 to L. Bear & Co. or the complainant, as the one or the other might thereafter be determined to be entitled to the same; that he received in cash from Boley the sum of \$1,509.10, from which he paid costs of suit and of sale \$85.14, attorney's fees \$217.76, to complainant A. R. Jones \$1,186.20, and the balance, amounting to \$21, he had deposited in the registry of the court. This report does not appear to have ever been confirmed.

Plaintiff then offered in evidence the rules judgment book of the circuit court of Escambia county, showing entries therein in the case of L. Bear against John D. Gray of a default for failure to plead, dated August 4, 1884, and a final judgment in the same case dated August 13, 1884, for \$634.79, both entered by the clerk of the court. He also offered the index to said judgment book correctly showing the page where the default and judgment were recorded, and also the judgment and execution docket of said court showing docketing of said judgment, the date of issuance of execution thereon, and correct indexing thereof. Defendant objected to this evidence upon the ground that evidence of the

record of the whole proceedings upon which judgment was based must be produced, or absence thereof accounted for. The court overruled this objection, and defendant excepted. Plaintiff then introduced evidence tending to show that, at the date of the Bear judgment, John D. Gray was the owner in fee of the property subsequently mortgaged to plaintiff, but that after the rendition of the judgment, and prior to the execution of plaintiff's mortgage, Gray conveyed the property to one Ackerman, who thereupon conveyed to Margaret E. Gray, wife of John D. Gray, in whose name the property stood at the time plaintiff's mortgage was executed. Plaintiff also introduced evidence tending to show that after Boley bid \$2,525 for the property at the foreclosure sale he had the title investigated, and found that the Bear judgment was a lien on it; that, when Boley paid the amount of his bid to the special master, there was deducted on account of the judgment the sum of \$1,015.90, which was afterwards paid by Boley to Bear on account thereof; also that, at the time of the foreclosure sale, the property was only worth \$2,525, and under the advice of his attorney plaintiff considered it more advantageous to accept Boley's bid, and pay Bear the amount of the judgment lien, than to have a resale of the property, and, as this course was best for all parties concerned, it was pursued.

Exception was taken to the following instruction given by the court: "If you should find for plaintiff, you will assess his damages at what his loss was by relying upon the representations, and that will be what he failed to realize from the foreclosure of the mortgage on the property by reason of the judgment against the property having to be satisfied out of the proceeds of the sale;" and to the refusal to give the following instructions requested by defendant: (1) "If you find from the evidence that the defendant acted in good faith in making any representations made by him, and honestly believed that they were true, then, even though they were false and his duty to know the truth was such as to fix liability upon him therefor, plaintiff cannot recover if the transaction was completed more than three years before the bringing of this action." (2) Same language, with the addition of the following words: "even though such falseness was not discovered by plaintiff until less than three years before that time." (5) "If you believe from the evidence that the defendant, Watson, had no knowledge of the existence of the judgment mentioned in the declaration at time the plaintiff loaned the money to Gray, and further believe that Watson was not in the business of examining and passing upon titles to real estate at said time, and that it was not his duty, under his relations with plaintiff in making this loan, to have known of the existence of said judgment, you will find for the defendant." (6) "In order to find for the plaintiff in this case, you must believe that

the defendant, Watson, with full knowledge of the existence of said judgment, represented to said plaintiff, with intent to defraud him, that there was no such judgment lien, or that defendant, Watson, willfully represented, with intent to defraud the plaintiff, that there was no such judgment lien, when it was his duty to have known of the existence of the same." Other facts are referred to in the opinion.

Maxwell & Maxwell and John Eagan, for plaintiff in error. John C. Avery and William Fisher, for defendant in error.

CARTER, J. (after stating the facts). I. The rulings upon the special demurrer, the motion to strike, and the demurrer to the replication to the second plea, constitute the basis of the first three assignments of error. We shall consider them all together; for, in disposing of the demurrer and motion, we incidentally determine the sufficiency of the replication to the plea. The demurrer and motion present the same identical question, the pleader being uncertain whether his objection ought to be taken by special demurrer or by motion. His objection to the declaration relates to the use of the words, "well knew or ought to have known," in the allegation of the scienter. He does not contend that this form of allegation is bad because in the alternative, nor that it renders the declaration uncertain or insufficient. He expressly admits that either form, "knew" or "ought to have known," states an actionable knowledge of falseness; and he confines himself to the argument that defenses may be interposed to a count alleging that he "ought to have known" different from those admissible to a count alleging that he "knew" of the existence of the judgment lien at the time he made the alleged representation, and that he was therefore embarrassed in preparing his defense to a count alleging that he "knew or ought to have known." He argues that, under section 1294, Rev. St., prescribing a limitation of three years in actions "for relief on the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud," in an action for deceit, in which it is charged that defendant "knew" his representation to be false, the cause of action accrues from the "discovery by the aggrieved party of the facts constituting the fraud," while in a similar action, in which it is charged that defendant "ought to have known" the falsity of his representations, the cause of action accrues from the time plaintiff acted upon the false representations, without reference to the time he discovered the facts constituting the fraud. From these premises he concludes that the count, being framed upon the theory that defendant "knew," as well as upon the theory that he "ought to have known," that his representa-

tion was false, was bad for duplicity, and framed so as to embarrass him in pleading the statute of limitations as a defense.

The defendant in error contends: That, in actions for deceit, it is only necessary to allege the scienter generally, i. e. that defendant "knew" his representation to be false. That, under this general allegation, it may be proved that the representation was made either—First, with actual knowledge of its falsity; second, without knowledge either of its truth or falsity; or, third, under circumstances in which the person making it ought to have known, if he did not know, of its falsity. That the allegation in this declaration that "defendant well knew, or ought to have known," that his representations were false, does not charge different causes of action, as to which different defenses may be interposed, but, at most, indulges in a possible ambiguity of intimation as to the character of evidence intended to be introduced to prove the scienter, and that if the words, "ought to have known," had been omitted from the count, the count would still have been provable by evidence that defendant "ought to have known." He insists that we should either reject those words as surplusage, or hold that the pleading be construed most strongly against him, thereby confining him to proof that defendant "ought to have known." To reach a correct conclusion amid these conflicting views, it will be necessary for us to ascertain the general nature and characteristics of an action on the case for deceit. In *Williams v. McFadden*, 23 Fla. 143, 1 South. 618, the court say: "The gist of the action for deceit is that the defendant made false representations, knowing them to be untrue. It naturally follows that if the representations, though false, were believed to be true by the vendor [defendant], he could not be held responsible in this form of action. In *Wheeler v. Baars*, 33 Fla. 696, 15 South. 584, it is said that "a false representation of a material fact, made with knowledge of its falsity, to a person ignorant thereof, with intention that it shall be acted upon, followed by reliance upon and by action thereon amounting to substantial change of position, is a fraud of which the law will take cognizance." The very name of the action, "deceit," implies that it is and must be founded on fraud. For this reason the action for deceit is not an appropriate remedy to relieve against negligence, accident, or mistake, or in which to recover for breach of contract, or upon a warranty, though it seems that an action on the case for breach of an express warranty or for false warranty will lie, in which neither allegation nor proof of scienter is required. *Shippen v. Bowen*, 122 U. S. 575, 7 Sup. Ct. 1283. It is not pretended that this action can be considered as one for damages for a false warranty or for breach of an express warranty. The action, being for deceit, is necessarily founded in fraud, and, in order to make out a case of

fraud, as distinguished from inadvertence, mistake, negligence, accident, and the like, it is necessary to allege and prove the scienter,—the knowledge of defendant that his representations were false. *Binnard v. Spring*, 42 Barb. 470; *Holmes v. Clark*, 10 Iowa, 423. This is generally held to be the rule both in England and America, and the distinction between fraud and warranty—between deceit and honest mistake—should not be lost sight of, nor should the action for deceit be confounded with other actions at law or in equity, in which no proof of scienter is required. The courts are not entirely harmonious as to the quantity and character of proof necessary to sustain the allegation of scienter in cases of this character. The English doctrine, as announced in the comparatively recent case of *Derry v. Peek*, 14 App. Cas. 337, which reviews many previous decisions, is that, in order to maintain an action for deceit, there must be proof of fraud; that fraud may be proved by showing that a false representation has been made—First, knowingly; second, without belief in its truth; third, recklessly, careless whether it be true or false; or, in other words, in order to prevent a false statement being fraudulent, there must be an honest belief in its truth. In Alabama, Colorado, Nebraska, and some other states, the courts do not seem to require proof of scienter in cases where the party making a false representation professes to speak from his own knowledge. *Munroe v. Pritchett*, 16 Ala. 785; *Jordan v. Pickett*, 78 Ala. 331; *Goodale v. Middaugh*, 8 Colo. App. 223, 46 Pac. 11; *Johnson v. Gullick*, 46 Neb. 817, 65 N. W. 883. In other states, the charge of fraudulent intent in actions for deceit may be maintained by proof of a statement made as of a party's own knowledge which is false, provided the thing stated is not merely a matter of opinion, estimate, or judgment, but is susceptible of actual knowledge, in which case it is deemed that the fraud consists in stating that the party knows the thing to exist when he does not know it to exist, and in such cases a belief in its existence will not warrant or excuse a statement of actual knowledge. *Fisher v. Mellen*, 103 Mass. 503; *Furnace Co. v. Moffatt*, 147 Mass. 403, 18 N. E. 168; *Haddock v. Osmer*, 153 N. Y. 604, 47 N. E. 923; *Bullitt v. Farrar*, 42 Minn. 3, 43 N. W. 566. It is also held in these states that, if the representations were not made as of the party's own knowledge, then the evidence must show that the party knew them to be untrue, and evidence that he had reasonable cause to believe that they were untrue will not constitute sufficient proof of scienter. *Pearson v. Howe*, 1 Allen, 207; *Stone v. Denny*, 4 Metc. (Mass.) 151; *Tryon v. Whitmarsh*, 1 Metc. (Mass.) 1; *Marsh v. Falker*, 40 N. Y. 562; *Marshall v. Fowler*, 7 Hun, 237; *McKown v. Furgason*, 47 Iowa, 636. The question was considered by this court in *Wheeler v. Baars*, 33 Fla. 696, 15 South. 534, and the

defendant in error relies upon the decision in that case in support of the position assumed by him in this one. It is there said that the scienter may be proved by showing—First, actual knowledge of the falsity of the representation by defendant; second, that defendant made the statement as of his own knowledge, or in such absolute, unqualified, and positive terms as to imply his personal knowledge of the fact, when in truth defendant had no knowledge whether the statement was true or false; or, third, that the party's special situation or means of knowledge were such as to make it his duty to know as to the truth or falsity of the representation. Under each phase, the proof must show that the statement was in fact false, and, in addition, under the first, that defendant had actual knowledge that it was false; under the second, that defendant made the statement as of his own knowledge, when in fact he had no knowledge whether it was true or false, which seems to bear a close resemblance to the English rule,—“without belief in its truth, or recklessly careless whether it be true or false”; and, under the third, that defendant's special situation or means of knowledge were such as made it his duty to know as to the truth or falsity of the representation. From this statement it is quite evident that proof sufficient to sustain the third phase tends very strongly to sustain the idea that the defendant had actual knowledge of the falsity of his statement; for when it is shown that the statement was material and false, and that the defendant's situation or means of knowledge were such as to make it incumbent upon him as a matter of duty to know whether the statement was true or false, the conclusion is almost irresistible that he did know that which his duty required him to know. For this reason the law conclusively presumes, from the existence of these facts, that defendant had actual knowledge of the falsity of his statement; or, more properly speaking, proof of these facts is sufficient to sustain a charge of actual knowledge, dispensing with further proof upon that subject, and admitting no proof to rebut the fact of actual knowledge, but only proof to rebut the existence of the facts from which such actual knowledge is inferred. We are therefore of opinion that proof of scienter in the third phase does not give another or different right or ground of action from that given by proof under the first phase, but that it simply establishes the same ultimate fact, viz. knowledge, by a different class of evidence, and consequently that an allegation that defendant “knew” his representation to be false is provable by evidence embraced in the third phase. In other words, an averment that defendant's situation or means of knowledge were such as made it his duty to know whether his statement was true or false, and an averment that defendant well knew his statements to be untrue, are but different methods of stating

the same ultimate fact, viz. knowledge. *McBeth v. Craddock*, 28 Mo. App. 880; *De Lay v. Carney Bros.*, 100 Iowa, 687, 69 N. W. 1053. Without committing ourselves to the proposition that the words, "ought to have known," are in pleading a sufficient allegation that the defendant's special situation or means of knowledge were such as to make it his duty to know as to the truth or falsity of his representation, but treating them as such, because both parties agree that they are, we think that allegation in this declaration is merely an alternative, cumulative, and superfluous statement of the same ultimate fact, viz. knowledge, admitting of no other or different defense or evidence than the allegation which it follows, that "defendant well knew," and that its presence in the declaration did not, therefore, render the pleading bad for duplicity, or so framed as to embarrass the defendant in preparing his defense. A case made out by proof that defendant fraudulently made an untrue material statement, where his special situation or means of knowledge made it his duty to know whether that statement was true or false, presents a pure case of fraud and deceit, as much so as if defendant actually knew his statement to be false. In either case, the action is one "for relief on the ground of fraud," and the cause of action accrues from the "discovery by the aggrieved party of the facts constituting the fraud." These conclusions sustain the rulings of the court below denying the motion to strike, and overruling the special demurrer to the declaration, embraced in the first and second assignments of error, as well as the ruling upon the demurrer to the plaintiff's replication to defendant's second plea, embraced in the third assignment of error.

II. The fourth error assigned relates to the ruling admitting in evidence the entries of default and final judgment in the case of *L. Bear* against *John D. Gray*. The objection urged was that the entries offered were only parts of the record. The defendant in error contends that the entries offered showed a perfect final judgment, emanating from a court of general jurisdiction; that the judgments of all courts of general jurisdiction are presumed to be valid, and to have been rendered in the exercise of jurisdiction regularly obtained; that the entries offered proved the existence of the judgment as a fact; and that he was not required, in this case, to prove more than its bare existence. There are authorities which hold, in accordance with the argument of defendant in error, that where a judgment is relied on as an estoppel, or as establishing any particular state of facts of which it is the judicial result, it can be proved only by offering in evidence a complete and duly authenticated copy of the entire proceedings in which the judgment was rendered; but that, where the only direct object to be subverted is to show the existence and contents of such judgment, a properly authenticated copy of the judgment entry of a court of rec-

ord possessing general original jurisdiction is admissible, without more, and, on being admitted, all the legal incidents attach which the law annexes to judgments of that class. *Gibson v. Robinson*, 90 Ga. 756, 16 S. E. 969; *Rainey v. Hines*, 121 N. C. 318, 28 S. E. 410. Unquestionably, when the only relevant fact in issue is whether a judgment has in fact been rendered, nothing need be produced but the judgment entry; but where it becomes necessary to prove that a valid judgment has been rendered, by which the party offering it has acquired, or his adversary has lost, some title or right, either by the judgment alone or by it and proceedings taken for its enforcement, we think the whole record, so far as it concerns the formal stages, must be produced. *Freem. Judgm.* § 407. There is much force in the remarks of Judge Campbell in *Kenyon v. Baker*, 16 Mich. 373: "No judgment can be lawfully given by any court until a suit has been commenced, and the defendants have been brought in and a trial or default had. Our practice allows all of these steps to be shown without making up any formal judgment record, as required by the old practice. But no judgment can stand until the jurisdiction of the court appears in some way, and no presumption can arise from an entry which has no previous steps to explain or warrant it." There certainly is no hardship in requiring the party offering the judgment to produce the entire judgment record proper, or account for its absence in some recognized manner. The whole is as readily accessible as a part, and without the whole the part can only be sustained by indulging in presumptions as to what the whole would show if introduced, or, at least, presuming that the whole, if introduced, would not show that the court had no jurisdiction to render the judgment. Presumptions are, from necessity and upon grounds of public policy, indulged to support judgments of courts of general jurisdiction where the record does not disclose that the court had no jurisdiction; but it would not only be unnecessary, but extremely dangerous, to indulge such presumptions where only a part of the whole of an accessible record is offered, and especially where, as in this case, the parts offered did not affirmatively show jurisdiction. These views find strong support in previous decisions of this court. Thus, in *Donald v. McKinnon*, 17 Fla. 746, and *McGehee v. Wilkins*, 31 Fla. 83, 12 South. 228, it was held that copies of the judgment entries alone offered to sustain a sheriff's sale under execution issued thereon were inadmissible, unless accompanied with transcripts of the record of the judgments. It is true these judgments emanated from courts of limited jurisdiction, as to which no presumptions are indulged; but the same rulings were made as to circuit court judgments in *Davis v. Shuler*, 14 Fla. 438; *Simmons v. Spratt*, 20 Fla. 495; and *Ashmead v. Wilson*, 22 Fla. 255. The printed report of the latter case does not disclose fully

the circumstances under which the judgment mentioned was offered, but we have referred to the transcript of the record on that appeal, and ascertained that the defendants offered in evidence a sheriff's deed to Martin Griffin, one of the defendants, purporting to convey the land in controversy, based upon an execution sale under a judgment from the circuit court of Duval county in favor of Robert J. Woods, and against C. P. Devereaux and Emily R. Wilson, executor and executrix of the estate of C. Parkhurst, deceased, and James Y. Wilson. In connection with the deed, defendants offered the default and final judgments entered in said suit by the clerk, but no other parts of the record. Judge McWhorter, delivering the opinion in that case, speaking of the judgment, says: "It was not competent evidence. 'It was part only of a record.' 'The whole record, or an authenticated or sworn copy of the whole, should be produced.'" See, also, the remarks of Judge Randall in *Stark v. Billings*, 15 Fla. 318, and in *Walls v. Endel*, 20 Fla. 86. In this case it was necessary for defendant in error to prove a valid judgment, of a certain date and for a definite amount, not only to show that Watson's alleged representations were untrue, but to fix the amount of special damages claimed in the declaration; and we think the court erred in admitting the isolated entries of the judgment by default and final judgment, without requiring the production of the whole record proper, or requiring its absence to be accounted for.

III. The defendant, Watson, offered in evidence a letter from John D. Gray, dated August 2, 1885, which the court excluded as being irrelevant and immaterial, and upon this ruling the fifth assignment of error is based. This ruling was correct. The letter contained no reference to negotiations for a loan from the plaintiff, Jones, but did refer to a loan from a third person, J. S. Leonard, which was not shown to have had any connection with the loan from plaintiff. No evidence was offered connecting this letter in any manner with any issue in the case, and upon its face it was entirely irrelevant and immaterial.

IV. The sixth assignment of error complains of the instruction given by the court, quoted in the preceding statement of facts, and the twelfth complains of the ruling denying defendant's motion for a new trial, which questioned the sufficiency of the evidence to support the verdict. It is urged in support of these assignments that the property covered by Jones' mortgage sold for more than enough to pay the mortgage debt, and that the debt would have been paid in full, but for the wrongful diversion of a portion of the proceeds, with plaintiff's consent, to payment of the Bear judgment. It is insisted by defendant in error that this question was not raised or argued in the circuit court, and for that reason we should not consider it. It appears from the record that the instruction complained of was excepted to by

incorporating it in the motion for a new trial, and that the motion for new trial was duly made, and the ruling denying it duly excepted to. These exceptions are clearly sufficient to present the question. There is nothing in the record to show that the very point was not raised and discussed in the lower court, and plaintiff in error in his brief insists that "the point was distinctly raised by us below for the purpose of insisting upon it, and is now squarely presented by the record." It appears from the transcript that the mortgaged property was knocked off to Boley, the highest bidder, for an amount more than sufficient to pay the mortgage debt, and that before completing his purchase Boley had the title investigated, and found that the property was incumbered by the lien of a prior judgment in favor of L. Bear. The judgment creditor, although he was not a party to the foreclosure proceedings, demanded that his judgment be paid from the proceeds of the sale, and the plaintiff and the master and the purchaser, without any authority from the court, consented that this be done, which was wholly unauthorized. The judgment creditor was a prior incumbrancer, whose rights were paramount to that of the mortgage plaintiff. The purchaser at the foreclosure sale could only take what title the parties to the suit had, and the prior judgment creditor, not being a party to the foreclosure proceedings, could enforce his lien by selling the property under his execution, even in the hands of such purchaser. *Broward v. Hoeg*, 15 Fla. 370. The master's sale could give nothing but a title subject to the Bear judgment, and the judgment creditor could, therefore, have no interest in, or right to, any of the proceeds of such sale. *Caldwell v. Houser*, 108 Ala. 125, 19 South. 796; *Freem. Ex'ns*, § 447; *Moseley v. Doe*, 2 Fla. 429; *Howe v. Robinson*, 20 Fla. 352. It is not pretended that the master undertook to sell the property free from incumbrances, or that the decree authorized him to do so, or that the purchaser was misled in any way to believe that he was, when he bid for the property, getting a clear title, nor was there any showing of mistake, accident, or fraud entitling the purchaser to be relieved from his bid, nor did the purchaser, before completing the sale, apply to the court for relief from his bid. It is true he did not have actual knowledge of the existence of the judgment lien at the time of the sale, but he must be presumed to have known that, as the master did not purport to sell clear of liens, he was purchasing subject to any prior lien of record affecting the land offered for sale. The rule caveat emptor applies to sales under mortgage foreclosure as well as other judicial sales, and while it may have been within the power of the court to relieve him from his bid upon prompt application, before he accepted a deed and paid over his money, yet he made no application of this kind, but insisted upon his purchase, and that

the prior lien should be discharged from the proceeds of his purchase. This he clearly had no right to do, nor did the judgment creditor have any right to insist that any portion of the proceeds of the sale be paid to him, nor did the master have authority to clear the title by discharging the lien of a prior incumbrancer not a party from the proceeds of sale, without directions to that effect from the court. *Osterberg v. Trust Co.*, 93 U. S. 424; *Brooks v. Brooke*, 12 Gill & J. 306; *Duvall v. Speed*, 1 Md. Ch. 229; *Investment Co. v. Way*, 52 Neb. 204, 71 N. W. 1021. The plaintiff in the mortgage foreclosure consented to these unauthorized acts, which were never approved by the court, and he is in no situation to claim that a balance is due him upon his mortgage. A case quite similar to the one at bar is that of *Bache v. Doscher*, 67 N. Y. 429. There it appeared that a judgment of foreclosure was entered for \$2,508.94, and a referee was appointed to sell the mortgaged premises. He was directed to make the sale, execute a deed to the purchaser, and from the proceeds of sale to retain his fees and expenses, and the amount of any liens for taxes and assessments, and to pay the costs of attorneys, the amount due upon the mortgage, and to deposit the surplus, if any, with the chamberlain of the city of New York. In pursuance of the judgment, the property was advertised and sold, the plaintiff mortgagee becoming the purchaser at \$9,700. The referee reported that he disposed of the proceeds of sale by allowing the plaintiff \$1,191.95 for taxes and assessments and \$6,091.25 for prior mortgages assumed by him; that he deducted his charges and expenses, and paid the costs, and paid over to plaintiff \$1,802.32, leaving a deficiency upon the mortgage debt of \$741.55. There was nothing in the complaint or judgment of foreclosure about any prior mortgages, nor were any prior mortgagees made parties to the foreclosure suit. The plaintiff mortgagee sued the defendant for the amount of the deficiency. The court held that no recovery could be had; that from the facts stated "it appears that there was no deficiency; and that the plaintiff had in his hands ample money to pay the mortgage and leave a surplus." We are of the opinion that the court erred in giving the instruction complained of, and also in refusing the motion for a new trial.

V. The first and second instructions requested by defendant, embraced in assignments of error Nos. 7 and 8, were properly refused, for reasons already stated. Whenever a party makes a false representation of a material fact to a person ignorant thereof, with intention that it shall be acted upon, followed by reliance upon and by action thereon amounting to a substantial change of position, and the special situation or means of knowledge of the party making the statement were such that it was his duty to

know as to the truth or falsity of the representation, such party is in law guilty of fraud as much so as if he actually knew that his statement was false, and an action for deceit based thereon is not, under our statute, barred until three years from "the discovery by the aggrieved party of the facts constituting the fraud."

VI. In *Wheeler v. Baars*, 33 Fla. 696, 15 South. 584, it is held that the knowledge by the maker of the representation of its falsity, or, in technical phrase, the scenter, can be established by either one of three phases of proof, showing—First, that the party made the representation with actual knowledge of its falsity; second, that the party, having no knowledge whether the statement was true or false, made the statement as of his own knowledge, or in such absolute, unqualified, and positive terms as to imply knowledge on the part of the person making it; or, third, that, from the party's special situation or means of knowledge, it was his duty to know as to the truth or falsity of the statement made. In that case, the first, second, and fourth counts of the declaration charged that defendant knew his alleged false representation to be untrue; the third, that he "ought to have known" its falsity; while the other counts (except one common count) appear to have been framed upon a false warranty, without alleging any scenter. Upon the question of scenter, the defendant in that case requested several instructions, all embracing the idea that he would be entitled to a verdict unless it was proven that he knew at the time he made the statement that it was untrue. The court below refused these instructions, and the ruling was sustained by this court. Judge Taylor, there speaking for the court, says: "As an abstract, broad, general proposition of law, it is quite true that no recovery can be had in an action of this kind unless the maker of the representation knew it to be false when made, and that he made it with intention to deceive, but the proof of such knowledge or scenter is sufficient if it establishes a case falling within either of the three phases pointed out. * * * It was not enough, therefore, for the court, under the proofs here, to simply say to the jury, in the language of the refused instructions, 'that the plaintiff could not recover in the absence of satisfactory proof that the defendant made the representation knowing it to be false.' Had these charges proceeded further after the announcement of the general proposition that scenter must be shown, with an explanation of the rules touching the three phases of proof that the law deems sufficient to establish such scenter, then it would have been proper to have given them, but in the form presented they are too general, and calculated to mislead."

For the same reasons the court below correctly refused instructions Nos. 5 and 6, requested by the defendant in this case, embraced in the ninth and tenth assignments of error. There was evidence on the part of the plain-

tiff tending to show that defendant made the alleged false statement as of his own knowledge, and in positive, unqualified terms, and also tending to show that defendant had actual knowledge that his representation was untrue. There was evidence on the part of defendant tending to show that he did not make the alleged statement; that he did not undertake to investigate the records to ascertain if there were any liens upon the property; that he never made any such investigation; and that he had no knowledge whatever as to whether there were any liens upon the property other than the building and loan mortgage. Upon this state of the evidence, it was not proper for the court to direct the jury to find for defendant if they found that he did not know, and that his situation "did not make it his duty to know," that his representation was false, as requested in the refused instructions. Even if the propositions asserted therein were abstractly correct, as applied to the first and third phases of proof of scienter, they did not embrace the second phase, as to which there was some evidence, and they were therefore properly refused. *McBeth v. Craddock*, 28 Mo. App. 380; *Caldwell v. Henry*, 76 Mo. 254.

VII. The eleventh assignment of error is not argued, and we treat it as abandoned.

The judgment of the circuit court is reversed, and a new trial granted.

(51 La. Ann. 972)

In re CITY OF NEW ORLEANS. (No. 12, 958.)¹

(Supreme Court of Louisiana. March 20, 1899.)

TAXATION—SALE—VALIDITY—NOTICE—SUFFICIENCY.

1. When an assessment made of real estate with certain name and description is valid, either of itself or rendered so by reason of confirmatory action of the owner, publication and sale of same in the same name and with the same description will convey a title to the purchaser that will be upheld, as against the delinquent taxpayer and his heirs and assigns.

2. Notice of proceedings for the sale of property for delinquent taxes is sufficient if it conform to the requirements of the state revenue law, same not being analogous to the citation which is prescribed by the Code of Practice.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frank A. Monroe, Judge.

Suit by Charles R. Churchill and Ida Churchill, wife of J. S. Thomas, Jr., for injunction against the city of New Orleans. Judgment for plaintiffs. Defendant appeals. Reversed.

Samuel L. Gilmore, City Atty., and Walter B. Sommerville, Asst. City Atty., for appellant. Wynne Rogers, for appellees.

WATKINS, J. Proceedings were inaugurated in the premises, by the petition of the city attorney, for an order of seizure and possession, directed to the civil sheriff, and com-

manding him to seize the property described, and to place the city in actual possession thereof; the property being known as lot No. 26 in square 200, bounded by St. Charles, Prytania, Euterpe, and Polymnia streets, measuring 26 feet front on St. Charles street by 127 feet 10 inches 5 lines in depth. Said order was predicated upon an alleged purchase of said piece of property by the city, with its improvements, at a public sale made for the delinquent taxes of the years 1889, 1890, 1891, 1892, 1893, and 1894, which was made on December 2, 1895, as will more fully appear by an act of sale passed before Taylor, notary, on December 13, 1895, and registered in the conveyance office, Book 162, folios 113 to 116, which is made a part of the petition. In the act of sale it appears that this property had been assessed in the years specified in the name of Widow Martha F. Churchill and minors, and of Widow Martha F., Charles R., and Miss Ida Churchill, and that under this assessment the property was advertised and sold, and the same was bid in for, and adjudicated to, the city at the total price of \$844.63; the same being the total amount of city taxes due by, and on said property for, said years. It further appears that it was sold under and in pursuance of the provisions of Act No. 96 of 1882, and Act No. 85 of 1888, and other laws in such cases made and provided. To this proceeding, Charles R. Churchill and Mrs. Ida Churchill, wife of J. F. Thomas, Jr., obtained an injunction against the issuance of said writ of seizure and possession. In their petition they alleged that the adjudication and sale of the aforesaid property to the city are absolutely null and void (1) because the property was wrongfully assessed, for the years for which the alleged sale was made, in the name of a party not the owner; (2) that said property was advertised for sale in the name of a party not the owner; (3) that the description of said property on the assessment rolls for the aforesaid years was incorrect, defective, and insufficient, and the assessment was illegal for want of certainty in its description; (4) that the advertisement of sale was illegal because of those wrongful and defective descriptions of said property; (5) that your petitioners were never served with a notice of seizure and sale of said property as required by law. To this injunction suit, the city made a general denial; and, upon the trial, judgment was rendered in favor of the plaintiffs and against the city, perpetuating the injunction. It further decreed that the sale and adjudication to the city were illegal, null, and void; and it ordered that the inscriptions of the said sale be canceled. And it is from that judgment that the city has appealed.

An inspection of the record, as well as the argument in briefs and orally, discloses that the first three grounds of objection are the same in substance; that is to say, that the assessment was erroneous to the extent that Mrs. Martha F. Churchill, widow, was nam-

¹ Rehearing denied May 1, 1899.

ed as one of the joint owners of the property, whereas, in point of fact, it is owned by the two plaintiffs in injunction solely, and in indivision as the heirs of their father. The record shows: That Charles H. Churchill died on the 26th of April, 1868, and that his widow, Mrs. Martha F. Churchill, was appointed as tutrix on the 10th of March, 1883, for her two minors, Charles R. Churchill and Ida F. Churchill, on the basis of an inventory then taken. That the property in controversy was included in the inventory, and appraised at \$8,000, and the inventory contained the statement that "the whole of the real estate inventoried herein as belonging to said succession was acquired by said Charles H. Churchill previous to his marriage." That on the 23d of January, 1889, a mandamus proceeding was filed in the civil district court in the name of Widow Martha F. Churchill, Charles R. Churchill, and Miss Ida Francis Churchill, the latter an emancipated minor; and, in their petition, it is alleged that taxes had been assessed against the property in controversy, for the years 1876, 1878, 1879, 1880, 1881, 1882, 1883, 1884, 1885, 1886, 1887, and 1888, in favor of the city, and that the same had been registered in the mortgage office, from which a mortgage resulted in favor of the city for the taxes of these years. The petition further represents that all of said taxes and tax inscriptions were null and void, and should be erased and canceled from the respective books of the city comptroller and recorder of mortgages, on the following grounds: (1) That the taxes and tax liens, privileges, and mortgages are prescribed by three and five years. (2) The assessments are made in the name of Charles H. Churchill, who does not own the property; that, said Charles H. Churchill having died, in 1869 his succession duly opened in the late Second district court, and that the properties were community property, and the plaintiffs herein were part owners as heirs of their father, with their mother as widow in community. Upon these representations, the plaintiffs prayed for a peremptory mandamus, commanding and ordering the comptroller and the recorder of mortgages to cancel and erase from the respective books of their offices the inscriptions of taxes and tax liens and privileges and mortgages against the property described in the names of Charles H. Churchill, or the estate of Charles H. Churchill, etc. Thereupon a judgment was entered to the effect that the provisional mandamus be made peremptory, and that the city comptroller and the recorder of mortgages do cancel and erase from the books of their respective offices the inscriptions of taxes, tax liens, and privileges on the property in controversy. From that judgment no appeal was taken, and it consequently became final. It further appears that this decree was filed in the proper city offices, and brought to the attention of the board of assessors of the parish of Orleans, and that subsequently, and during the years mentioned in this suit, the property

was assessed in conformity therewith; that is to say, in the names of Martha F. Churchill, and of the plaintiffs, as the widow and heirs of Charles H. Churchill. It is against these assessments, and the privileges and mortgages resulting therefrom, that the present suit seeks relief for the two plaintiffs, claiming to have inherited the property from their father, Charles H. Churchill, as his separate property. In other words, the proposition we have to consider is this: That whereas, the property was inventoried as the separate property of Charles H. Churchill, who died in 1868, and was subsequently assessed to him during all the years prior to 1889, and from which the plaintiffs were relieved by the mandamus suit and judgment on the theory that, as a matter of fact, the property was community and owned by them and their mother jointly, the plaintiffs in the present suit seek to be relieved from the payment of all taxes assessed against the property since the year 1889 upon the theory that the mandamus suit was wrong, and that, in point of fact, the property was owned by their father separately, and that their mother had no interest therein; claiming that they had no knowledge of the mandamus proceeding, and never authorized the institution of that suit by Charles P. Johnson, who claimed to act as agent, nor by James C. Moise, who signed the petition as attorney for the relators. The trend of all the testimony is to that effect. In our opinion, their pretensions cannot be entertained. On the faith of the records of the civil district court, the property was assessed for a great many years as the separate property of Charles H. Churchill, from which the plaintiffs were relieved through the effect of the mandamus suit, and upon the faith of the judgment therein rendered the assessing officers made the assessments in years subsequently thereto, from which they seek relief upon the theory that the mandamus suit and judgment were wrong. Between the two, we are asked to render a judgment whereby the plaintiffs will be relieved for the taxes of over 20 years by means of this circuit of action. Before passing on this question, an examination of our jurisprudence will be both necessary and instructive.

In *Sewell v. Watson*, 31 La. Ann. 589, the point was made that title to property derived at tax sale is bad, because it was assessed on the roll in the name of a man who had previously died, of which the court, speaking through Mr. Justice White as its organ, said this ground of relief was not good. "The property stood on the public records as that of James H. Coleman," the court said, "and was so assessed. The assessor in listing the property for taxation could have assessed it in no other way than as it stood on the records of the country, unless it be considered that it was his duty to be informed of facts not public, not to be ascertained from the condition of the property or from its occupants, for it had none." In *Mason v. Bemiss*, 38 La. Ann. 935, the charge was that the tax title was

null, because the property was not assessed in the name of the true owner, and the court, through Mr. Justice Todd, said: "It is not required of the officer charged with the assessment that, before making it, he should constitute himself a judge of the validity or invalidity of the judicial proceeding upon which the title to the property purports to rest; but that the fact of possession for many years as owners, under an adjudication, would alone suffice to guide and determine him in making the assessment as relates to the ownership of the same." In *Insurance Co. v. Levi*, 42 La. Ann. 432, 7 South. 625, a number of pertinent cases, announcing the same doctrine, are collated and approved. In *Carter v. City of New Orleans*, 33 La. Ann. 816, it was held: "When the assessment made, with certain description and in a certain name, is valid, either of itself or by reason of confirmatory action of the owner, publication and judgment in the same name and with the same description will be upheld, if otherwise regular." *Lane v. Succession of March*, 33 La. Ann. 554, is to the same effect. In *Reed v. Creditors*, 39 La. Ann. 115, 1 South. 784, this court applied the doctrine of equitable estoppel to a tax delinquent who complained of the accuracy and sufficiency of assessments. In *Oteri v. Parker*, 42 La. Ann. 374, 7 South. 570, it was held "the contention that some of the property assessed in plaintiff's name was not owned exclusively by himself, but owned by himself conjointly with others, involves only the correctness of the assessment, and cannot be urged after the expiration of the time limit fixed in the statute." See *Shattuck v. City of New Orleans*, 39 La. Ann. 206, 1 South. 411. In *Palmer v. Board*, 42 La. Ann. 1122, 8 South. 487, the court said: "Plaintiff cannot complain that after the sale to Fishel, which was duly recorded, the property was assessed in the name of Fishel. The state was guarantor of that title, and the assessors were bound to respect it. It was spread upon the public records as evidencing the existing title, and the assessors were not bound to go behind it." In *Prescott v. Payne*, 44 La. Ann. 650, 11 South. 140, it was said: "But it is equally true that, as matter of law, the Hitchcock title was apparently a good one, and entitled to be respected and upheld, as such, until judicially investigated and declared null and void. This being the case, and this principle being applied to the Offut title, it seems manifest that the assessing officer was justified in making the assessment according to the title. It was certainly not his duty to institute an examination into prior assessments to ascertain the possible illegality of the sale to Offut; and had he made such an examination, and found what, in his opinion, was evidence of error or illegality in such assessment, it would have been unquestionably out of his power and beyond his capacity to so decide,—possessing no judicial power. Accepting this view as correct, we are of the opinion that any alleged errors in the title of Offut

could not possibly affect an assessment made in his name during the time the property stood upon the record in his name." In *Augusti v. Bank*, 46 La. Ann. 530, 15 South. 75, this court expressed the opinion "that it is made the duty of an assessor by statute to examine the records of the conveyance office to ascertain what taxable property there is in his district or parish. The record of deeds and conveyances and of mortgages are taken as the basis of the assessment. It does not devolve upon him to test the validity of these acts in order that he may ascertain in whose name to assess the property. If an act be not radically null upon its face, he is within the law in taking as correct a recorded deed interested parties have for years permitted to remain on the record as an adverse title, unquestioned and unassailed."

We have been at the pains to collate and make quotations from all of the foregoing authorities for the purpose of making it plain that, in our opinion, the defects of title which the plaintiffs suggest in their injunction cannot be entertained in any view that can be taken of them, as this court is fully committed to the theory that the assessors are authorized to act upon the face of titles as they appear upon the record, and in which interested parties have apparently acquiesced through a series of years without making question or complaint, in the manner required by law, in order to obtain correction or relief therefrom. With regard to the allegation of plaintiffs' petition, to the effect that they had never been served with the notice of the seizure and sale of said property as required by law, one of the plaintiffs testified positively that he was never served with any such notice, but on cross-examination admitted that Martha F. Churchill, widow of Charles H. Churchill, was his mother, that she resided at No. 1168 St. Charles avenue, and that he lived with her. The other of the plaintiffs made a similar admission with respect to her residence with her mother. The city attorney introduced, over the objection of defendant's counsel, a notice which was signed by the city treasurer, and addressed to Martha F. Churchill, Charles R. Churchill, and Miss Ida Churchill, of date April 23, 1895, the purport of which is that the aforesaid parties are advised that city taxes against the property in question for the years 1883 to 1895, inclusive, "are unpaid and delinquent," and "that after the expiration of twenty days from the service of this notice, if said taxes, interest, and costs are not paid to the city treasurer, proceedings will be at once taken according to law, and said property advertised and sold to satisfy said taxes, interest, and costs." The official return thereon indorsed is that it was served "on Widow Martha F. Churchill in person, a person apparently above the age of fourteen (14) years, residing at No. 1168 St. Charles street."

In our opinion, such a notice, addressed to these joint owners against whom the property in question had been assessed, and in whom

the title appeared to be, and served upon one of the three in person at the domicile wherein all three at the time resided, is a sufficient compliance with the requirements of the revenue law. Act 1888, p. 129, No. 85, §§ 50, 51. Tax statutes are sui generis, and neither such a notice nor the service thereof need possess the technical sufficiency of the citation and return provided in the Code of Practice. There is no particular form of notice prescribed by the revenue laws. The objection urged by counsel for plaintiffs in injunction is that no proof was administered of the capacity of the officer whose name is appended to the return, and that the return does not state his capacity. But no such objection was urged to its admissibility at the time same was introduced and filed in evidence; the only objection then made being that the offer came too late, the case having been closed. This objection having been overruled, counsel reserved a bill of exceptions. Necessarily, any other objection there may have existed thereto was presumably waived. Inasmuch as no proof was administered with regard to the alleged imperfection and insufficiency of description of the property in the assessment, our inference is that that ground of complaint has been abandoned. Entertaining these views, the judgment appealed from is erroneous, and must be reversed. It is therefore ordered and decreed that the judgment appealed from be annulled and reversed, and it is further ordered and decreed that the demands of the plaintiffs in injunction be rejected and disallowed, and that they pay all costs of both courts. It is further ordered that the rule taken in behalf of the city be made absolute, and that a writ of seizure and possession issue as therein prayed for, addressed to the civil sheriff of the parish of Orleans, commanding him to seize the property therein described, and place the city of New Orleans in actual possession thereof, and that the defendants in rule be decreed to pay all costs of proceedings therein.

(121 Ala. 24)

TAYLOR v. STATE.

(Supreme Court of Alabama. April 4, 1899.)

INTOXICATING LIQUORS—ILLEGAL SALES—AUTHORITY OF SELLER.

1. A sale of liquors by a person neither the owner thereof nor authorized by the owner to sell is within Acts 1880-81, p. 187, making the sale of liquors in Bibb county a misdemeanor.

2. A person delivering liquors not owned by him, and which he is not authorized to sell, to another, under an agreement by which the latter pays him the price, to be used in replacing the liquor sold, is not a mere agent of the transferee to replace the liquor delivered, but a seller, within said provisions.

Appeal from Bibb county court; N. H. Thompson, Judge.

Thomas M. Taylor was convicted of violating the local option law in Bibb county, and he appeals. Affirmed.

25 So.—44

Upon the trial of the cause the state introduced a witness who testified that on a certain day, at a certain place, within 13 months before the finding of the indictment, he purchased a pint of whisky from the defendant, and paid him 40 cents in cash for it. The defendant offered in evidence a showing as to what one William Lilze, an absent witness, would testify if present, in which it was stated that the said witness would testify that, on the day the state's witness testified he purchased the whisky from the defendant, the defendant was bringing to him (Lilze) the whisky, and, when it was delivered, it was one pint short. Upon the introduction of this showing, the solicitor objected to its introduction in evidence. The court sustained the objection, and the defendant duly excepted. The defendant introduced other witnesses to prove that, at the time designated, the defendant had in his possession whisky which they (the witnesses) had ordered, and which was subsequently delivered to them by the defendant. The state objected to this testimony by said witness, the court sustained the objection, and the defendant duly excepted. The substance of the testimony of the defendant himself, as a witness in his own behalf, is sufficiently stated in the opinion. Upon the introduction of all the evidence, the court, at the request of the state, gave to the jury the following written charge: "I charge you, gentlemen of the jury, that, if you believe the evidence in this case beyond a reasonable doubt, you must find the defendant guilty as charged in the indictment." To the giving of this charge the defendant duly excepted.

Logan & Van de Graaff and W. O. Darden, for appellant. Charles G. Brown, Atty. Gen., and W. W. Lavender, for the State.

SHARPE, J. A special statute, approved February 28, 1881 (Acts 1880-81, p. 187), makes the sale of spirituous, vinous, or malt liquors in Bibb county a misdemeanor. A sale completed, which passes title to the liquors as between the parties to the contract, is within its terms. The sale of such intoxicating liquors is the mischief intended by the lawmakers to be suppressed, and the act of selling, without regard to the ownership of the seller, comes within the spirit as well as the letter of the prohibition. The only tendency of the evidence called for by the questions to witnesses whereto objections were sustained, and likewise of the writing taken as the statement of the absent witness, Lilze, was to show that defendant was not the owner of the whisky he was charged with selling. The sale, vel non, being the question at issue, such evidence was immaterial. Some conflict appears in the testimony as to the circumstances attending the transaction, but there is none as to the fact that a sale was made by the defendant as charged in the indictment. The defendant himself testified to the effect that he gave Parker a pint of whisky, stating at

the time that it was not his, and that, a few minutes thereafter, Parker expressed doubt as to whether he could get whisky to replace it, whereupon he told Parker he could pay him for it, and that he (defendant) would replace the whisky, and that he then accepted from Parker 35 or 40 cents in payment for the whisky. This was not the creation of an agency in defendant to replace liquor, like the transaction considered in *Amos v. State*, 73 Ala. 498. It appears that the result of the second thought, if not of the first intention, was strictly a sale.

In the absence of conflicting testimony to the fact of guilt, a charge affirmative of guilt, predicated upon the belief of the testimony by the jury, may be given, though this court has reiterated that such a charge is of doubtful propriety, as against a defendant in a criminal case, and should never be given where there is any evidence upon which a verdict of acquittal could be based, or where the facts in evidence pointing to guilt rest in inference only. In view of uncontradicted evidence touching the defendant's guilt, and of the conclusive character imparted to it by the admissions in court of the defendant, we cannot say that there was error either in the giving of the written charge requested by the solicitor, or in the reference thereto by the court upon the recall of the jury. To recall the jury, after their retirement, for the purpose of giving further proper instructions, is within the discretion of the trial court. *Cooper v. State*, 79 Ala. 54.

Affirmed

(121 Ala. 33)

TALBERT v. STATE.

(Supreme Court of Alabama. April 20, 1899.)

LARCENY—INTENT—JURY—REASONABLE DOUBT.

1. Where the taking is in the presence of the owner or others, otherwise than by robbery, and there is no subsequent denial or concealment, it does not raise the presumption, as a matter of law, that a felonious intent did not exist, but the question is for the jury, unless the proof leaves no room for any reasonable inference either way.

2. A doubt for which a "reason can be given" is not necessarily a reasonable doubt; the doubt on which a right to acquittal is predicated must be actual and substantial, and not capricious and speculative.

3. The state must prove accused's guilt, and not the falsity of his defense, beyond a reasonable doubt.

4. An instruction that the state must prove an affirmative defense false to a "moral certainty" is erroneous.

Appeal from circuit court, Washington county; William S. Anderson, Judge.

Dan Talbert was convicted of larceny, and he appeals. Affirmed.

The evidence for the state tended to show that the defendant took the gun in the presence of one of the state's witnesses, and was seen carrying it off by the owner of the gun; that, upon the owner requesting him to return the gun, he said that he would do so if

the owner would pay him eight dollars that said owner owed the defendant; that the owner paid the defendant the eight dollars, but that he still refused to deliver him the gun. The evidence for the defendant tended to show that he won the gun at a game of cards with the owner; that, after winning it, he allowed the owner to keep it, and that he subsequently took the gun in the presence of the owner and other persons, and told the owner that he would return it to him upon the owner paying him forty dollars, which was the estimated value of the gun; that, after the owner paid him eight dollars, the defendant stated to him that, upon the payment of the balance of the forty dollars he, the owner, owed the defendant, the latter would return the gun. Upon the introduction of all the evidence, the defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "The court charges the jury that if they believe the evidence they must find the defendant not guilty." (2) "The court charges the jury that unless they believe from all the evidence that the defendant is guilty as charged in the indictment, without a single doubt for which a reason can be given, then they must find the defendant not guilty." (3) "The court charges the jury that unless they believe from all the evidence, without a single doubt for which a reason can be given, that the defendant took the gun with the intent to steal, they must find the defendant not guilty." (4) "The court charges the jury that, if they believe from the evidence that the state has proven facts tending to show the guilt of the accused, the burden is then on the defendant to introduce some evidence of an affirmative defense, but, when the defendant has done this, the burden is upon the state to prove beyond every reasonable doubt and to a moral certainty that this affirmative defense is false." (5) "The court charges the jury that if they believe from all the evidence that the gun was taken openly in the presence of Jack Coleman or others, and that there was no subsequent attempt to conceal it connected with any claim of right whatever, then they must find the defendant not guilty." (6) "The court charges the jury that if they believe from all the evidence that the defendant took the gun openly in the presence of the owner or others, and at the time of the taking he offered to return the gun to the owner, provided that the owner would pay him eight dollars, which he claimed to be due from the owner to him, then they cannot presume that a felonious intent existed at the time of the taking, and must find the defendant not guilty."

Edward P. Wilson, for appellant. Charles G. Brown, Atty. Gen., for the State.

TYSON, J. There is a conflict in the decisions of this court upon the question where

a defendant is charged with larceny, and the evidence discloses that the taking was open and in presence of the owner or other persons, and there is no subsequent denial or concealment of the act, as to whether he can, as a matter of law, be convicted. The earliest case in this state is *McMullen v. State*, 53 Ala. 531, where the rule was declared to be: "If it should appear that the prisoner took the prosecutor's goods openly, in his presence, or the presence of other persons, and not by robbery, or, having them in possession, avowed the fact before he was questioned concerning them," etc., "these circumstances would be pregnant evidence to the jury that the taking was without felonious intent, but a mere trespass." They were "pregnant circumstances" for the consideration of the jury, but it was their province to determine whether the presumption favorable to the prisoner arising from them was not repelled, in view of all the evidence. Notwithstanding this case was expressly overruled upon this point in *Johnson's Case*, 73 Ala. 523, which we will give an extended notice later on, this court, in the case of *Barnes v. State*, 103 Ala. 44, 15 South. 901, reaffirmed the doctrine there declared, and cited it with approval, when Justice McClellan said: "Charge 3, refused to the defendant, in effect declared that there cannot be a larceny when the capture is open and in the presence of other persons, and there is no subsequent denial or concealment of the act. This is not the law, and the charge was well refused." It must not be overlooked that it is a question of intent we are called upon to deal with, and its existence is only susceptible of ascertainment from proof of acts, conduct, or declarations of the prisoner, and must, of necessity, lie in inference, and be solely deducible as an inferential fact from the evidence showing his acts, conduct, declarations, and other circumstances attendant upon the taking. It may be that a bold and reckless thief, in order to relieve himself of the criminal act, might adopt the plan of taking the personal property of any other in the very presence of the owner or of other persons. If he had the felonious intent,—and this he must have to make him a thief,—such a taking and carrying away would rather aggravate the offense than otherwise. Certainly, the law offers no premium, such as his acquittal, for his venality, which would only tend to make the bold more bold and the reckless more reckless. If the manner of taking is adopted as a mere device to steal, he would be none the less guilty than he would have been had he adopted the methods of a "sneak thief." Again, a daring thief could adopt this device to steal the goods of another under a simulated or fraudulent claim of ownership, or to satisfy a pretended or fraudulent debt which he might claim against the owner. As aptly said by Chief Justice Brickell in *McMullen's Case*: "We do not understand that larceny cannot be committed when goods are openly taken

from the possession of the owner without force, or even without fraud; nor that because there is no secrecy attending the taking and carrying away, but it is avowed without inquiry, the offense cannot be committed. If such was the law, the bolder and more reckless the criminal, the greater his chances of escaping conviction. Clandestinity and falsehood are usual attendants of larceny, but it is sometimes committed openly, and boldly avowed."

This brings us to a consideration of the doctrine announced in *Johnson's Case*. An examination of that case discloses the fact to be that the taking and carrying away was by the express consent and direction of the owner. The defendant was ordered by the prosecutor to take the articles from the counter in the store, and carry them to his (prosecutor's) house. In compliance with this command, the defendant openly, in the presence of the owner and others, picked up the articles of merchandise charged to have been stolen, and walked out of the store with them, remarking that he did not believe he would ever get his pay for labor performed by him upon the farm belonging to the father of the prosecutor, and upon which the prosecutor also worked, and that he would take the goods, and save that much. To constitute larceny, the taking must be tortious, and against the consent of the owner, as well as with a felonious intent to deprive the owner of his property. If his possession is acquired with the consent of the owner, and the *animus furandi* is formed after the caption has been completed and the possession acquired, it is not larceny, but may be embezzlement. *Clark, Cr. Law*, p. 164, § 963; *Green v. State*, 68 Ala. 530. Under these facts, which were undisputed, the prisoner was, as a matter of law, entitled to have the court charge the jury affirmatively to acquit him of the charge of larceny, without reference to whether the taking was openly in the presence of the owner or others. Therefore what is said in the opinion upon the subject of an open taking of the goods in the presence of the owner or other persons was unnecessary to a decision of the question presented upon the facts, and must be regarded as dictum. Notwithstanding the *Case of McMullen* is overruled in this dictum, we are of the opinion that *McMullen's Case* asserts the correct rule, and we adopt it, and this dictum in conflict with it is overruled.

The foregoing considerations show that the taking of goods in the presence of the owner or other persons, otherwise than by robbery, will not raise the presumption, as a matter of law, that a felonious intent did not exist in the mind of the defendant, but that its existence or nonexistence should be submitted to the jury for their determination when the other essentials of the charge of larceny were shown by the evidence, such as the taking and carrying away against the will of the owner, etc. Nor do we mean to be under-

stood as saying that cases cannot arise where the fact of intent is involved. Its existence or nonexistence cannot be affirmed as a matter of law, but, in such cases, the evidence must be clear, and leave no room for any reasonable inference against its existence or nonexistence.

What we have said serves to demonstrate there was no error in refusing to the defendant charges numbered 1, 5, and 6. Charges 2 and 3 predicated the right of the defendant to an acquittal, if the jury, from all the evidence, had a single doubt of his guilt for which a reason could be given. "A mere doubt, however honestly entertained, is not enough upon which to base an acquittal. Nor is a doubt for which a reason may be given necessarily a reasonable doubt, although a reasonable doubt may be a doubt for which a reason can be assigned." *Roberts v. State* (Ala.) 25 South. 238. Obviously this is true, since the doubt must be actual and substantial to entitle a defendant to an acquittal, and therefore a reasonable doubt, while a doubt for which a reason can be given may be capricious, speculative, and without the shadow of substance. *Peagler v. State*, 110 Ala. 13, 20 South. 363. Charge 4 was bad in requiring the state to prove beyond a reasonable doubt the falsity of the defense interposed by the defendant. All that can be required of the state is to prove the guilt of the defendant beyond a reasonable doubt. The judgment of the circuit court must be affirmed. Affirmed.

(121 Ala. 154)

BETTS v. COBB.

(Supreme Court of Alabama. April 18, 1899.)

APPEALABLE ORDERS—EXECUTORS—REMOVAL—FAILURE TO GIVE ADDITIONAL BOND—MISCONDUCT—WILLS—POWER TO SELL ESTATE.

1. An order requiring the giving of an additional bond by an executor is not appealable.

2. Conceding an order requiring an executor to give an additional bond to be appealable, he may be removed for failure to comply with it during the pendency of an appeal by him therefrom, where no supersedeas bond was given, under Code 1896, § 442, providing that an appeal from a judgment or order requiring the performance of some act shall not stay the execution of the judgment unless a supersedeas bond be given.

3. A devise of testatrix's entire property in trust, with power in the executor to dispose of the same as he may see fit, but without providing for the payment of her debts, gives the trustee no power to dispose of the property without providing for the payment of debts.

4. On the hearing of an application to remove an executor for misconduct, evidence that he has disposed of lands of the estate without authority from the probate court is admissible.

Appeal from probate court, Conecuh county; John D. Burnett, Special Judge.

Application by J. F. Betts for the removal of John M. Cobb as executor of the last will of Orrie A. Cobb, deceased. From a judgment denying the application, petitioner appeals. Reversed.

The proceedings in this case were had on a petition filed by the appellant, John F. Betts, in the probate court of Conecuh county, asking for the removal of the appellee, John M. Cobb, as executor of the last will of Orrie A. Cobb, deceased. The petition was filed on November 3, 1897. It was averred in the petition that the petitioner was a creditor of the estate of Orrie A. Cobb, deceased, and that John M. Cobb was the duly-qualified executor of said estate, under the last will and testament of Orrie A. Cobb, having been nominated thereto in the bill and appointed by the probate court; that on October 8, 1897, on the application of the petitioner, a decree was rendered by the probate court of Conecuh county, requiring that within 15 days from the date of said decree said John M. Cobb, as executor of the will of O. A. Cobb, deceased, give bond, in the sum of \$6,000, for the faithful administration of his trust, but that he had failed or refused to give said bond, as required by said decree; that said Cobb was using the property belonging to said estate for his own private use and benefit; that he had failed to make and return inventories of said estate, as required by law, and had never made any partial or annual settlement of his administration; that he had executed a mortgage on the property belonging to said estate without being authorized to do so, and had disposed of the assets of said estate without authority of law and without an order of the court; that he had collected debts belonging to said estate, and invested the money of the estate for his own benefit, without authority, and that he had kept no account between himself and said estate. The respondent, John M. Cobb, as executor, filed his answer, in which he denied that he had been guilty of maladministration of the estate of O. A. Cobb, deceased, as averred in the petition, and admitted that he had not given the bond as required. On the hearing, it was shown that on October 8, 1897, on the petition of J. F. Betts, the probate court had rendered a decree requiring John M. Cobb, as executor of the estate of Orrie A. Cobb, deceased, to give a bond for the faithful administration of his trust, in the sum of \$6,000, within 15 days from the rendition of said decree; that said John M. Cobb did not give the bond as required, but, before the expiration of the 15 days from the date of the rendition of said decree requiring him to give bond, he had taken an appeal to the circuit court from said decree, but in taking said appeal he had given no bond, except security for the costs of said appeal. Upon the petitioner offering to introduce in evidence said decree of the probate court rendered October 8, 1897, the respondent objected to its introduction in evidence, the court sustained this objection, and to this ruling the petitioner duly excepted. The will of Orrie A. Cobb, deceased, was introduced in evidence. In said will the testatrix appointed her husband, John M. Cobb, as executor of her said will, and "as trustee to take and hold

under the terms of this, my last will and testament, all of my property." The second item of said will was as follows: "I give and bequeath to the said John M. Cobb, as trustee, all property, whether real, personal, or mixed, of which I may die seised and possessed, wherever situated, to have and to hold the same as trustee for my two sons, Johnnie S. Cobb and Willie A. Cobb, in the manner and subject to the conditions, limitations, and restrictions hereinafter set forth." Among the property thus bequeathed in trust was a hotel, and the lot upon which it was situated. The third item of the will related to the management of said hotel by the executor. The fourth item of the will was as follows: "I authorize my aforesaid husband, John M. Cobb, as executor or trustee under the terms of this will, to sell and convey, collect and reinvest, any and all property, whether real, personal, or mixed, which may come into his possession or under his control, as executor or trustee, under the terms of this will, and to do and perform all matters and things relating to the management of my said estate in such manner as he may deem best, under the terms of this, my last will and testament, until the younger of my aforesaid two sons shall have reached the age of twenty-one years, at which time it is my will that my executor and trustee, after deducting all expenses of educating, maintaining, and raising my said two sons, make an equal division of my said estate between my said two sons, or the survivor of them, and the said John M. Cobb, my husband, if he be then living." It was further shown that on September 29, 1897, John M. Cobb, as executor of the last will and testament of O. A. Cobb, deceased, executed a mortgage upon the property of the testatrix's estate to Grief Bros. and others. No evidence was introduced to show the execution of said mortgage. John M. Cobb, as a witness, testified to the execution of said mortgage, and also testified to the payment of some of the debts of the estate. During the examination of John M. Cobb as a witness, the petitioner asked him the following question: "Didn't you sell 80 acres of land belonging to the estate of O. A. Cobb * * * without any order from the probate court?" The defendant objected to this question, the court sustained the objection, and to this ruling the petitioner duly excepted. Upon the hearing of all the evidence, the court rendered a decree denying the prayer of the petition, and refusing to remove John M. Cobb from the executorship of the estate of Orrie A. Cobb, deceased. From this decree the petitioner appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

G. R. Farnham and J. T. Jones, for appellant.

SHARPE, J. The power of a testator to exempt his executor from giving bond to secure the performance of his duties is given

alone by statute. Code, § 67. The same statute places a limitation upon the power, so that, in addition to the authority vested in the probate judge to require such bond of his own motion when the estate is likely to be wasted, any person interested in the estate may do so upon showing his interest, and that it is or will be endangered for want of security.

In *Smith v. Phillips*, 54 Ala. 8, it was held that a creditor is a person interested, within the meaning of the statute, and the theory of such interest was said to be that the law charges the whole property of the decedent primarily with the payment of his debts, subject to legal exemptions. The order of the probate court requiring bond of the appellee, which was offered in evidence by the appellant, appears to have been made upon regular proceedings on the hearing of his application to require the appellee to give bond, whereat the appellee appeared and unsuccessfully attempted to show cause against the application. We are not informed by the record of the ground upon which the order was objected to, or upon which it was excluded by the court; but, recognizing no other ground, we presume its exclusion was for the reason that it had been appealed from. We think the ruling was erroneous for the reason that the order was not such as could be appealed from. It did not order the executor's removal in case he failed to give the bond; and, until such order of removal was made, the status of the executor was unchanged, and the interest of no one was altered by the order.

In *Boynton v. Nelson*, 46 Ala. 501, it was said by Justice Saffold of a similar provision for requiring additional bonds (Code, § 93): "I imagine no appeal can be taken from the order requiring the additional bond, because none is expressly given, and it is not a final order. The party cannot be said to be injured unless he is removed. Besides, if he give the bond, his liability is not thereby increased beyond what it should be, and if he fail to do so he has his remedy on his appeal from the order removing him." This conclusion is further strengthened by the fact that special provision is made for an appeal from an order of removal (Code, § 458), in which case a special bond is required to prosecute the appeal to effect, and until the same is decided faithfully to discharge his duties as such executor or administrator. *Id.* § 461. That the court may be forestalled in its efforts to conserve an estate by the taking of an appeal without security against its maladministration is not in consonance with the policy of the statutes; and, if an appeal could lie from an order merely requiring bond, the necessity for such special bond would be as great as in case of appeal upon removal. In *Allen v. Draper*, 98 Ala. 590, 13 South. 529, the appeal entertained, without objection, was from an order both requiring bond and ordering removal of the administrator if the bond was not given; and in *Johnson v. Clements* (Ala.)

14 South. 14, which was an appeal from the chancery court, no question was raised as to whether the order was appealable.

If it be assumed that the order requiring the bond was appealable, still it could not operate to supersede the execution or enforcement of the order without a supersedeas bond. Code, § 442. When security for costs only is given, the appeal, if properly taken, suspends the power of the probate court over the judgment or order appealed from, but does not suspend its operation. In such case, "whatever measures are necessary for the execution of the decree, it is the duty of the court, on the application of a party in interest, to pursue as if the appeal had not been taken." *Ex parte Hood*, 107 Ala. 520, 18 South. 176. The execution of such order lies in its enforcement by the removal of the executor for failure to give the bond required. Code, § 92. Such failure being a ground for removal of the executor, the order should have been received in evidence, notwithstanding the appeal to the circuit court. The trust created by the will of Mrs. Cobb is one in which her creditors are not provided for, and in which they have no interest. Their rights in the estate depend not upon the will, and they are bound neither by its disposition of the property nor the authority it confers upon the executor to manage and dispose of assets in his hands. In the execution of the trust, and as between its beneficiaries and himself, the power to dispose of property may be ample, but it cannot rightfully be exercised in their favor to the prejudice of the creditor, or in favor of one creditor as against another. The disposition made by the appellee of the property, real and personal, belonging to the estate, was the proper subject of inquiry upon the trial. The question asked by appellant as to the sale of land to Stallworth called for evidence relevant to that inquiry; though its weight may have depended upon further evidence. The objection to that question should have been overruled. For the errors mentioned, the judgment appealed from must be reversed, and the cause will be remanded.

(121 Ala. 38)

QUINN v. STATE.

(Supreme Court of Alabama. April 6, 1899.)
APPEAL—MOTION IN ARREST—FINAL JUDGMENT.

An appeal will not lie from an order overruling a motion in arrest of judgment, since an appeal will lie only from a final judgment. Code, §§ 426, 4405.

Appeal from circuit court, Franklin county; Thomas R. Roulhac, Judge.

Turner Quinn was convicted of bastardy, and he appeals. Appeal dismissed.

The only judgment set forth in the record on the present appeal is as follows: "Comes the solicitor, A. H. Carmichael, who prosecutes for the state, and the defendant in his own proper person, and, issue being made up, under the direction of the court, as to wheth-

er the defendant was the real father of the child or not, thereupon came a jury of good and lawful men, to wit, W. R. Horton and eleven others, who, being duly impaneled and sworn according to law, who, upon their oaths, do say: 'We, the jury, find the defendant guilty.' And on the 18th day of November, 1897, comes the defendant, and makes and files his motion for arrest of judgment on and for the causes set out in said motion. Upon consideration by the court, it is ordered and adjudged that said motion be and is overruled, and it is ordered that said motion be and is made part of the record of this case."

W. I. Bullock, for appellant. W. H. Key, for the State.

SHARPE, J. It does not appear from this record that any judgment was rendered against the defendant from which he could appeal. The ruling upon his motion in arrest of judgment was necessarily while the cause was pending, and before final judgment, and it is only from a final judgment that an appeal will lie under section 426 of the Code, which, together with section 4405, is applicable to appeals in bastardy cases. The ruling was not upon a motion for a new trial, such as may be appealed from under section 434 of the Code. To render the verdict effective, it must be followed by a judgment of the court as prescribed in such cases by section 4393 of the Code. The requisites of such judgments were considered in *Smith v. State*, 73 Ala. 11; *Austin v. Pickett*, 9 Ala. 102; *Berryman's Case*, Id. 455; *Wilson's Case*, 18 Ala. 757. The appeal will be dismissed.

(121 Ala. 64)

CAMPBELL et al. v. WEAKLEY.

(Supreme Court of Alabama. April 11, 1899.)

WILLS—VESTED ESTATES—TIME.

A will gave testator's property to his executors, to hold for 10 years, for the sole use of testator's children named, subject to certain conditions. The executors were directed to lease the real estate during the continuance of the trust, and collect the rents; no renting to be for a longer period than 10 years after testator's death. The executors were also directed to make an equal division of the income among the children at stated periods during the continuance of the trust, and after the expiration of 10 years after testator's death to divide the trust estate among them. The will provided that if, at the time of such division, testator's son should be living, he should be vested with an absolute fee-simple title to the share allotted to him. The statute provided that such a trust could have no force beyond 10 years. *Held* that, on expiration of 10 years from testator's death, the children took an absolute fee-simple estate, as tenants in common, in the realty, though they agreed to postpone the division, allowing the executors to continue to hold the estate.

Appeal from city court of Birmingham; W. W. Wilkerson, Judge.

Bill by Samuel D. Weakley, as administrator of the estate of Joseph P. Mudd, deceased, against E. K. Campbell, guardian ad litem

for William A. Mudd and another, and others. From a decree overruling a demurrer to the bill, defendants appeal. Affirmed.

The bill in this case was filed on April 12, 1898, by the appellee, Samuel D. Weakley, as administrator of the estate of Joseph P. Mudd, deceased. It was averred in the bill that one Joseph P. Mudd died intestate on January 12, 1898, being a resident of Jefferson county, Ala., leaving property therein, and that the complainant was duly appointed and qualified as administrator of the estate of said Joseph P. Mudd, deceased; that complainant's intestate was a son of William S. Mudd, who died in Jefferson county, Ala., on September 2, 1884, being seised of a large estate of real and personal property, and leaving a last will and testament, which was attached as an exhibit to the bill. Said will was duly admitted to probate and letters testamentary were issued to Mortimer H. Jordan, William A. Walker, Hardin P. Cochran and Joseph P. Mudd, as executors; that M. H. Jordan died in the year 1881, and that H. P. Cochran resigned his executorship and never took any part in the management of the trust; that said William S. Mudd left surviving him four daughters and one son, Joseph P. Mudd, and certain grandchildren, and that with the exception of a specific bequest to the grandchildren, all the rest and residue of the estate of William S. Mudd was devised by the terms of his will to his executors to have and to hold for a period of 10 years after his death, for the sole, separate and exclusive use and benefit of his children who survived him, to wit, Joseph P. Mudd, Sarah E. Cochran, Florence E. Jordan, Virginia T. Walker and Sue E. Mudd. It was also provided in said will that after the expiration of the 10 years from the death of the testator, his executors should divide all of his estate between his said five children; that at the expiration of 10 years from the death of William S. Mudd, his five children, all of them being of full age, "agreed that it was inadvisable to have a division of said trust estate at that time, and that the same should continue to be held by the said William A. Walker and Joseph P. Mudd as such executors, and that the rents, incomes and profits of such estate should be received and disposed of by them in accordance with the terms and provisions of said will."

The provisions of the will, which are involved in the present controversy, are sufficiently shown in the opinion.

It was further averred in the bill that William A. Walker and Joseph P. Mudd had never made any settlement of their accounts as executors; that Joseph P. Mudd was entitled to large commissions as such executor, and that it was necessary to have an accounting with the said William A. Walker, as such executor, to determine what might be due by him, as executor, to the estate of complainant's said intestate.

It was further averred that at the time of

the filing of the present bill, the estate of William S. Mudd, deceased, owned considerable personal property and a large amount of real estate, which, at the expiration of 10 years from the death of William S. Mudd, vested equally in said Joseph P. Mudd and his four named sisters; that said real estate is, in part, of such character that it cannot be equitably divided among the owners thereof, and that it was necessary for it to be sold in order to effect an equitable and equal distribution of the proceeds among the joint owners.

The complainant then averred in the bill that the personal property belonging to the estate of said Joseph P. Mudd, deceased, was insufficient to pay the debts of said estate, and that it was necessary to sell the real property belonging to such estate for the payment of its debts; that the only property belonging to Joseph P. Mudd, which was unincumbered, was his undivided one-fourth interest in the property belonging to the estate of William S. Mudd, and that Joseph P. Mudd, at the time of his death, was a widower, and left surviving him, as his only children and heirs at law, William S. Mudd and Joseph P. Mudd, who are minors under the age of 14 years. The four sisters of Joseph P. Mudd, all of whom were over 21 years of age, and William S. Mudd and Joseph P. Mudd, the son of said Joseph P. Mudd, deceased, were made parties defendant to the bill, and a guardian ad litem was asked to be appointed for the infant defendants.

The prayer of the bill asked for an accounting by William A. Walker, as executor of the will of William S. Mudd, deceased; that a settlement of said accounts be had, and that William A. Walker be required to pay to the complainant, as administrator, whatever might be found to be due complainant's intestate on said settlement, and further that the estate of William S. Mudd, deceased, be divided as required by the said will, and that so much thereof as could not be equitably divided should be paid over to the complainant, to be used by him in paying the debts of Joseph P. Mudd, deceased, and to be disposed of in accordance with the law.

E. K. Campbell was appointed guardian ad litem of William S. Mudd and Joseph P. Mudd, the infant children of Joseph P. Mudd, deceased, and said infant defendants, by their guardian ad litem, demurred to the bill on the ground that Joseph P. Mudd, the complainant's intestate, having died before the division of said trust estate was made, the said infant defendants succeeded to all the rights in said trust estate to which the said Joseph P. Mudd would have been entitled, if living, and that, therefore, said infant defendants would be the equitable owners of an undivided interest in said estate, and that neither the complainant, nor the estate of said Joseph P. Mudd, deceased, was entitled to participate in any division thereof.

Upon the submission of the cause upon the demurrer, a decree was rendered overruling said demurrer. From this decree the infant respondents appeal, and assign the rendition thereof as error.

Tillman & Campbell, for appellants. E. H. Cabaniss, for appellee.

HARALSON, J. The cardinal rule, the one above all others for the construction of wills, is to ascertain the intention of the testator and give it effect, if not prohibited by law. *Wolfe v. Loeb*, 98 Ala. 426, 13 South. 744.

"Every estate in lands is to be taken as a fee simple, although the words necessary to create an estate of inheritance are not used, unless it clearly appears that a less estate was intended." Code, § 1020 (1824).

The law inclines to regard devises and legacies as vested rather than contingent, and this rule is applied, when the intention is obscure or doubtful. *Bethea v. Bethea*, 116 Ala. 285, 22 South. 561; *Foster v. Holland*, 56 Ala. 474.

As to the partiality of the law for vested over contingent estates, it is well settled, that in doubtful cases an interest shall, if possible, be construed to be vested in the first instance, rather than contingent, but if it cannot be so construed, it shall at least be construed to become vested as early as possible, a principle applicable alike to real and personal property. 29 Am. & Eng. Enc. Law, 441-445, 468, and authorities cited.

A casual reading of the will to be construed, displays the testator's unmistakable intention in the gifts he made, as to the character of the estate he gave, and when they should vest. In the fourth item he said, "I give, devise and bequeath to my executors hereinafter named, all my property and estate, not otherwise disposed of by this will, of whatever character and description, to have and to hold for the period of ten years, for the sole, separate and exclusive use and benefit of my son Joseph P. Mudd and my four daughters (naming them), subject to the following trusts, limitations and conditions." As to his real estate, with the disposition of which we have here to do, he said: "I direct and require my said executors, to rent or lease my real estate, situated in and near the said city of Birmingham, from year to year, for a period or periods of years, during the continuance of said trust estate, and to receive and collect the rents and income from said estate." Here he limits the duration of any renting to a period of 10 years after his death. After providing for the payment of expenses attending the administration of the trust, he directed, as to the income from rents of lands and other sources, such as interest on loans, investments and dividends on stock, that "said executors shall, monthly or quarterly, as they may deem best, divide the remainder of said

rents, incomes, dividends, profits and interest accruing as aforesaid, during the continuance of said trust estate, equally between my said son and four daughters." Here again is displayed the purpose in committing the trust to his executors for the period named, to be for accumulation for the benefit of his children, and that their interest would be the better subserved by such a course.

In the ninth item he provided: "After the expiration of ten years after my death, I direct and require my said executors to divide all of said trust estate between my said son and four daughters," etc. Repeatedly, and not less than some seven times, he referred to the period the executors were to keep his estate together and rent it out, for the benefit of his son and daughters, as "ten years after my death." As indicating the same period of time, and as synonymous in that respect, with the expression, "ten years after my death," he as many times used the expression, "during the continuance of said trust."

Having definitely directed and required, in as clear terms as he could employ, that his executors should divide all the said trust estate between his said son and daughters, "after the expiration of said ten years after my [his] death"; and after having as definitely and as often employed the expression, "during the continuance of said trust," as indicating the said 10-year period, he again many times uses the expressions, "at the time of such division," and "on such division," meaning thereby, the division which he directed and required his executors to make at a certain and fixed, and not at an uncertain and indefinite time resting in their discretion. He took very great and abundant caution, to fix a definite period of time when the estate intrusted to his executors should cease, and be divided between his said son and four daughters. At the close of the trust estate, these parties could, by proper proceedings, if the executors refused to divide, have compelled the division directed and required at that time to be made to them, for, they then became the absolute owners of the property, divested of all interest in or power over it by the executors as trustees.

The will provided, that "if at the time such division of said trust estate is made by my executors, my said son, Jos. P. Mudd, shall then be living, he shall take and be vested with an absolute fee-simple title to the share of said trust estate allotted to him on such division, and if at the time such division of said trust estate is made by my said executors, my said son, Jos. P. Mudd, shall then be dead, then and in that event, the share of said trust estate to which my said son would be entitled, if living, shall descend to, vest in and become the property of his widow and heirs at law, in the same manner as property of like kind descends under and by virtue of the laws of Alabama."

It is alleged that said 10-year period ex-

pired several years prior to the death of said Joseph P. Mudd, complainant's intestate; that at his death he left no widow, his wife having previously died, and that he left only two children, William S. and Joseph P. Mudd, the infant defendants. It is further shown, that on the expiration of said 10-year period, the said Joseph P. Mudd and the four daughters, all being of full age, agreed that it was inadvisable to have a division of said trust estate at that time, and that the same should be continued to be held by the said William A. Walker and Joseph P. Mudd, as executors, and that the rents, incomes and profits of said estate should be received and disposed of by them in accordance with the provisions and terms of said will.

It cannot be supposed from the language employed, that the testator intended to give his executors a larger estate than one for 10 years. Moreover, this estate was given them for accumulation for the benefit of his devisees and legatees, and beyond 10 years, under the statute, as he is presumed to have known, no estate created for such purposes could have any force or effect. Code, § 1081 (1835). The agreement referred to between the five children of the testator for the executors to continue to hold the estate, after the expiration of the 10-year period, and deal with it as they had been doing under the will, was their agreement with the executors,—not one directed or authorized by testator in his will to be made,—and such agreement had no effect on the provisions of the will. The son and daughters, being the absolute owners of the property, had the right to deal with it as they pleased, and if they postponed the division among themselves which the will required to be made at a certain time, this did not interfere with the vesting of their gifts at the time the testator in his will directed they should vest.

Our conclusion is, that complainant's intestate, said Joseph P. Mudd, and the other four named children, being alive at the expiration of the period of 10 years from testator's death, took the estate absolutely as tenants in common. The demurrer of the infant defendants, on the ground, substantially, that complainant's intestate having died before the division of said trust estate was made, they succeeded to all the rights thereto, to which their father would have been entitled if living, was properly overruled.

Affirmed.

(122 Ala. 149)

PULLMAN PALACE-CAR CO. v. HARRISON.

(Supreme Court of Alabama. Feb. 7, 1899.)

COURTS—JURISDICTION—FOREIGN CORPORATIONS—ATTACHMENT.

The courts of Alabama being without jurisdiction of an action against a foreign corporation by a citizen of the state on a cause of action accruing in another state, Code 1886, §§ 2929, 2930, 2932, 2934, 2940 (Code 1896, §§

524, 525, 527, 529, 535), providing that in attachments against a foreign corporation a complaint and affidavit setting forth the cause of action must be filed, and that the trial thereon shall proceed as in suits commenced by summons, does not give the courts of the state jurisdiction to condemn by attachment the property of a foreign corporation situated in Alabama to the satisfaction of a claim against it by a resident of the state for a tort committed outside of the state.

Appeal from circuit court, Tuscaloosa county; S. H. Spratt, Judge.

Action by J. I. Harrison against the Pullman Palace-Car Company. There was a judgment for plaintiff, and defendant appeals. Reversed.

Jones & Brown, for appellant. Foster & Oliver, for appellee.

TYSON, J. The plaintiff commenced this suit by attachment against defendant upon an affidavit averring that defendant "is justly indebted to him in damages for the negligent loss of his valise and baggage while he was a guest on one of its sleeping cars, in the sum of \$161.80," which was past due, and that defendant resides out of the state of Alabama. Accompanying it was an additional affidavit, as required by section 529, Code 1896 (section 2984, Code 1886), setting up the facts out of which the cause of action arose. It appears from the latter that plaintiff was travelling from the city of Chicago, in the state of Illinois, to the city of Cincinnati, in the state of Ohio, as a passenger on a certain railroad between the cities over which defendant ran its sleeping cars; that he purchased a ticket of defendant's agent, and became a passenger upon one of its cars on the night of the 4th of September, 1893, and took with him into the car his valise, which the porter of the car took charge of and placed immediately under the berth he occupied during that night. Upon awaking the next morning, he found that the valise had been stolen, which was afterwards returned to him from Ripple, Ind., after the larger portion of its contents had been taken out, and it so badly damaged as to be of no value, etc. Upon these affidavits the writ of attachment was issued, and levied upon certain personal property belonging to defendant found by the sheriff in one of its cars being operated over the Alabama Great Southern Railroad through the county of Tuscaloosa. The complaint in the cause averred substantially the facts as set forth in the affidavits, seeking a recovery on account of the negligence of the agents or servants of appellant in allowing the valise to be stolen. Defendant appeared, as shown by written agreement of counsel, in which it was expressly stipulated that by doing so it did not waive its right to question the jurisdiction of the court, and made several motions to dissolve the attachment and dismiss the suit on the ground that it was a nonresident corporation, and the cause of action arose outside of the state of Alabama, to which motions the court sustain-

ed demurrers. Defendant then filed a plea in abatement, in which it averred that it is a corporation organized under the laws of the state of Illinois and resides out of the state of Alabama, and the cause of action upon which this suit was brought arose outside of the state of Alabama, and that the suit is not upon any contract entered into with reference to a subject-matter within this state, but that the respective rights of the parties to this suit, so far as they relate to the subject-matter thereof, depend upon the laws of the state in which the defendant resides, or those of the state in which the cause of action arose. This plea was demurred to, and the ground of demurrer assigned was, the record shows that the action was begun by original writ of attachment, levied on property of defendant within the jurisdiction of the court. The court sustained this demurrer, and this ruling of the court raises, in our opinion, the material question involved in the determination of this cause. It is: Can a foreign corporation's property found in this state be attached and condemned to satisfy a demand growing out of a tort committed by it in another state? Without legislative enactment, a foreign corporation could not be sued outside of the state of its domicile, for the reason there was no means provided by which service could be had upon it. By the common law, to maintain a personal action against a corporation, there must have been service of process upon the principal officer within the jurisdiction of the sovereignty creating it. The officer upon whom, in the sovereignty of its creation, service could be legally had, binding the corporation, it may be, could be found in another jurisdiction, but he was not regarded as carrying with him his official functions, and service upon him there could not bind the corporation. *St. Clair v. Cox*, 106 U. S. 354, 1 Sup. Ct. 354; *Sullivan v. Timber Co.*, 103 Ala. 371, 15 South. 941. To meet and obviate this inconvenience, and oftentimes injustice, the legislature of this state has enacted statutes by which process may be served upon the agents of foreign corporations doing business in this state. We do not deem it important, to a correct decision of this case, to review these statutes. They do not materially differ, for the purpose here involved, from those in existence when the case of *Railroad Co. v. Carr*, 76 Ala. 388, was decided by this court. In that case the learned judge reviewed them at length, and, after an exhaustive examination of cases decided by other courts, held that a foreign corporation, though doing business in this state through its agents located here, could not be held liable by our courts for a tort committed by it in another state. We quote his conclusion in that opinion as he there so aptly and tersely states the doctrine by saying: "We cannot think that it was the intention of the legislature, in any of the statutes we have been considering, to allow foreign corporations to be sued in this state, except on causes of action originating in this state, or on con-

tracts entered into in reference to a subject-matter within this state. To hold otherwise would allow foreign corporations which transact business in Alabama to be drawn into our courts for the adjudication of every contract they may make, and of every tort and wrong they may be charged with committing, even in the state which gave them being." This doctrine is reaffirmed in the case of *Railroad Co. v. Dooley*, 78 Ala. 524, where a resident of this state sued out an attachment against a resident of the state of Kentucky, and the only service effected was a writ of garnishment on the Louisville & Nashville Railroad Company, a foreign corporation; this court holding that this mode of service can be resorted to only in causes of action originating in this state, or on contracts entered into with reference to a subject-matter within this state. The case of *Railroad Co. v. Carr* is cited approvingly in the cases of *Railroad Co. v. Trousdale*, 99 Ala. 394, 13 South. 23; *Railroad Co. v. Williams*, 113 Ala. 402, 21 South. 938; *Railroad Co. v. Chumley*, 92 Ala. 317, 9 South. 236. These cases clearly refused the relief sought by the plaintiffs in each because the court was without jurisdiction to hear and determine their causes of action. As being persuasive of the correctness of the interpretation of the legislative intent as declared in *Railroad Co. v. Carr*, supra, we call attention to subdivision 2 of section 669, Code 1896 (section 3414, Code 1886), in which the jurisdiction of courts of chancery is limited, as against nonresidents, to causes of action arising in this state, or the act on which the suit is founded was to have been performed in this state; and the case of *Iron Age Pub. Co. v. W. U. Tel. Co.*, 83 Ala. 498, 3 South. 449, in which it is construed. The contention here, however, is that, as the property of appellant was found within the jurisdiction of the court, the attachment being a proceeding in rem, the court had the right to condemn it to the satisfaction of plaintiff's demands. This involves an inquiry into the nature and character of a suit by attachment under our statutes, and what it is that gives the court jurisdiction to render a judgment condemning property levied upon under a writ of attachment to satisfy such judgment. Section 535, Code 1896 (section 2940, Code 1886), provides for process by attachment against foreign corporations having property in this state for the recovery of debts, or to recover damages for a breach of contract when the damages are not certain or liquidated, or in cases where the action sounds in damages merely, in the same manner, and subject to the same rules, as in case of natural persons residing without the state. Section 524, Code 1896 (section 2929, Code 1886), provides for what demands attachments may issue. Section 527 (section 2932) requires an affidavit before a writ of attachment can issue. Section 525 (section 2930) provides the cases in which it may issue, one of those being when the defendant resides out of the state. Section 529 (section 2934) provides for the additional affidavit where

the attachment is sued out to recover damages for a breach of contract, when the damages are not certain or liquidated, or when the action sounds in damages merely. Section 561 (section 2995) requires a complaint to be filed setting forth the cause of action, and section 562 (section 2996) provides the cause shall proceed as suits commenced by summons and complaint. It is manifest that an affidavit showing for what demands the attachment is issued, and that one of the causes as enumerated in section 525 (section 2930) exists, should be required before the issue of the writ of attachment. In the case of *Bank v. Clement*, 109 Ala. 270, 19 South. 814, the then chief justice, speaking for the court, discusses at length the nature and character of suits by attachment. He said: "The theory of an attachment, whether it be process against or to subject the property or effects of a resident or nonresident of the state, as the remedy has been administered in this state, is that it partakes essentially of the nature and character of a proceeding in personam, and not of a proceeding in rem. The complaint—the primary pleading—is filed in the same form, containing no other averments than are contained in the complaint when the suit is commenced by the issue and service of personal process; and, as we have seen, the issues pertaining to the suit are the issues pertaining to a suit in personam. The judgment rendered is general and personal that the plaintiff have and recover of the defendant, and upon it, and for its enforcement, any process may issue which can issue upon a personal judgment, and is leviable upon any property of the defendant, the subject of levy and sale to satisfy a judgment. *Betancourt v. Eberlin*, 71 Ala. 464. It is apparent the statutes intended an attachment when the original process shall serve a double purpose: First, giving notice to the defendant to appear and defend; second, the creation of a lien upon the thing attached or effects garnished, affording security to the plaintiff if he succeeds in obtaining judgment." When, however, there is not a personal appearance by the nonresident defendant, and the levy of the attachment is upon property belonging to him found in this state, the proceeding is in the nature of a proceeding in rem, rather than a proceeding in personam. But says the learned judge in the case hereinabove quoted: "The judgment rendered must correspond to the nature of the proceeding. Of necessity, it must ascertain and declare the amount of the debt, claim, or demand sought to be enforced by the attachment; and this must be ascertained and declared in the same mode and form as if the suit was in personam. There must follow a condemnation of the property attached or of the effects garnished." This case, in our opinion, so clearly defines the nature and character of a suit by attachment under our statutes, that we think it would be superfluous to comment further upon the subject.

The next question for consideration is, what is it that gives the court jurisdiction to render a judgment against the defendant, and to condemn his property to the satisfaction of the judgment; or, in case there is not a personal appearance by a nonresident defendant, what is it that gives the court jurisdiction to render a judgment to condemn his property upon which the attachment is levied to the satisfaction of the judgment? Jurisdiction is defined to be "the power of a court or judge to hear and determine a cause." U. S. v. *Arredondo*, 6 Pet. 691; *Woodruff v. Stewart*, 63 Ala. 206. In *Lamar v. Gunter*, 39 Ala. 324, the court said: "The power to hear and determine a cause is jurisdiction, and it is coram iudice whenever a case is presented which brings this power into action. But, before this power can be affirmed to exist, it must be made to appear that the law has given the tribunal capacity to ascertain the complaint against the person or thing sought to be charged or affected; that such complaint has actually been preferred; and that such person or thing has been properly brought before the tribunal to answer the charge therein contained." Perhaps the definition is more clearly stated for the purposes of this case in *Goodman v. Winter*, 64 Ala. 410, where this language is to be found: "The power to decide upon the cause of action, as presented by the pleadings, is jurisdiction, like the power to decide any other legal proposition which the case may involve." The remedy by attachment was unknown to the common law, and derives its existence from statutory enactment; and in consideration of its harshness and extraordinary character courts are generally, in the absence of any statutory provision regulating their construction, inclined to construe the statutory provisions creating it strictly in favor of those against whom it may be employed. And on account of its origin the jurisdiction of the courts invoked to enforce this remedy is placed upon the same footing with courts of special or limited jurisdiction, with no presumptions in favor of their jurisdiction in cases arising under the attachment laws. *Shinn*, *Attachm.* § 8, notes; *Wap. Attachm.* § 23, and notes; *Wade*, *Attachm.* § 38. In *Wap. Attachm.* § 603, the writer, in discussing the question of jurisdiction, says: "The foundation for power to hear and determine the cause is laid by the attachment, but the superstructure is not thus raised. The sine qua non of the suit against the property is the seizure, but that alone confers no authority to try the cause. It is, therefore, not true, in an unqualified sense, that seizure alone gives jurisdiction in an attachment suit, if the term 'jurisdiction' is used as usually defined.—power to try the cause." *Wade*, *Attachm.* § 39, and note; *Shinn*, *Attachm.* § 127. *John D. Works*, on *Courts and Their Jurisdiction* (page 519, § 74), in treating of attachments, says: "It is a remedy that is incidental to, and which depends upon, the right of the

plaintiff to recover a judgment against the defendant, and can only be obtained in connection with and during the pendency of an action for the recovery of such judgment, or to establish a right thereto, and have the property attached applied to the satisfaction of the amount claimed to be due or owing to the plaintiff, and is denominated a 'provisional remedy.'" Without repeating at length what we have heretofore stated, it seems to us, in view of the requirements under the several sections of the Code above quoted in substance, namely, that the affidavit must set out the cause of action, a complaint must be filed by the plaintiff, and the cause tried by the court as in suits commenced by summons and complaint, and the judgment must ascertain and declare the amount of the debt, claim, or demand sought to be enforced by the attachment, that the power of the court to decide upon the cause of action as presented by the pleadings must determine the question of its jurisdiction. This we have seen does not exist in this case. It would be an anomaly in judicial procedure if defendant could be made liable upon a cause of action by suit in attachment, when it would not be liable in the same court, upon the same cause of action, by suit commenced by summons and complaint upon personal service, because of the want of jurisdiction in the court to hear and determine the cause. We are unwilling to declare such was the legislative intent in the absence of some expression in the statutes regulating attachment proceedings strongly indicating such intention to have existed; especially as such a conclusion is illogical, and cannot be maintained upon sound principles of public policy and reasoning. There was error in sustaining the demurrer to defendant's plea in abatement. Judgment is reversed, and cause remanded.

(121 Ala. 611)

STRAUGHN v. RICHARDS.

(Supreme Court of Alabama. April 12, 1899.)

EXEMPTIONS—WAIVER—DEFECTS IN CLAIM—POWER OF OFFICER.

1. An officer holding property under execution cannot ignore a claim of exemption made to him merely because it fails to show that the debt was contracted during the existence of the law creating the exemption, the question of the sufficiency of the claim being judicial, for determination by the courts.

2. The owner of exempt property does not lose his exemption against an execution levied on it by the fact that the officer returned the claim of exemption served on him to the owner with the statement that he would have nothing further to do with the matter, and thereafter sold the property.

Appeal from circuit court, Covington county; J. W. Foster, Judge.

Detinue by A. C. Straughn against F. M. Richards. Issue was joined on the plea of

non detinet, and the case was tried upon an agreed statement of facts, which were substantially as follows: On the 18th day of September, 1897, plaintiff recovered a judgment against the defendant in an action of assumpsit before a justice of the peace in beat 4 of said county. The plaintiff's demand did not contain any clause whereby defendant's right of exemption was waived, and the judgment so obtained was a plain judgment, against which defendant had the right to claim his exemptions as to personal property. On the 24th day of September, 1897, an execution was issued on said judgment, and placed in the hands of the constable of said beat for collection. On the same day, to satisfy said execution, the constable levied the same on a lot of mixed lumber, containing about 7,000 feet, belonging to defendant, and had the same to sell on the 15th day of October, 1897. The advertisement, or notice of sale, was given by written notices posted at Rose Hill and two other public places in said beat No. 4, in said county. On the 7th day of October, 1897, defendant went to the said constable, and handed him a paper, and told him that it was his claim of exemption of said property, and that he claimed the lumber levied on as exempt. Said paper is in words and figures as follows:

"State of Alabama, Covington County. Before me, S. T. Dillard, a justice of the peace in and for said state and county, personally came F. M. Richards, who, being duly sworn, doth depose and say that he is a resident citizen of the county of Covington, of said state, and that he hereby makes known and declares under oath that he has selected and claimed as exempt to him, under the constitution and laws of the state of Alabama, the following described personal property: 10,000 feet of lumber, \$65; 3 cows and calves, \$30; 30 head of hogs, \$60; 2 black mare mules, \$150; 1 two-horse wagon and harness, \$30; 4 yoke of oxen and one cart, \$200; 1 buggy and harness, \$30. [Total] \$565. [Signed] F. M. Richards.

"Sworn to and subscribed before me this 30th day of September, 1897. [Signed] S. T. Dillard, J. P."

The constable read said paper over, and examined it, and then said to the defendant that he would have no more to do with the matter, and that he (defendant) could tear down the notice of sale, and then handed the claim of exemptions back to defendant. The constable did not hold or retain in his possession the said claim of exemptions after the occurrence above set out. The constable notified the plaintiff concerning the occurrence by "sending him word" thereof, and plaintiff called on the constable with respect to the same, and asked to examine the paper, but did not see the same, for the reason that the constable had previously returned the same to the defendant, as hereinbefore set out. The defend-

ant had not filed or recorded his claim of exemption in the office of the probate judge of said county. Under the direction of the constable, given at the time said claim of exemption was handed to him by the defendant, he (the defendant) took down two of said notices of sale before the sale day, but did not take down the three notices which were posted at Rose Hill, and which remained posted there until after the sale. On the day of sale, October 15, 1897, the plaintiff directed the constable to proceed with the sale of the property levied on, and the property was sold, and the plaintiff became the purchaser thereof at said sale. A number of persons were present at the sale, but defendant was not present, and it is not insisted that he knew that the sale was to be had on that day, except upon the facts hereinbefore set out. On the day of sale, after plaintiff had bought the lumber, he sold a part of it to different persons, and removed the remainder, about 5,000 feet, to the premises of another person. On the following day the defendant, without any legal process or authority from any one, moved the said 5,000 feet of lumber back to his own premises, from whence plaintiff had moved it the preceding day. Plaintiff then brought this action of detinue for said lumber before a justice of the peace, where the case was first tried, and from which court the said case comes to the circuit court on appeal. On the trial in the justice court the defendant, against the objection of the plaintiff, was allowed to amend his said claim of exemptions hereinbefore referred to and set out by inserting the words: "Against an execution issued from the justice court of beat No. 4 of Covington county, Alabama, and that the debt upon which judgment was rendered, upon which the execution was issued, was contracted since the 23d day of April, 1873." Said amendment of said claim of exemption was inserted in said claim immediately after and following the phrase therein, "the following described personal property." The defendant also made a preliminary motion before said justice court, and before the trial of the present case, to set aside the said sale of said property under said execution, on the ground that it was invalid and void by reason of his aforesaid alleged claim of exemptions. This motion was granted by the justice of the peace, and the said sale of the said property hereinbefore set out was set aside. The justice of the peace then proceeded to hear this case, and rendered a judgment in favor of the defendant, from which judgment the plaintiff, A. B. Straughn, took an appeal to this court. Upon these facts, the court, at the request of the defendant, gave to the jury the general affirmative charge in his favor. To the giving of this charge the plaintiff duly excepted. There was verdict and judgment for the defendant. The plaintiff appeals, and assigns as error the giving of the general af-

firmative charge at the request of the defendant. Affirmed.

Morgan D. James, for appellant. B. H. Lewis, for appellee.

SHARPE, J. Unless the case be one in which the right of exemptions does not exist, a claim of exemptions, made in due time, when not frivolous, or wanting in the essentials of a bona fide claim, cannot be lawfully ignored. When so made, mere informalities or defects in the claim, which might be fatal on objection made in the court having jurisdiction of the cause, will not justify the levying officer in assuming its invalidity, or in disregarding it by proceeding to sell the property claimed. In such case the sufficiency of the claim becomes a judicial question, which the officer is without power to determine, and which must be referred to the court by a contest in the mode prescribed by the statute. *Kennedy v. Smith*, 99 Ala. 83, 11 South. 665; *McLaren v. Anderson*, 81 Ala. 108, 8 South. 188; *Block v. Bragg*, 68 Ala. 291; Code, § 2047. The claim in question, as presented to the constable, shows a definite claim to the lumber in controversy in substantial compliance with the statutory requirements. Code, §§ 2041-2047. The defect in failing to show that the debt was contracted during the existence of the law creating the exemption was amendable in the discretion of the court, and was not such as to influence the action of the constable. *Block v. Bragg*, *supra*. Having presented the claim to the constable, the property so claimed was thereby protected from sale until the claim was successfully contested. The defendant was not placed in default by the act of the constable in returning to him the claim with the statement that he would have nothing more to do with the matter. The failure of the officer to do his duty in respect of retaining the claim, and bringing it to the notice of the plaintiff, may have deprived the defendant of the right to a release of the property until the plaintiff was given the opportunity for 10 days to contest, but the effect of the claim was not destroyed thereby. The sale upon which the plaintiff bases his right to recover was unauthorized, and conveyed to him no title. There was no error in giving the charge requested by defendant. Affirmed.

(121 Ala. 39)

TAYLOR v. STATE.

(Supreme Court of Alabama. April 4, 1899.)
INTOXICANTS—ILLEGAL SALES—CONDITIONAL SALES—CHARGE.

1. It is no defense to a prosecution for illegally selling intoxicants that they were the property of others.
2. The fact that a sale of whisky was on a condition which was not complied with does not remove it from the inhibition of the statute against the sale of whisky.

3. A charge not authorized by the evidence is properly refused.

4. A requested charge that, unless accused sold the whisky, and did not exchange, barter, or loan it, he was not guilty, was covered by one given that, if he parted with it in any other way besides selling it, he was not guilty.

Appeal from Bibb county court; N. H. Thompson, Judge.

Thomas M. Taylor was convicted of selling liquors without a license, and he appeals. Affirmed.

Upon the introduction of all the evidence, the court, at the request of the defendant, gave to the jury the following written charge: "(1) If the jury believe that the defendant parted with the whisky in any other way besides selling it, they must acquit the defendant." The defendant also requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(2) Unless the jury believe the defendant sold the whisky, and did not exchange, barter, or loan it, they must find him not guilty. (3) If the jury believe it was a conditional sale, unless the conditions of sale have been complied with, there was no sale, and defendant must be acquitted."

Logan & Van de Graaff and W. C. Darden, for appellant. Charles G. Brown, Atty Gen., and W. W. Lavender, for the State.

DOWDELL, J. The defendant was tried and convicted on an indictment for selling spirituous, vinous, or malt liquors without a license, and contrary to law. The evidence on the part of the state showed that within 12 months before the finding of the indictment, and in Bibb county, the defendant sold to the witness Mace Boyd one pint of whisky, and for which said Boyd paid defendant 40 cents cash. The defendant denied the sale, and testified that he loaned the whisky to Boyd, which was to be replaced by said Boyd. The defendant also testified that the whisky which he let Boyd have did not belong to defendant, but was the property of other parties. If there was a sale of the whisky by the defendant to Boyd within the limits of Bibb county, as charged in the indictment, the question of the ownership of the whisky was wholly immaterial. A violation of the statute would be as complete in a sale by one of whisky, the property of another, as it would be of the property of the seller. The act of selling the statute condemns. The court committed no error in its rulings on the evidence offered by the defendant to prove that the whisky was the property of some other person, and not the property of defendant. Nor was there any error in the refusal of the court to give charges 2 and 3, requested by defendant. Charge 3 does not contain a correct proposition of law, besides being wholly abstract; there being no evidence of any conditional sale.

Any possible benefit which the defendant could have had under charge 2 was fully covered by charge numbered 1, given by the court at the request of the defendant. The court is not required to give charges in repetition, or where a charge requested has been already substantially given. *McAlpine v. State* (Ala.) 23 South. 130; *Burton v. State*, Id. 729; *Dennis v. State*, Id. 1002. We are satisfied that with the instruction given by the court to the jury, contained in charge numbered 1, requested by the defendant, no injury resulted from the refusal to give charge 2. See Code 1896, § 4333. There being no reversible error in the record, the judgment of the county court is affirmed.

(21 Ala. 245)

COLUMBUS WATERWORKS CO. v. LONG et al.

(Supreme Court of Alabama. April 11, 1899.)

EMINENT DOMAIN—FOREIGN CORPORATIONS—PUBLIC USES IN FOREIGN STATE—PETITION.

1. In the absence of constitutional inhibition, a legislature may authorize a foreign corporation to exercise the power of eminent domain for public uses within the state, and this though incidentally public uses in another state be also promoted.

2. A petition by a water company to condemn land to prevent its source of water from becoming polluted, as authorized by Acts 1896-97, p. 1401, § 1, need not state the uses to which the land is to be put, more definitely than that it is for a watershed for its reservoir, so as to prevent the pollution of its source of supply.

3. The petition, stating in the language of the statute that petitioner was unable to agree with the owners as to the price, is sufficient; the price or the effort made to agree need not be stated.

Appeal from probate court, Lee county; W. O. Robinson, Judge.

Condemnation proceedings by the Columbus Waterworks Company against Emma Long and others. There was a judgment for defendants, and plaintiff appeals. Reversed.

This was a proceeding which was instituted by the appellant, the Columbus Waterworks Company filing an application to the probate court of Lee county for the condemnation of certain lands in said county belonging to the appellees, who were made parties respondent, to the petitioner's use.

The petition describes the lands sought to be conveyed, gives the names, ages and residences of the owners thereof, and alleges that the petitioner, the Columbus Waterworks Company, is a corporation under the laws of Georgia, with its residence and place of business in the city of Columbus, Georgia; "that it is a corporation, supplying water for the public to the inhabitants of the towns of Phoenix City and Girard, in this state, and Columbus, in the state of Georgia; and that in order to prevent its source of water supply from being polluted, it is necessary for it to acquire title, ownership and control" of said

lands; "that petitioner has endeavored to acquire title, ownership and control of said lands by purchase from the owners thereof, but that petitioner and the said owners cannot agree as to the price to be paid for said lands; that petitioner herein seeks the condemnation of said lands so as to vest in it the absolute title, ownership and control of and to the same in itself; that the use and purpose for which it is sought to be used is for a watershed for its reservoir, so as to prevent the pollution of its source of water supply. The prayer is for process, for a jury to assess the damages, and for an order of condemnation. This is substantially all the allegations of the petition.

To the petition, the respondents demurred upon the following grounds: "(1) Said petition shows on its face that the petitioner, the Columbus Waterworks Company, is a corporation organized under the laws of the state of Georgia, and that it has its residence and place of business in the city of Columbus, county of Muscogee, and state of Georgia, and fails to aver or show that it is authorized by its charter granted it in said state of Georgia, to supply water for public use to the inhabitants of Phoenix City and Girard in the state of Alabama. (2) Said petition fails to show or aver that petitioner has corporate authority to perform such a public duty in the state of Alabama as will give it the power to exercise the right of eminent domain in Alabama, and against landowners in this state. Said petition fails to show or aver that petitioner has corporate authority to supply water for the public to the inhabitants of cities, towns or villages in the state of Alabama. (3) The law does not authorize the condemnation of a watershed to prevent pollution of the source of water supply unless said watershed is shown to be necessary for that purpose. (4) The said petition fails to aver or show with sufficient clearness that the land sought to be condemned in this proceeding is necessary to prevent the pollution of its source of water supply. (5) Said petition fails to set forth with sufficient clearness the uses or purposes for which the lands are sought to be taken. (6) Said petition fails to show or aver that petitioner made a bona fide effort to agree with these defendants as to the price of the lands sought to be condemned. (6½) The petition fails to state what price was offered to these defendants for their lands. (7) Under the laws of Alabama complainant would have no right to acquire title or ownership over the lands of these defendants. (8) That a foreign corporation has no right to exercise eminent domain in Alabama. (9) That complainant has no right to condemn these defendants' lands for the purpose of a watershed for petitioner's revision or source of water supply. (10) Petitioner, as a Georgia corporation, has no right to condemn these

defendants' lands in order to enable it to furnish water to the towns, villages and cities of Georgia." Upon the hearing of these demurrers, the 1, 2, 3, 4, 5, 6, 6½, and 10 were sustained, and the 7, 8 and 9 grounds were overruled. The petitioner declining to amend its petition to meet said demurrers, judgment was thereupon entered dismissing the petition. From this judgment the petitioner appeals, and assigns as error the ruling of the court in sustaining the several grounds of the demurrer. Respondents make a cross assignment of error, in which they assign the overruling by the court of the 7, 8 and 9 grounds of demurrer as error.

Barnes & Duke, for appellant. Houston & Power and Samford & Son, for appellees.

HARALSON, J. The legal principles involved in this appeal may be briefly stated.

The constitution provides, that "private property shall not be taken or applied for public use, unless just compensation be first made therefor; nor shall private property be taken for private use, or for the use of corporations other than municipal, without the consent of the owner," with an exception for right of way that has no application here. Const. art. 1, § 24.

The legislature of a sovereign state is not restrained in the exercise of its power of eminent domain by restrictions not found in the constitution, and there is nothing in that instrument which forbids its exercise in favor of a foreign corporation or a nonresident for public uses in this state. Lewis, Em. Dom. § 10. It seems to be an admitted fact generally, that the power inheres in a state for domestic uses only, to be exercised for the benefit of its own people, and cannot be extended merely to promote the public uses of a foreign state, yet this doctrine has never been carried so far as to deprive a state of the capacity of empowering a foreign corporation from taking lands for public uses, to be carried out within its own borders. It is not the instrumentality employed for operating the public use, but the use itself, that satisfies the constitution. The fact that the use is public and the public may have the privilege of enjoying it, is the controlling principle. Instances illustrative of the principle might be multiplied in which railroads have been constructed in part through or in states other than the state of their incorporation, in whose favor this right has been conferred by the neighboring states. In re Townsend, 39 N. Y. 171; 6 Am. & Eng. Enc. Law, 517, notes 3, 4; Mills, Em. Dom. §§ 13, 352; Sedg. St. & Const. Law, 122-132; Cooley, Const. Lim. 662.

It is equally clear, that this right is not to be denied where public uses are to be subserved in the state granting condemnation, because in connection therewith, public uses in another state may be likewise promoted.

While a state will take care to use this power for the benefit of its own people, it will not refuse to exercise it for such purpose, because the inhabitants of a neighboring state may incidentally partake of the fruits of its exercise. Such refusal would violate the principles of a just public policy, and the neighborly comity which should exist between states.

The act under which this proceeding was instituted, provides "that any corporation supplying water for the public to the inhabitants of any city, town or village in this state, is hereby authorized to acquire by purchase any lands or interest therein, acquisition of which may be necessary to prevent the source of water from being polluted; and that such corporation, if they cannot agree with the owner of the lands or real estate desired to be acquired for this purpose, may file their petition in the probate court in the county in which such lands, or any part thereof, may be situate, setting forth in substance the lands or interest desired to be acquired, and their inability to agree with the owner as to the price thereof." Acts 1896-97, p. 1401, § 1. The second section of the act provides, that the petition must be in writing, verified by oath of the applicant or some agent thereof, with security for the costs of the proceeding; that the petition must set forth the uses or purposes for which the land is to be taken, or interest or easement therein to be acquired, and the name and residence of the owner if known, etc. The remainder of the enactment relates to the procedure for a complete condemnation thereunder, without reference to any of the general provisions of the Code for condemnation proceedings. The petition follows closely the language of the act. It states the name of the petitioner, a foreign corporation organized under the laws of Georgia, engaged in supplying water to the inhabitants of Phoenix City and Girard in this state, and Columbus in the state of Georgia, and avers that "in order to prevent its source of water supply from being polluted, it is necessary for it to acquire title, ownership and control to the lands hereinafter described, and further, that the use and purpose for which the land sought to be condemned, was for a watershed for its reservoir so as to prevent the pollution of its source of water supply; that petitioner has endeavored to acquire title, ownership and control of said lands by purchase from the owners thereof, but that petitioner and the owners cannot agree as to the price to be paid for said lands." The owners' names, ages and residences are given, and the lands sought to be taken are carefully described, amounting to 10.65 acres. It was unnecessary to describe the uses to which the lands were to be applied, and the inability of the plaintiff and defendants to agree, any more definitely than was done. The averments as to these matters were as full as the statute required.

From what has been said, it is manifest the court was in error in sustaining the demurrer to the petition. It was not liable to any of

the objections raised to it by demurrer. There is nothing in the cross assignments of error.

Reversed and remanded.

(121 Ala. 542)

DAVIS et al. v. WILLIAMS et al.

(Supreme Court of Alabama. April 11, 1899.)

SPECIFIC PERFORMANCE—CONTRACTS—RAILROADS—CONVEYANCES OF LAND—CONSIDERATION—CHAMPERTY—STALE DEMAND—HUSBAND AND WIFE—PARTIES—APPEAL.

1. A contract with a construction company, donating land to it, conditioned on its locating a railroad, which it was building, through lands of the donor, is not invalid, as against public policy, where, under its agreement with the railroad company, such contracts were allowable as part of the consideration for building the road, since its effect is to secure a benefit to the railroad company.

2. Such a contract is not unilateral, or lacking in consideration, since a compliance with the condition constitutes the consideration for the promise of the other party.

3. A bill by an assignee for specific performance of a contract to convey land conditionally is not champertous, where assignor had complied with the conditions previous to the assignment, and complainant was only attempting to convert his equitable title into a legal one.

4. An action to recover land held under an equitable title, brought only a few years after the right accrued, is not a stale demand.

5. A party who conveys his equitable interest under a contract is not a necessary party to a bill by the assignee for its specific performance.

6. A company having a contract for a conveyance of land, conditioned on the construction of a road through land of grantor, after the completion of the road may convey his equity without any demand on the other party for performance.

7. In an action for specific performance of a contract for the conveyance of land, it is immaterial that it belonged to a wife, where she and her husband joined in the contract.

8. Where parties join in a demurrer, which is overruled as not being good as to one, the other, if the overruling is error as to him, can make it available only on a separate assignment of error.

Appeal from chancery court, Macon county; Jere N. Williams, Chancellor.

Bill by J. L. Williams and others against Mary C. Davis and others for specific performance of a contract. From a decree overruling respondents' demurrers, they appeal. Affirmed.

The respondents jointly demurred to the bill upon the following grounds: "(1) The bill, on its face, shows that the contract sought to be enforced is one which a court of equity will not specifically enforce. (2) The bill, on its face, shows that the contract sought to be enforced is without consideration. (3) The bill, on its face, shows that the consideration of the contract sought to be enforced was an illegal agreement on the part of the Georgia & Alabama Construction Company. (4) The bill shows on its face that complainants are guilty of maintenance in prosecuting this suit. (5) The bill shows on its face that the only interest that complainants have in the subject-matter of this lit-

gation is such interest as they acquired by the alleged transfer from Charles Hannon et al. (6) A court of equity will not specifically enforce a contract in favor of persons who were not parties to the contract, and whose only interest in it arises from the purchase of a mere right of action. (7) There is a nonjoinder of parties complainant, in that Charles F. Hannon, John J. King, J. J. Willaford, and R. E. Hardaway are not made parties to the bill. (8) The bill, on its face, shows that there has been such delay on the part of the Georgia & Alabama Construction Company to enforce the agreement relied upon as would render the demand stale. (9) No good and sufficient reason is shown for the delay to enforce this contract from the date of the completion of the road, prior to the first day of January, 1892, to the date of filing this bill. (10) The bill fails to show any demand made by the Georgia & Alabama Construction Company for a deed to them. (11) The bill fails to show any contract on the part of decedent, Davis, to convey any land to complainants. (12) For aught that appears in the bill, the property may have been the property of Mary C. Davis, the married woman, at the time of the execution of the alleged agreement. (13) The bill does not show that either the interest of Mary C. Davis or of Hubert T. Davis came to them, or either of them, through R. T. Davis." Upon the submission of the cause upon the demurrers, the chancellor decreed that they were not well taken, and overruled them. From this decree the respondents appeal, and assign the rendition thereof as error.

HL. T. Davis and S. B. Paine, for appellants. Tompkins & Troy, for appellees.

MCCLELLAN, C. J. On January 5, 1891, the Georgia & Alabama Construction Company, a partnership, and R. T. and Mary C. Davis, entered into the following contract: "We, R. T. Davis and M. C. Davis, do hereby agree that if the Georgia & Alabama Construction Company will build the Savannah, Americus & Montgomery Railroad within one-half mile of our residence, on either side of the dwelling and storehouse occupied at present by us, and build a depot on the said railroad within one mile of our residence, at any place along the line of said railroad that is most suitable to themselves, we hereby agree to give the Georgia & Alabama Construction Company one-half interest in forty acres of land, which may be laid off in lots and streets. The lots must commence at a point near the railroad, and on the big road leading from Union Springs to Tuskegee, Alabama, and known as the 'Union Springs and Tuskegee Dirt Road.' Just as soon as the railroad is built and the depot established, and the train makes a trip through from our place to Montgomery, Alabama, we will make a warranty title to one-half interest in (40) forty acres of land through which the railroad will run, Nos.

as follows, sections 34 and 35, township 15, range 23; and, it makes no difference to us where the railroad enters our land, we will deed one-half interest in forty acres of land along said railroad to the Georgia & Alabama Construction Company at any point on section 34 or 35, township 15, range 23, that they may select. We further agree to do all in our power to aid the Georgia & Alabama Construction Company, and, if the depot ground is selected for a depot on our land, we will also deed to them sufficient grounds for that purpose. Now, everything being fully understood, having been read by J. T. Adams, the company's agent, and agreed to by ourselves and Mr. Adams, we sign the paper, and consider it in full force and effect." At that time said construction company was under a contract with the Savannah, Americus & Montgomery Railway Company, a corporation, for the building of a railroad for said corporation from Americus, Ga., to Montgomery, Ala. One of the provisions of said contract, constituting in part the consideration inducing the construction company to enter into it, was that said company "should be permitted to receive conveyances of real estate from the owners thereof on the line of said railroad, either as a donation by said owners, or in consideration of an agreement on the part of said construction company to build said railroad through or near the lands of the grantors." The construction company built the railroad through the lands, and located and built a depot on the lands, of the said R. T. and Mary C. Davis, in accordance with the stipulations of the contract above set out; and having completed said road, and run trains over it, to Montgomery, Ala., the company selected, also in accordance with the contract, the 40 acres of land, a one-half interest in which Davis and his wife were, by its terms, to convey to the company. In 1896 the members of the partnership, the said construction company, and their several wives, executed an assignment of said contract of January 5, 1891, to J. L. Williams and George E. Salter. Meantime R. T. Davis had died, and the title to said land had become vested in his wife, the said Mary C. Davis, and his son, Hubert T. Davis; the former owning an undivided two-thirds, and the latter an undivided one-third, interest therein. The assignees of the contract demanded of the said Mary C. and Hubert T. Davis that they convey to them an undivided one-half interest in the 40 acres of land selected and located by their assignors, but they refused to do so, and repudiated the contract. On, and setting forth, the foregoing facts, said assignees, Williams and Salter, on March 12, 1897, filed their bill of complaint against said Mary C. and Hubert T. Davis, described the land involved therein, and prayed that the respondents be decreed to execute to complainants a proper deed conveying to them a one-half undivided interest in the land described. The respondents jointly demurred to the bill.

The demurrer was overruled. They appeal to this court from the decree in that behalf, and jointly assign errors here.

It is insisted by the demurrer that the contract sought to be enforced is against public policy, and void, or, if not so, at least that it is of such an evil character or tendency that a court of conscience should not decree its specific performance. The argument is that it was the duty of the construction company to the public to locate and build the railroad and depot wholly in the interest of public convenience and accommodation, and that the contract in question tended directly to induce a breach of this duty, to the inconvenience and injury of the public, etc., and hence was against public policy. The authorities relied on to support this proposition fail to do so. They hold, and most justly, that such contracts made with officers of a railway corporation for their personal advantage tend to induce them to a breach of their duty to locate the railroad to the best interest of the company and of the public, and hence are against public policy. But that is not the case presented by the bill. Here the contract was made with the construction company, which built the road under an agreement with the railway corporation, by which the former was allowed to make such contracts, as a part of the consideration moving to them for locating and building the road. It is therefore the same, to all legal intents and purposes, as if it had been made with the railway company itself. And it is well settled that such contracts made with the railway company—"contracts by which some benefit is secured to the corporation itself by the choice of a particular location, so long as they do not infringe the rights of the public"—are valid, and, when performed on the part of the company, are binding on the other party. Here the corporation is benefited, in that its authorization to the construction company to make this contract went to reduce the cost to it of building the road. And there is no presumption that any right of the public is infringed. Thousands of such contracts have been made in this state,—indeed, it is rather the rule, than otherwise, to make donations and subscriptions to railway enterprises conditioned upon the location of the road to a particular place or along a specified route,—and their validity has not only never been questioned, but has often been either expressly or impliedly sustained. *Railway Co. v. Wilks*, 86 Ala. 478, 6 South. 34; *Hall v. Sims*, 106 Ala. 561, 17 South. 534; *Haas v. Hall*, 111 Ala. 442, 20 South. 78; *Garner v. Hall* (Ala.) 21 South. 835; 3 Elliott, R. R. § 928; *Greenh. Pub. Pol.* p. 321; *Railroad Co. v. Dawson*, 62 Tex. 260; *Railway Co. v. Derkes*, 103 Ind. 520, 3 N. E. 239; *Taggart v. Railroad Co.*, 24 Md. 563; *Railroad Co. v. Spafford*, 41 Iowa, 292. Nor is such contract objectionable as being unilateral or for want of consideration. When the condition has been complied with,—when the road has been lo-

cated and built as specified in the writing,—the contract is as binding as if it had been originally absolute and unconditional, and compliance on the one part constitutes the consideration for the promise on the other. *Taggart v. Railroad Co.*, supra; *Railway Co. v. Derkes*, supra.

The bill is not open to the objection taken by the demurrer for champerty or maintenance. On its averments, the construction company, at and before the time of their transfer and conveyance to complainants, had a perfect equity in and to a half interest in the land described. It being the duty of respondents to convey that interest to the company, it is not to be assumed that they had repudiated the contract, or held the whole land otherwise than in recognition of the company's equity. There was no question of adverse possession in a third party at the time of the transfer. The company having this equity,—this equitable title,—and having conveyed it to complainants, there can be nothing of maintenance or champerty in the latter's present effort to convert their equitable into a legal title. The effort is simply to conserve the interest they have purchased, solely for their own benefit, and at their own charge. 2 Story, Eq. Jur. § 1050. The cause of action propounded here is analogous to a right of recovery in ejectment at law. It is a suit in equity to recover certain land held under an equitable title. It would seem that no lapse of time short of 10 years would bar the action; and, whether so or not, it is clear, we think, that the lapse of time after the right accrued, and before bill filed, was not sufficient to render the demand stale. *Ashurst v. Peck*, 101 Ala. 499, 14 South. 541; *Id.*, 108 Ala. 429, 19 South. 781.

Hannon and others, who composed the construction company, and transferred and conveyed their title and rights under this contract to complainants, are no more necessary parties to this bill than had their title been a legal one, and the complainants, as their grantees, were suing in ejectment at law. They are without interest in the suit, and could not have been made parties to it.

A demand by the construction company before the transfer, and conveyance by them to complainants, was obviously unnecessary. With or without such demand, they had a perfect equity, and the right to convey it to complainants.

It is immaterial that the land may have belonged to Mary C. Davis. If it did, the contract, being joined in by her husband, is binding on her. It is also of no consequence, as the case is now presented, whether the land came to Mary C. Davis through R. T. Davis. However the title accrued, it is affected by the contract. If Hubert T. Davis' title is not so affected, the fact is of no avail here, as he joins both in the demurrer below and in the assignment of error here. The demurrer, not being good as to one of the demurrants, was properly overruled; and, if

there had been error as to him in the decree overruling the demurrer, it could be availed of here only upon a separate assignment as to him. Affirmed.

(121 Ala. 70)

LANGLEY v. LANGLEY et al.

(Supreme Court of Alabama. April 11, 1899.)

**ADMINISTRATORS—ACTIONS—SALES OF REALTY—
BONA FIDE PURCHASERS—LIENS—
EQUITY—APPEAL.**

1. One of two administrators purchased lands of the estate sold by order of a probate court, but failed to make either the cash or the deferred payment required by the order, though in the report of the sale it was alleged that the cash payment had been made. Before the maturity of the deferred payment a deed was executed and delivered to him, and he sold the land. *Held*, that purchasers from him or his subvendees would not be protected as purchasers for value without notice, though they bought in ignorance of the fact that the purchase money had not been paid, and the conveyance to him was made under an order of the court.

2. A remaining administrator may maintain a suit to enforce a vendor's lien against a co-administrator, who purchased land of the estate sold under order of the probate court, and failed to pay the purchase money, although he has since resigned and been discharged by order of court; Code 1896, § 250, providing that proceedings for settlement of the accounts of one outgoing administrator shall not prevent any action by the remaining administrator against such administrator for any property remaining in his hands, or for any other cause of action.

3. Where a bill that is demurrable has been dismissed on motion for want of equity, the decree will be reversed, and the cause remanded, with directions to allow complainant to amend.

Appeal from chancery court, Tallapoosa county; J. R. Dowdell, Chancellor.

Bill by F. E. Langley, administrator, against W. T. Langley and others to enforce a vendor's lien. The facts averred in the bill are sufficiently stated in the opinion. The defendants demurred to the bill, and moved to dismiss it for want of equity. On the submission of the cause upon the demurrers and the motion to dismiss, the chancellor granted the motion, and ordered the bill dismissed for want of equity. From this decree, complainant appeals, and assigns the rendition thereof as error. Reversed.

T. L. Bulger and J. M. Chilton, for appellant. Garrett & Lackey, for appellees.

TYSON, J. The bill in this cause was filed by the appellant, as administrator of the estate of Slaughter, and seeks to enforce a vendor's lien upon certain lands therein described, which were sold by an order of the probate court of Tallapoosa county for division among the heirs. It is alleged in the bill that the petition for the sale of these lands was filed by the complainant and one of the respondents, W. T. Langley, who was a co-administrator with the complainant; that the lands were ordered to be sold by the administrators for one-half cash, and the remainder

on 12 months' credit. At the sale, on the 23d day of November, 1893, the respondent Langley became the purchaser at and for the price of \$1,283.20, and gave his note to the complainant for the deferred payment, due November 23, 1894; and that he never made the cash payment, nor has he ever paid the note. It is further alleged that a report of the sale was made to the probate court, in which it was stated that the respondent Langley had paid the cash payment, which was untrue, and that no report has ever been made that the deferred payment was paid, that, notwithstanding the terms of sale were partly for credit, before the maturity of the deferred payment the probate judge appointed Oliver, and commissioned him to execute a deed to Langley as purchaser, and Oliver, on the 3d day of July, 1894, executed a deed to him. The remaining allegations of the bill aver a sale of the land by Langley, the purchaser, to certain other respondents, and contract of sales by some of his grantees to certain other defendants, and the resignation by Langley, the respondent, as administrator of said estate, and decree entered by the probate court on the 17th day of November, 1896, discharging him from any further administration of said estate, leaving the complainant at the time of the filing of the bill as the sole administrator. Under these averments, it is too clear for disputation that the deed to Langley, as purchaser, did not convey the legal title to the land, but only vested in him an inchoate equity, which, upon full payment of the purchase money, would ripen into a perfect equity; and the purchaser from him or his subvendees cannot claim the protection afforded to purchasers for valuable consideration without notice, although they bought in ignorance of the fact that the purchase money had not been paid, and although the conveyance to Langley was made under an order of the court. *Cruikshank v. Luttrell*, 67 Ala. 318; *Wallace v. Nichols' Adm'r*, 56 Ala. 321; *Ketchum v. Creagh*, 53 Ala. 224; *Bolling v. Smith*, 108 Ala. 411, 19 South. 370; *McOully v. Chapman*, 58 Ala. 325; *Ligon v. Ligon*, 84 Ala. 555, 4 South. 405; *Anderson's Adm'r v. Bradley*, 66 Ala. 263; *Washington v. Bogart (Ala.)* 24 South. 245; *Bogart v. Bell*, 112 Ala. 412, 20 South. 511; *Allison v. Allison*, 114 Ala. 393, 21 South. 1008.

The main question presented is whether the complainant can maintain this bill, his co-administrator being the purchaser at the sale of the lands, not having paid any portion of the purchase money, and having resigned, and been discharged by the probate court before the filing of this bill. The contention of appellees is that, as the respondent Langley was the seller and purchaser, the moment he contracted the debt for the purchase of the lands it was extinguished, and it became assets in his hands as administrator, and he was chargeable with the amount as if he had collected the money or converted the property of the estate into money. And, in support

of this contention, they cite the cases of *Childress v. Childress*, 3 Ala. 752; *Ward v. Oates*, 42 Ala. 225; *King v. Shackelford*, 6 Ala. 423; *Duffee v. Buchanan*, 8 Ala. 27; *Ligon v. Ligon*, 84 Ala. 555, 4 South. 405; *Knight v. Haynie*, 74 Ala. 542; *Cook v. Cook*, 69 Ala. 294.

We do not doubt the soundness of the principles upon which the opinions in those cases are made to rest. No one can doubt that complainant could not maintain this bill so long as the respondent Langley was his co-administrator. The reason for the rule is clearly stated in *King v. Shackelford* to be "that where there are several executors each has a right to receive the debts and other assets of the estate, and a payment of the sums received by him to his co-executor will not discharge his liability to the estate. Further, that executors are not liable to each other, but each is liable to the cestuis que trustent and devisees to the full extent of the funds received by him." No such relation as that exists in this case. And the complainant alone is now responsible for the administration of the assets of the estate. Can it be doubted that Langley's promise to pay the price of lands, which he has never paid, going into possession under the purchase and reselling it as owner, is an asset of the estate? Suppose both the Langleys had resigned as administrators at the same time, and the court had appointed an administrator *de bonis non*, it would hardly be contended that such administrator *de bonis non* could not enforce the lien for the purchase money. The cases of *Ketchum v. Creagh*, *Cruikshank v. Luttrell*, *Wallace v. Nichols' Adm'r*, cited above, were bills by administrators *de bonis non* to enforce vendors' liens against the purchasers at sales made of lands under an order of the probate court. And in the case of *Cruikshank v. Luttrell* the administrator had the purchaser at the sale, who was unable to pay the purchase price bid by him to transfer his certificate of purchase to him (the administrator), and he resold the lands to Luttrell at private sale, taking his notes for the purchase money. Yet this court did not say that the administrator only became chargeable with the purchase money as if he collected it, or converted the lands into money upon a settlement of the estate by the outgoing administrator with the administrator *de bonis non*. On the contrary, it held that the administrator *de bonis non* could enforce a vendor's lien upon the lands. Section 241 of the Code of 1896 (section 2173, Code 1886) required respondent Langley within one month after his resignation to make final settlement of his administration of the estate; and of which settlement notice was required to be given. Section 242, Code 1896 (section 2174, Code 1886) provides that the remaining or succeeding executor or administrator of the estate, if there be one, must be a party to such settlement, and is entitled, if a resident of the state, to personal notice at least 10

days before the day appointed for the settlement. That the remaining administrator is a necessary party cannot well be doubted. Indeed, the decree rendered on any settlement made by the administrator after resignation, without notice to the remaining administrator as required by the statute, would be void. As said in *Hatchett v. Billingslea*, 65 Ala. 17: "The object of the notice is that the administrator may appear at the settlement, and have an opportunity to contest the account. This is eminently necessary and just; for, as the law now stands [section 244, Code 1896 (section 2176, Code 1886)], a decree may be rendered against him in favor of the outgoing administrator; and, if the estate be solvent, an execution may be ordered thereon, under which the assets of the estate may be sold away from his possession and control." And the learned judge might have stated further that, in the event the outgoing administrator was indebted to the estate, the decree must be rendered in favor of the remaining administrator. Code 1896, § 243 (Code 1886, § 2175). On the inquiries of a balance due the outgoing administrator and of the solvency of the estate the estate and remaining administrator should be represented. In such a settlement the resigned administrator is the party, on the one hand, and the continuing administrator or succeeding administrator (administrator *de bonis non*) is the adverse party. *Hatchett v. Billingslea*, supra. Section 250 of Code 1896 (section 2182, Code 1886) provides that "the proceedings for the settlement of the accounts of deceased or outgoing executors or administrators, provided for in this article, do not prevent any action by the remaining or succeeding administrator or by any person entitled thereto against such executor or administrator or his personal representative, for any property remaining in his hands or for any other cause of action." The settlement required of a resigned administrator is in the same article with this section, and it indeed immediately succeeds those providing the manner by which such a settlement is to be had. It will be observed from reading section 241 (section 2173), that it requires settlement to be made by an administrator when removed. We hold that, under this section, had the respondent Langley made a settlement of his administration of the estate after his resignation, this would not preclude the complainant from maintaining this suit to enforce a vendor's lien upon the land for the purchase money confessedly due by him. Unless we disregard the opinion in the case of *Hendricks v. Thornton*, 45 Ala. 299, the right of the complainant to maintain this bill is conclusively determined by it. The only difference between that case and the one under consideration is in that case the outgoing administrator was removed, and here the outgoing administrator resigned. This difference can make no possible distinction between the

two, since, as we have stated, the method of procedure in both are provided by the same statutes. We adhere to the opinion of the court in that case as to what is there said as to the right of the remaining administrator to maintain the suit.

The conclusion reached by us in this case is recognized in the case of *Cook v. Cook*, supra, where it is said: "The only case where a decree is authorized in favor of one personal representative against another is where there is a removal, a resignation, or revocation of the letters of an executor or administrator, or his authority ceases for any cause. In such case a decree may be rendered in favor of a remaining or succeeding executor or administrator." While it is unnecessary to consider demurrers, where a bill is dismissed for want of equity, unless they raise the same question as raised by the motion to dismiss, as the bill may be amended to meet defects pointed out by them, yet, in this case, for the purposes of further proceedings in this cause, it would be well for us here to say that the respondent J. E. Heard is not a proper or necessary party to the bill. The averment as to him shows that he parted with his interest in the lands by conveyance to James A. Heard, although there is no ground of demurrer raising the question. If a bill is defective and subject to demurrer filed to it, where it has been dismissed for want of equity, the ends of justice are best accomplished by reversing the decree, and remanding the cause, with directions to allow the complainant to amend as he may be advised. *Cruikshank v. Luttrell*, supra. The decree of the chancellor dismissing the bill must be reversed and annulled, and the cause is remanded. Reversed and remanded.

(121 Ala. 172)

ALABAMA MINERAL LAND CO. v. JACKSON.

(Supreme Court of Alabama. April 11, 1899.)

STATUTE OF FRAUDS—DESCRIPTION OF PROPERTY—DAMAGES.

A contract to purchase land afterwards to be selected by the purchaser is within the statute of frauds, as failing to describe the land, and will, on the purchaser's failure to select, neither support a bill for specific performance nor an action for damages.

Appeal from circuit court, Chilton county; N. D. Denson, Judge.

Action by the Alabama Mineral Land Company against Elihu E. Jackson. There was a judgment for defendant, and plaintiff appeals. Affirmed.

The plaintiff claimed \$45,000 damages for the breach of a contract in writing entered into by and between the plaintiff and the defendant on September 15, 1892. The substance of the contract, and the breaches thereof, as averred in the complaint, are sufficiently stated in the opinion. The defendant, E.

E. Jackson, filed several pleas, all of which were, on his own motion, withdrawn, except pleas numbered 4, 7, 8, and 9. By pleas 7 and 9 the defendant interposed the defense of the statute of frauds, and averred that the description of the 10,000 acres of land, the timber upon which was sold or contracted for by said contract, was too vague, uncertain, and indefinite to support an action for the breach of said contract. Plea No. 4 was as follows: "Comes the defendant, E. E. Jackson, and, for answer to the complaint, saith that the contract upon which the action was founded was not executed by him, nor by any one authorized to bind him in the premises, and he makes oath that this plea is true." To this plea was attached the affidavit of the defendant, E. E. Jackson, in which he stated that the averments of said plea were true. By plea No. 8 the defendant averred that the plaintiff did not own, and never did own, the timber on said lands, which, under the contract, it was open to defendant to designate. To the fourth plea the plaintiff demurred upon the grounds that said plea was no answer to the complaint, for one partner may bind another, in such a contract as here sued on, by signing for both, or by signing the firm name. To the seventh and ninth pleas the plaintiff demurred upon the following grounds: "(1) The complaint does not claim damages for the breach of a contract for the sale of lands, but for the breach of a contract to make or complete a contract for the purchase of timber on lands. (2) A contract to make a contract for the sale or purchase of timber on lands is not within the statute of frauds. (3) The contract, as set out in the complaint, shows that plaintiff has complied with the statute of frauds, and is bound thereby, and defendant is also bound. (4) Defendant cannot willfully refuse to designate said timber lands as provided for in the contract sued on, and then claim the benefit of his own wrong. (5) Said complaint declares against E. E. Jackson and W. H. Jackson as partners, and said plea No. 7 does not aver that the purchase of said timber was outside or beyond the scope of said partnership. (6) Because the reference in said contract and in said plea to the terms of payment, and the substitution of timbered lands for other lands which had been cleared, and what particular 10,000 acres were to be selected, or in what section or township they were to be selected, are not necessary to entitle plaintiff to recover, when defendant willfully refused to designate said 10,000 acres, and also willfully refused to complete the contract. (7) For that it would make no difference what state or county, township or range, said block of 10,000 acres would lie in, when defendants willfully refused to designate the lands, the timber upon which was sold to them. (8) When defendants refused to designate the said 10,000 acres, they estopped themselves from pleading the vagueness or uncertainty of the contract, or

the indefiniteness of the description of the lands, the timber upon which was sold to them." To the eighth plea the plaintiff demurred upon the following grounds: "(1) Defendant, being a vendee of plaintiff, is estopped to deny plaintiff's title to the timber sold. (2) Said plea No. 8 does not aver that plaintiff could not have acquired the timber on the lands sold under said contract in time to comply with its contract. (3) For that party may sell that which he does not own, if he can acquire the same in time to comply with the terms of his sale." The demurrers to each of the pleas were severally overruled, and, the plaintiff declining to plead further, judgment was rendered in favor of the defendant. The plaintiff appeals, and assigns as error the ruling of the court upon the pleadings.

J. J. Willett and S. D. Logan, for appellant. Gunter & Gunter, for appellee.

MCCLELLAN, C. J. Writings were signed by the Alabama Mineral Land Company and E. E. Jackson by which, in terms, the latter was to purchase from the former, at a stipulated price per acre, "the timber from a continuous block of ten thousand acres, consecutive sections, in a northwesterly line from Maplesville, townships 21 and 22"; the purchaser to determine upon a continuous body of lands, mineral lands excepted, and to designate the same to seller on a day named. It was further stipulated that in "case of any material tract recently timbered having been cleared of said timber, or pillaged of same, to any material extent, the seller will substitute other lands for cutting in its stead" at any time prior to a stated date. The purchaser failed to determine upon and designate a body of lands, or the lands contemplated in the agreement, and failed to make the payments provided for in the writing. The action is prosecuted by the land company. The complaint claims \$45,000 damages for the breach of the alleged contract stated above, which is set out in the complaint; and the plaintiff, after averring that it had fully complied with all the provisions of said contract on its part, assigned the following breaches thereof on the part of the defendant: "First, that defendant failed to designate the lands on which he was to cut and remove the timber, and has failed to make payment for said timber as provided in said contract; second, defendant willfully refused to complete said contract, by willfully refusing to designate said ten thousand acres from which the timber was to be cut; third, defendant has failed and refused to purchase the timber from said ten thousand acres as provided in said contract, and has failed and refused to pay for the same." To this complaint the defendant pleaded, among other defenses, the statute of frauds, for insufficient description of the land, an interest in which was intended to

be embraced in the contract. Plaintiff demurred to the pleas (7 and 9) setting up this defense, and its demurrers were overruled. This ruling presents the question of importance involved on this appeal.

Under the statute of frauds the written agreement or memorandum must describe the subject-matter directly, or by reference to something outside of the writing, by resorting to which certainty may be attained. It requires no discussion to demonstrate that the contract under consideration does not, either in itself or by reference, describe the land intended to be sold so as to admit of, or to furnish means for, its identification. To the contrary, the writing expressly refers the segregation and identification of the land to the selection of the purchasers within certain very uncertain limitations. There cannot, we think, be two opinions on the inquiry whether this writing, intended to evidence a sale and purchase of an interest in land, fills the requirement of the statute of frauds. Manifestly it does not. And we do not understand appellant's counsel to seriously insist that the writing bound the plaintiff to sell and the defendant to purchase any particular land, and it is admitted that the agreement could not be specifically enforced in equity. But it is insisted for appellant that while the land has not been designated by the defendant, and while a court of chancery would not select the 10,000 acres contemplated by the contract for the defendant, Jackson, and force him to take them, yet the seller has a remedy in an action for a breach of the contract against Jackson, for that he failed and refused to determine upon and designate particular land as by the terms of the writing he was required to do; the theory being, in the first place, that the same certainty of description is not necessary in the contract for the purposes of an action at law for its breach as is required on a bill filed for its specific performance in equity, and, in the second place, that the defendant is estopped to say that the contract is void for uncertainty as to its subject-matter, because, under the terms of the writing, it was his duty to remove that element of uncertainty by designating the particular land to be covered by the contract.

We cannot assent to either of these propositions. A contract which is so uncertain in respect of its subject-matter that it neither identifies the thing by describing it, nor furnishes any data by which certainty of identification can be attained, is void as well at law as in equity, and as incapable of supporting an action for damages as of supporting a bill for specific performance, upon proper objection taken. The infirmity of the contract here under consideration is that it not only does not attempt to describe the land, but expressly provides that the identity of the subject-matter shall be fixed by acts in pais to be subsequently performed by the purchaser; and, until such acts are performed, no court can, for

any purpose, say that any certain land is embraced in the writing, and no court can give validity to it as a contract for the sale of any land, either directly, by enforcing its specific performance, or indirectly, by awarding damages for its breach. It falls necessarily within the general rule that, while not absolutely void, but to be so held upon proper objection, a contract falling under the influence of the statute of frauds, and not complying with its provisions, will not be directly enforced, nor will damages be awarded for its violation. The true view of this writing, in its final analysis, is this: The land company agrees to sell to Jackson, and Jackson agrees to buy from the company, a wholly uncertain part of its lands, for a stated consideration. This undertaking, standing alone, is of no efficacy whatever, as it does not identify the subject-matter; and there results from the agreement so far stated no obligation on the part of the company to sell any land to Jackson, and no obligation on Jackson to buy any land from the company. The only further provision of the writing bearing on the matter we are considering is that by which Jackson agrees to determine upon, and to designate to the company, the particular 10,000 acres of its land he will purchase from the company, and the correlative undertaking of the company to sell him the particular acres he thus determines upon and designates. Clearly, these latter stipulations are of no effect towards supplying identification of the subject-matter until they are complied with. So long as the particular lands are not determined upon by Jackson, and designated by him to the company, the whole agreement remains at large, as to the thing intended to be contracted about,—the infirmity of the absence of identification still attaches to the writing; and it cannot be said that there is any contract to sell any land, because there is no contract to sell any particular land. Had Jackson determined upon and designated the particular 10,000 acres to be sold and purchased, and evidenced such determination and designation by writing, the effect would have been to complete, or, to speak accurately, to make a contract for the sale of land where no contract before existed. The undertaking of Jackson to determine upon and designate lands was therefore, in substance, and essentially, an agreement on his part to enter into a contract to purchase such lands as he might determine upon and designate. It was, to all intents and purposes, an agreement to make a contract for the sale and purchase of lands. And, like the contract of sale, an agreement to make such contract must itself comply with the statute of frauds in all essential respects,—including, of course, a description of the land; else the agreement is void, and will not support either a bill for performance or an action for damages. *Amburger v. Marvin*, 4 E. D. Smith, 393; *Dicken v. McKinley*, 163 Ill. 318, 45 N. E. 134, and 54 Am. St. Rep. 471; *Raub v. Smith*, 61 Mich. 543, 28 N. W. 676, and 1 Am. St. Rep. 619;

Wardell v. Williams, 62 Mich. 59, 28 N. W. 796, and 4 Am. St. Rep. 814; *Yates v. Martin*, 2 Pin. 178; *Hayes v. Burkam*, 51 Ind. 130; *Smith v. Bowler*, 2 Dism. 153; *Pulse v. Hamer*, 8 Or. 251; *Ledford v. Ferrell's Adm'r*, 84 N. C. 285; *Martin v. Wharton*, 38 Ala. 637. The undertaking is none the less a mere engagement to make a contract for the sale and purchase of land, for that to perfect the contract, under the statute of frauds, requires only the selection and designation of the subject-matter. This very thing is as essential to the contract, under the statute, as the expression of a consideration, or the subscription of the party to be charged; and it would scarcely be contended even that a writing containing every requisite except the expression of the consideration, and, in lieu of such expression, an undertaking on the part of one of the parties to express the consideration therein subsequently, or in another writing, could be made the basis for awarding damages for a failure to execute such undertaking, or that a parol promise to subscribe a writing containing all essential stipulations and expressions could be actionable. That is what we have in this case,—a parol promise; for, every requisite to the contract not being in writing, there is no written contract, and the whole transaction lies in parol. It might as well be insisted that where the contract is entirely verbal, the party purchasing agreeing to pay a portion of the purchase money and take possession at once, and thus to validate the sale, an action would lie for his failure to thus perfect the contract by paying and taking possession, as to insist that an action will lie upon any stipulation of an agreement which for any reason is void under the statute of frauds.

It is argued for appellant "that the defendant, Jackson, cannot set up his own wrong in avoidance of the contract." The obvious vice of this position lies in its assumption that there ever was a contract between the parties. Of course, it is familiar law "that one who by his own fault has prevented the performance by the other party of the contract, or made performance impossible, cannot claim exemption from liability on the contract," and "that in the case of dependent promises a plaintiff who has come short of fulfilling, because the defendant prevented him, may maintain his action." But these principles presuppose the existence of a contract between the parties,—a legal, valid, binding, living contract; not a mere form of words, without substance; not a mere expression of terms which on their face appear to set forth promises and obligations, but which, by reason of some positive rule of law operating upon the terms so expressed, in fact and in law bind nobody to do anything. If the writing under discussion could have been a contract without containing a description of the land, and the plaintiff had been prevented from carrying out its part of the contract, and from conveying the land to the defendant, by the latter's refusal to iden-

tify the land to be conveyed, in such case the doctrine contended for would obtain. Plaintiff's failure to carry out its undertaking having been caused by defendant's own wrong, it would not affect its right to compensation for defendant's default. But this statement of the law manifestly assumes the very point in issue,—the existence of a contract, and defendant's wrongful prevention of the execution of its legally binding stipulations by the plaintiff. On the real case, without assumptions,—the case we have,—the default of the defendant did not prevent the plaintiff carrying out an existing contract, but it prevented any contract coming into existence.

Appellant's counsel cite the case of *Lingeman v. Shirk* (Ind. App.) 43 N. E. 33, as being directly in point to the support of his contention that this action lies on Jackson's undertaking to "determine upon, and designate" to the land company, the particular 10,000 acres of land to be embraced in the contract. This decision may be all that is claimed for it; but it is not supported by any authority,—not even by the cases cited in it,—and is, in our opinion, unsound, and not to be followed.

These views fully dispose of the case on its merits against appellant, and we do not understand counsel to desire the decision of other points appearing on the record. Affirmed.

(21 Ala. 363)

COONEY v. PULLMAN PALACE-CAR CO.
(Supreme Court of Alabama. April 18, 1899.)

CARRIERS—SLEEPING-CAR COMPANIES—LIABILITY FOR LOSS OF BAGGAGE—WHAT CONSTITUTES BAGGAGE—MEASURE OF DAMAGES.

1. A passenger on a sleeping car left his satchel with an employé, who placed it in the car where it could be easily seen. From the time the passenger got on until the train reached a certain point no one boarded or left the car, but at that point several persons left the car carrying satchels. Several employés were on watch all night, but none knew of the loss of the passenger's satchel until he got up, though one of them was familiar with its appearance and was present when the other passengers got off. *Held*, that the company had not exercised reasonable care, and was liable.

2. A passenger cannot recover for the loss, through a carrier's negligence, of a pistol carried in his satchel.

3. A passenger who is a general traveling agent for a commercial house can recover for loss, through the carrier's negligence, of mileage tickets carried by him in his satchel; such tickets being usually carried by those doing much traveling.

4. A passenger can recover for loss, through the carrier's negligence, of opera glasses, a glass and brass compass, razor and strap and accoutrements, and nasal syringe, with accompaniments, together with the satchel containing such articles.

5. A passenger is entitled to recover the value as testified to by him of baggage lost through the carrier's negligence, though such articles have no market value.

Appeal from city court of Birmingham; W. W. Wilkerson, Judge.

Action by R. L. Cooney against the Pullman Palace-Car Company. From a judgment

in the justice court for plaintiff, defendant appealed to the city court of Birmingham, which rendered judgment for defendant, and plaintiff appeals. Reversed.

The appellant, R. L. Cooney, sued the Pullman Palace-Car Company, in the justice of the peace court, for damages for the loss of a satchel and its contents, while a passenger in the defendant's sleeping car from Mobile to Birmingham, Ala. Judgment was rendered in that court for the plaintiff, and from which the defendant appealed to the city court of Birmingham, where the case was again tried, and a judgment rendered for the defendant. The case was tried in the city court without a jury. On that trial the evidence of the plaintiff showed that on November 15, 1895, plaintiff was traveling from Mobile, Ala., to Birmingham, Ala., at which latter place he resided, in a Pullman palace car. He had with him two satchels,—one a large one, and the other a small one. The larger satchel contained wearing apparel. The smaller satchel, the value of which was \$8, contained a pair of opera glasses, value, \$15; a Smith & Wesson nickel-plated, pearl handle revolver, with case, value, \$14; between 700 and 800 miles mileage on the L. C. R. R., minimum value, \$18; a glass and brass compass, value, \$1.50; from 50 to 60 miles of mileage on the Southern Railroad, value, 75 cents; a razor, with strap and various accoutrements, value, \$2; a nasal syringe, with accompaniments, value, \$1. The said grip, with its contents, was stolen or otherwise lost. The plaintiff, in getting into the car at Mobile, handed the satchels to the porter. The car being crowded, he was compelled to take an upper berth. There being no room in the upper berth for said baggage, said satchels were placed at the end of the car, one on top of the other, or at least they were there the last time plaintiff saw them,—were in the custody of the Pullman car porter. The plaintiff, testifying, further said: "I have stated fully all of the circumstances connected with the loss of the same, it having been handed to the porter, and he having deposited it at the other end of the car, I having gotten into the upper berth; and, on arising in the morning and having occasion to use toilet articles, the valise could not be found. The value of said grip and each of the articles contained therein has already been stated. On the following morning I heard the conductor remonstrating with the porter (who acknowledged very frankly to me that he had received the custody of said grip, and had seen it subsequent to its having been placed at the end of the car), telling the said porter that he remembered too many things or words to that effect. I immediately notified the Pullman Palace-Car Company of said loss, and had from them a statement to the effect that their operatives had reported the loss to them, and they would investigate and see if they could find it. I made claim on them for the value

of said grip, which they, while not denying the fact that it had been lost in their custody, or the custody of their employes, claimed they were not responsible for it." On being cross-examined, this witness testified: "It is a fact that I do not know of my own knowledge whether my valise was lost or stolen; but I do know that said valise was given into the custody of the Pullman car employes, and was not touched by me or anybody acting for me since that time. It is a fact that I do not know of my own knowledge what became of said grip; but I do know, as already stated, that it was handed to the Pullman car employes, and was by them deposited in the car for safe-keeping, disappeared while in their possession, and has never been in my possession since. The cash market value of my valise and its contents I cannot state, for two reasons: I am not in that business; and, second, the valise and its contents were not on the market." The evidence for the plaintiff also showed that he was general traveling agent for the New York Life Insurance Company, and was accustomed to travel on railroads most of his time for his company, and that a person having much traveling to do usually carried with him mileage tickets.

The defendant introduced, as a witness, James Cartwright, waiter on said Pullman car, who testified: That plaintiff boarded a certain sleeping car of defendant at Mobile, Ala., at midnight on the 15th November, 1895, for Birmingham, Ala., and occupied upper berth No. 1, which was the first berth in the front end of the car as it went towards Birmingham. Plaintiff entered said car from the rear end from Birmingham. He carried to the door of the car two valises,—one a small alligator satchel, and the other a large valise. He gave them to witness at the door of the car, and witness took charge of them, and placed the valise and satchel in front of berth No. 1, to be occupied by plaintiff, and never moved them from that place. That a man occupied the lower berth under the one occupied by plaintiff, and was occupying the same before plaintiff got on at Mobile. The man got up and left the car at Montgomery within a few minutes after the train reached Montgomery. The plaintiff did not get up until about 30 miles north of Montgomery, and did not ask for his alligator satchel until then. The defendant also introduced A. M. Ambrose, the conductor, and J. M. Riggs, the porter, who testified that the said car was under the control of a conductor, waiter, and porter,—the three witnesses examined by defendant,—and that it was not customary or usual to have any more persons in charge of a sleeping car; that it is the duty of each of these three employes to guard and watch said car at all times; that the conductor did not return until 1:30 a. m. that night; that the waiter who took plaintiff's valise was on watch and guard all the time that night up to 3 o'clock a. m., and the porter was on watch and guard all the time from 3 o'clock a. m.

and on during the whole day; that, while said porter and waiter were so on guard and watch, each could see the full length of the aisle of the said car from the front to the back, and between all the berths on the right and left sides; that some one of these employes was on guard and watch all that night; that no person boarded or left said car between Mobile and Montgomery, and that no one left his berth between these two places; that none of these employes knew what became of the satchel; and that several people got out of the car at Montgomery, and some of them had valises in their hands as they got off the car, though none of the employes knew of the satchel being lost until plaintiff inquired for the same above Montgomery, when he got out of his berth, as above stated. This was all of the testimony in the case; and on this evidence the court rendered judgment for the defendant. To the rendition of this judgment, the plaintiff duly excepted.

John W. Tomlinson, for appellant. Walker, Porter & Walker, for appellee.

DOWDELL, J. In the recent case of *Car Co. v. Adams*, 24 South. 925, decided by this court, it was said: "The rule now seems to be well settled that sleeping-car companies are not held to the responsibility of common carriers and innkeepers. Many reasons for this distinction will be found stated in the text-books and decisions, and nowhere more fully, perhaps, than in *Blum v. Car Co.*, 1 *Flip*. 500, *Fed. Cas. No. 1,574*,"—citing *Hutch. Carr.* 617d; 22 *Am. & Eng. Enc. Law*, 797, where the authorities may be found collated. The writer of this opinion is, however, not very profoundly impressed with the soundness of reasoning in the case of *Blum v. Car Co.*, *supra*. In the case above referred to of *Car Co. v. Adams*, the case of *Lewis v. Car Co.*, 143 *Mass.* 267, 9 *N. E.* 615, is cited with approval, wherein it was said by *Morton, C. J.*: "A sleeping-car company holds itself out to the world as furnishing safe and comfortable cars, and, when it sells a ticket, it impliedly stipulates to do so. It invites passengers to pay for, and make use of, its cars for sleeping; all parties knowing that, during the greater part of the night, the passengers will be asleep, powerless to protect himself or to guard his property. He cannot, like the guest of an inn, by locking the door, guard against danger. He has no right to take any such steps to protect himself in a sleeping car, but, by the necessity of the case, is dependent upon the owners and officers of the car to guard him and the property he has with him from danger from thieves or otherwise. The law raises the duty on the part of the car company to afford him protection. While it is not liable as a common carrier or as an innkeeper, yet it is its duty to use reasonable care to guard the passengers from theft; and if, through want of such care, the personal effects of a passenger such as he might rea-

sonably carry with him are stolen, the company is liable for it. Such a rule is required by public policy, and by the true interests of both the passengers and the car company, and the decided weight of authority supports it."

It becomes a question in the present case as to whether the defendant car company exercised reasonable care to guard and protect plaintiff's property from loss, by theft or otherwise, while a passenger in defendant's sleeping car. The evidence on the part of the plaintiff made a *prima facie* case in his behalf. Does the evidence of the defendant overcome this *prima facie* case by showing the exercise of that reasonable care for plaintiff's property that he was entitled to, and such as would exempt the defendant from liability?

The first witness introduced by the defendant was Cartwright, the waiter, who took plaintiff's hand baggage when he entered the sleeping car. The testimony of this witness coincides with plaintiff's as to the manner of plaintiff's entering the car, and the disposition of his satchels, except as to the particular place where Cartwright deposited the satchels in the car; and we think, under the circumstances, this was an immaterial conflict. The other two witnesses of the defendant,—the car conductor and the porter,—testified that the car was under the control of the conductor, porter, and waiter, and that it was not customary or usual to have any more persons in control of a sleeping car; that it is the duty of each of these three employes to guard and watch said car at all times, some one to be on guard at all times; that some one of these employes was on guard and watch all that night; that while on guard he could see the full length of the aisle in the car, and between all the berths on the right and left sides; that no person boarded or left said car between Mobile and Montgomery; and that several people got out of said car at Montgomery, some of them having valises in their hands as they got off the car, though none of the employes knew of the satchel being lost until plaintiff inquired for the same above Montgomery, when he got up out of his berth.

It is evident from the testimony that the satchel was stolen or lost, and it was not stolen or lost between Mobile and Montgomery; but it is a fair and reasonable inference from the testimony that it was stolen or lost upon the arrival of the train at Montgomery. These last two witnesses tell of the duties of the employes, and in a general way how they are and were performed, and yet they wholly fail to show what care, if any, was exercised at Montgomery, where a number of passengers got off said car, some with satchels in their hands, to prevent a theft, or the taking of plaintiff's satchel, through mistake, by any one of those leaving the car. The witness Cartwright knew plaintiff's satchel, for he remembered it, and could de-

scribe it at the time of the trial of this case. He was evidently up and present at the time the several passengers left the car at Montgomery, for he says that the person who occupied the lower berth beneath the one occupied by plaintiff left the car in a few minutes after the train reached Montgomery. Neither of the defendant's witnesses says that the plaintiff's satchel was or was not taken away by some one of the persons who left the car at Montgomery with satchels in their hands; nor do they pretend to say that they, or either of them, exercised any care whatever in this regard. Can it be denied that reasonable and proper care on the part of defendant's employe, Cartwright, who knew plaintiff's satchels, would have prevented its loss through any one of those leaving the car at Montgomery? After a careful and fair consideration of defendant's evidence, we do not think it shows that reasonable exercise of care and protection to the plaintiff and his property that the law requires.

The next question is as to what articles of the property lost the defendant should be held liable for. The rule as laid down in the case of *Car Co. v. Adams*, *supra*, supported by the authorities cited in that case, seems to limit the responsibility of the car company to the clothing, ornaments, and such articles as are usually carried by travelers in their hands, together with a sum of money sufficient for the expenses of the journey in which one is engaged. Under this authority, no claim could be made for the pistol, the same being an article not necessary to the journey. The evidence on the part of the plaintiff was that he boarded the car at Mobile for Birmingham, the latter place being his home and destination, and also that he was general traveling agent of the New York Life Insurance Company, and that it was usual for persons having much traveling to do to carry with them mileage tickets. This being the undisputed proof, he was entitled to recover for the loss of the tickets. For the value of the remaining articles, to wit, the opera glasses, glass and brass compass, razor and strap and accoutrements, and nasal syringe, with accompaniments, being such articles as add and contribute to the comfort, pleasure, and enjoyment of the traveler, and such as are not unusual to be carried by hand while traveling, together with the satchel which contained the same, the plaintiff was also entitled to judgment.

It is insisted that the market value of the articles lost is the only criterion of value; and, the plaintiff's evidence failing to show any market value, he cannot recover. Where it is shown that the property in question has a market value, then that is the proper standard of value; but, if the property be not shown to be marketable, the rule would not apply. It is said in *Hutch. Carr. § 770b*: "The general rule of damages in trover, and in contract for not delivering goods, undoubtedly is the fair market value of the goods.

But this rule does not apply when the article sued for is not marketable property." In *Railway Co. v. Nicholson*, 61 Tex. 550, it is said: "The lost articles seemed to be of such a character, viz. secondhand clothing, books, and table furniture, which had been used by the plaintiff, that they could not be said to have to him a value at one place different from what they possessed at another. He could hardly have supplied himself in the market with goods in the same condition and so exactly suited to his purposes as were those of which he had been deprived. As compensation for the actual loss is the fundamental principle upon which this measure of damages rests, it would seem that the value of such goods to their owner would furnish the proper rule upon which he should recover,—not any fanciful price that he might for special reasons place upon them, nor, on the other hand, the amount for which he could sell them to others, but the actual loss in money he would sustain by being deprived of articles so specially adapted to the use of himself and his family." See, also, the case of *Railroad Co. v. Frame*, 6 Colo. 385. The plaintiff in the present case testified to the value of the articles lost; and, there being no evidence that the articles had any market value, this evidence of value by the plaintiff was sufficient. The judgment of the city court will be reversed, and judgment here rendered in favor of appellant for \$48.25,—that being the total value of the articles lost, and for which the defendant (appellee) is held responsible,—together with interest on the same from the 15th day of November, 1895.

(121 Ala. 422)

TOWNS v. TOWNS.

(Supreme Court of Alabama. April 11, 1899.)

EJECTMENT—RIGHT TO POSSESSION.

Where a bill filed by children to have the title of lands which had been purchased with their deceased mother's separate estate devested out of their father and vested in them, also prays that possession be decreed to the husband during his life, and the decree, after finding that the husband holds the legal title in trust for the children, subject to his curtesy, orders that such title be devested out of him and invested in them, subject to his life estate as husband, he has a possessory interest for life so as to entitle him to maintain ejectment.

Appeal from city court of Anniston; James W. Lapsley, Judge.

This was a statutory real action, in the nature of ejectment, brought by I. N. Towns against C. N. Towns to recover certain lands specifically described in the complaint. The defendant pleaded the general issue, and, upon issue joined on this plea, the trial was had. From a judgment for plaintiff, defendant appeals. Affirmed.

Upon the trial of the cause, it was shown that the plaintiff had lived on the lands sued for, and had been in possession of them continuously since 1856; that at that time he pur-

chased said lands with money belonging to his wife, constituting a part of her statutory separate estate; that his said wife was dead, and that C. N. Towns was his son by said wife. In 1889, after the death of his said wife, a bill was filed by C. N. Towns and Mary Towns, the only children of the plaintiff's deceased wife, which sought to have the legal title to said lands devested out of said I. N. Towns and invested in the complainants, and that the possession of said lands be decreed to said I. N. Towns during his lifetime; the grounds of equity being that I. N. Towns held the lands in trust for the complainants in said bill. Upon the hearing of the cause, the chancellor rendered the following decree, on August 5, 1889: "This cause is submitted on the testimony as noted by the clerk, and, the same being duly considered by the court, it is decreed as follows: That the pleadings and proof herein show that the land described in the bill was purchased with the funds belonging to Martha B. Towns as her separate statutory estate, and the legal title to the same was taken in the name of the defendant, Isaac N. Towns. It is further ascertained that the said Martha B. Towns is dead, and complainants are her only heirs at law, and as such have inherited the interest of their mother in said lands, and that said Isaac N. Towns holds the legal title to said lands in trust for said heirs, subject to his curtesy as husband of said Martha B. Towns therein. It is further ordered and decreed by the court that the legal title to said lands as described and set out in said bill be devested out of the said Isaac N. Towns, and the same is hereby invested in the said complainants, as prayed for in the bill, subject, however, to the life estate of the said Isaac N. Towns in the same as such husband. It is further ordered that complainants pay the costs of this proceeding, for which let execution issue." In 1892 the present defendant moved on the lands by the complainants' request, and occupied part of said lands with plaintiff. In 1897 the plaintiff notified the defendant to surrender possession of the lands, which the defendant refused, and thereupon the present action was instituted. The cause was tried by the court without the intervention of a jury, and upon the hearing of the evidence the court rendered judgment in favor of the plaintiff. From this judgment, the defendant appeals, and assigns the rendition thereof as error.

H. A. Emerson and Merrill & Bridges, for appellant. Matthews & Whiteside, for appellee.

SHARPE, J. The sole question presented by this appeal is as to the effect of the chancery decree set out in the bill of exceptions. The decree was rendered upon a bill filed by appellant and his sister to obtain the title theretofore held by the appellee in the lands sued for, and upon its terms alone he depends to show a divestiture of that title and to maintain his defense.

The bill in the chancery cause prayed a decree that the legal title to the lands be divested out of the said Isaac N. Towns and invested in complainants, and that the possession and use of the said lands be decreed to said Isaac N. Towns during his lifetime, and at his death pass absolutely to complainants. The decree recites the ascertainment of the complainants' equitable interests as heirs of Martha B. Towns, deceased, who was the wife of Isaac N. Towns, and the conclusion reached by the court "that said Isaac N. Towns holds the legal title in said lands in trust for said heirs, subject to his curtesy as husband of said Martha B. Towns therein," and orders "that the legal title be divested out of the said Isaac N. Towns, and the same is hereby invested in the said complainants, as prayed for in the bill, subject, however, to the life estate of the said Isaac N. Towns in the same as such husband."

Construing this decree in connection with the prayer of the bill to which it specially refers, we think it means and has the effect to reserve to Isaac N. Towns a possessory interest in the lands in question equal to that which the law would have conferred upon him if his wife, Martha B. Towns, had died seised and possessed of them in fee. In such case, while the fee-simple title would have passed to the heirs of Mrs. Towns, the law would have carved out from their interests an estate in favor of the husband, entitling him to the possession and use of the land during his life. Such life estate is in no sense a mere equitable interest, as is contended for appellant, but it is one recognized by and maintainable at law; and, entitling its owner to possession, it will support ejectment, which is a possessory action. *Tyler, Eject. p. 44; Gregg v. Tesson, 1 Black, 150; White v. St. Guirons, Minor, 331.* The facts as found by the city court are undisputed, and there was no error in the judgment. It will be affirmed.

(121 Ala. 664)

HOLT v. ADAMS et al.

(Supreme Court of Alabama. Nov. 3, 1898.)

ADVERSE POSSESSION—EVIDENCE—NOTION—TACKLING—EJECTMENT—IMPROVEMENTS—COMPENSATION.

1. While one was negotiating for the purchase of certain land, the vendor's agent pointed out a boundary line, according to which a limekiln was located on the land to be sold. After the purchase, he had a survey made, which placed the kiln on his land, and he immediately took possession of it, with the other land purchased, believing it to be on his land, and used it until it was burned, six or seven years afterwards, when he erected a new kiln, and continued in actual occupation of it until he sold the land. *Held*, that these facts authorized a submission to the jury of the question whether the possession of the land on which the kiln was located was under a bona fide claim of right, and adverse to the owner of the adjoining land, who claimed it.

2. Where the purchaser of land goes into possession of a kiln, which is supposed by both parties to be on the land bought, and leases

the kiln to tenants, the possession of his vendor may be tacked to his own, so as to make out three years of continuous adverse possession next preceding ejectment by the owner of the land, and allow a recovery by him of the value of his improvements on the land.

3. Code 1896, § 1541, which requires a person claiming adverse possession of land to give notice thereof by filing in the probate office of the county in which the land is located a declaration of his claim, particularly describing the land, has no application to one who enters upon land and asserts adverse possession there to under an honest claim of purchase.

4. Where one who has purchased land enters a part of it on which a kiln is located, under an honest belief that it is a part of his purchase, though his deed does not embrace the land on which the kiln is situated, and after the kiln is burned rebuilds it, and occupies it continuously, under a bona fide claim of right, claiming it as his property, without regard to the true boundary line, until he conveys it to a third person, who goes into possession, and such person, through himself and his tenants, occupies the property continuously up to the commencement of ejectment, under a bona fide claim of right and an honest belief that it is a part of the land described in his deed, this combined possession, continued for three years next preceding the commencement of the action, will entitle him to an allowance for the value of the kiln.

5. Though the purchaser of land, at the time he bought it, was told that a certain limekiln was not on his tract, but it appeared from a survey made by his vendor before the sale, and from a survey made by him after the sale, that it was on his land, his continuous possession for seven years may be deemed to be under a bona fide claim of right, and an honest belief that, by his deed, he acquired the legal title and right of possession to that part of the land on which the kiln was located.

6. In ejectment it appeared that defendant's grantor had occupied the land under a mistake as to the true boundary, and while so occupying it had rebuilt improvements, which were on it when he took possession, but had been destroyed by fire. *Held*, that, from the date of taking possession to the date of the destruction of the improvements, plaintiff was entitled to the value of the use and occupation of the land with the improvements on it, but from the time of the destruction of the improvements without any improvements, and that the assessment of the value of the land was to be based on its value at the time of the trial without any improvements.

Appeal from circuit court, Shelby county; Geo. E. Brewer, Judge.

This was a common-law action of ejectment brought by H. B. Holt against J. B. Adams and others. Upon the introduction of all the evidence, the plaintiff requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "If the jury believe the evidence, you must find the defendants' suggestion of adverse possession to be untrue." (2) "If you believe from the evidence that Willoughby, the agent of the railroad company, told Mr. Stein, at the time of the sale to him, that the kiln was not on the land sold him, he cannot claim to be a purchaser in good faith of the kiln, his suggestion of adverse possession must fall, and you must find it to be untrue." (3) "If you find the suggestion of adverse possession to be true, you must assess the value of the use

and occupation according to its value when Stein took possession, and from that date to the present date." (4) "If you find the suggestion of three years' adverse possession to be true, you must assess the value of the land according to its value when Stein took possession." The judgment entry in the case was as follows: "This day, March 22, 1898, come the parties, by their attorneys, and, by leave of the court first had and obtained, the plaintiff amends his complaint by adding the words, 'Shelby county, Alabama,' to the description of the lands sued for in the first demise; and amends his complaint further by striking out in the second demise laid in the complaint the words '¼ section,' and substituting therefor the words '1/16 of a section'; and the defendant, before entering upon the trial, suggests upon the record that he, and those whose possession he has had for three years next before the commencement of the suit, had adverse possession of that portion of the land sued for described in their plea of not guilty, and as to which he pleads not guilty. Issue being joined upon the defendants' plea of not guilty, and upon the defendants' suggestion of three years' adverse possession, thereupon came a jury of good and lawful men, to wit, M. T. Horton, foreman, and eleven others, who, being impaneled and sworn according to law, upon their oaths do say: 'We, the jury, find the issue in favor of the plaintiff for a part of the S. E. ¼ of N. W. ¼ section 9, township 22 S., range 2 W., Shelby county, Ala., beginning at the southeast corner, and running north 200 ft.; thence west 300 feet; thence south 200 feet; thence east 300 ft., to the point of beginning,—on which is located a limekiln, cooper's shop, tram road, lime house. We further find the defendants' suggestion of three years' adverse possession true. We further find the value of the improvements to be \$1,700. We find the value of the land to be \$5. We further find the value of the use and occupation of the said property without the improvements to be \$900.' It is thereupon considered by the court that the plaintiff have and recover of the defendants the following described property, to wit: A part of the S. E. ¼ of N. W. ¼ of Sec. 9, township 22 S., range 2 W., beginning at the S. E. corner of S. E. ¼ of S. W. ¼ of said section 9, Tp. 22 S., R. 2 W.; running north 200 feet; thence west 300 feet; thence south 200 feet; thence east 300 feet, to point of beginning,—on which is located a limekiln, cooper's shop, tram road, lime house, together with the costs in this behalf expended, for which let execution issue. It is further considered by the court that the plaintiff have and recover of the defendants all of the S. E. ¼ of N. W. ¼ of section 9, Tp. 22 S., R. 2 W., that is described in the defendants' plea of disclaimer, to wit: All of said land sued for, except a certain strip beginning at the southeast corner of the tract sued for; thence north 200 feet; thence west 300 feet; thence south 200 feet; thence east 200 feet, to point

of beginning,—said strip including a certain limekiln, cooper's shop, tram road, lime house, and siding. It is further considered by the court that no execution or writ of possession shall issue until one year after the date of this judgment, in accordance with sections 2704 and 2705 of the Code of 1886." The plaintiff appeals, and assigns as error the refusal of the court to give to the jury the several charges requested by him, and the description in the judgment of the starting point of the boundary of the land recovered, and in ordering in said judgment that no writ of possession shall issue until one year, etc. Affirmed.

Lackland & Wilson, for appellant. A. Latady, Brown & Leeper, and Mr. Oliver, for appellees.

BRICKELL, C. J. This is an action of ejectment by the appellant to recover possession of "the southeast quarter of the northwest quarter of section 9, township 22, range 2 west, situated in Shelby county, Alabama; the same being the subdivision of land upon which is located the limekiln on the South & North Alabama Railroad, formerly operated by N. B. Dare, and known as the 'Dare Kiln.'" Defendant disclaimed possession of all the land sued for, except a part thereof 200 feet by 300 feet, particularly described, on which is situated the limekiln, etc., and as to this part he pleaded not guilty and the statute of limitations of 10 years. Before entering on the trial, defendant also suggested upon the record, as authorized by section 1536, Code 1896, adverse possession for three years next preceding the commencement of the suit, and the erection of permanent improvements. Plaintiff proved title to the land described in the complaint, derived by means conveyances from the United States. Defendant offered no evidence of title to the land sued for, but his testimony tends to show that on January 13, 1887, one Stein purchased from the Louisville & Nashville Railroad Company the E. ¼ of the S. W. ¼ of the same section, adjoining the land sued for on the south; that before he purchased the land the Calera Land Company, the owner of the land sued for, had caused a survey thereof to be made, and immediately after the purchase by Stein the latter had a survey made of the land bought by him from the railroad company, and, according to both surveys, the limekiln was on the N. E. ¼ of the S. W. ¼, the land purchased by him; that, while Stein was negotiating for the purchase of the land, the agent of the railroad company pointed out the line dividing the N. E. ¼ of the S. W. ¼ from the S. E. ¼ of the N. W. ¼, and, according to this line, the kiln was on the land he bought from the railroad company; that he bought the kiln believing it to be on the land bought from the railroad company, entered into possession thereof at the time of the purchase, and held possession until he sold to defendant Meyer, on March 27, 1895. Meyer testified that "he bought the

kiln from Stein in 1895; that he entered into and held possession of it under the deed of Stein to him dated March 27, 1895, * * * and had had actual possession of it through himself and tenants ever since that time." The deed from Stein to Meyer conveyed the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, the subdivision adjoining that described in the complaint. Six or seven years after Stein went into possession of the land and kiln, which he supposed was on the land when he took possession, the kiln was destroyed by fire, and he erected a new kiln, together with other improvements, on the site of the old one. There was also evidence, which was somewhat in conflict, tending to show the value of the land not disclaimed without any improvements thereon, the value of the improvements when Stein took possession, the value of the improvements erected by Stein, and the value of the use and occupation of the land without any improvements. The jury found in favor of the plaintiff, appellant here, for the land in controversy, and further found that the suggestion of adverse possession was true, that the value of the improvements was \$1,700, the value of the land without any improvements \$5, and the value of the use and occupation of the land without the improvements was \$900, and judgment was rendered accordingly, with a provision that "no execution or writ of possession shall issue until one year after the date of this judgment, in accordance with sections 2704 and 2705 of the Code of 1886."

The evidence before the jury, although not without conflict, was sufficient to authorize the court to submit to the jury the determination of the character and duration of the possession by defendant, and those under whom he claimed, on the issue made by the suggestion of adverse possession and the erection of valuable improvements. The character of the possession necessary to support this issue does not differ from that of the possession which will put in operation the statute of limitations, except that in the former case the occupancy must be in good faith, under either color or claim of title. If the defendant claims title in good faith, the character of the possession is sufficient, although he may have no color of title. *Railroad Co. v. Jones*, 68 Ala. 48; *Pickett v. Pope's Lessee*, 74 Ala. 122. The effect of the plea of disclaimer and not guilty, under which the case was tried, was to conclusively admit that the land in controversy was a part of the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and therefore was not embraced in the deed from the railroad company to Stein or in that of Stein to Meyer. *McQueen v. Lampley*, 74 Ala. 408. While it is true that the possession of a coterminous landowner of land beyond the true boundary line is not adverse when he holds under the mistaken belief that he is occupying land within the boundaries described in his deed, and has no intention to claim beyond his true line, yet the circumstances under which he takes and holds possession of land beyond the boundaries described in his

deed may reasonably justify the inference, and even the prima facie presumption, that his possession of such land is under a bona fide claim of right, and therefore adverse. *Hess v. Rudder* (Ala.) 23 South. 186. The testimony tending to show that, while Stein was negotiating with the agent of the railroad company for the purchase of the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$, the latter pointed out to him a line which he said was the north boundary line thereof, and according to this line the limekiln and other improvements were on this land, and that after the purchase Stein had the land surveyed, and the survey placed the kiln on this land, and that he immediately took possession of the kiln, together with the other land purchased, believing it to be on the land he had bought, and occupied it for six or seven years, until it was destroyed by fire, when he erected a new kiln and other improvements on the same site, and continued the actual occupation, until he sold the property and transferred the possession to Meyer,—all this testimony was sufficient to justify a reasonable inference that the possession of the land in controversy was under a bona fide claim of right, and adverse to the owner of the adjoining land, and therefore sufficient to authorize its submission to the jury. There was evidence, also, sufficient, if believed, to justify the tacking of Meyer's possession to that of Stein, so as to make out three years' continuous adverse possession next preceding the commencement of the suit. Meyer went into possession of the kiln and land in controversy under his purchase from Stein, and leased the property to tenants. The privity required to constitute continuous adverse possession by tacking the possession of the original entryman to that of another may be effected by any conveyance, agreement, or understanding, written or verbal, which has for its object a transfer of the rights acquired under the original entry. The transfer of the possession alone is sufficient to create the privity for this purpose, and written evidence of the transfer is not necessary when the property is held by the transferee under the claim of the first entryman. 1 Am. & Eng. Enc. Law (2d Ed.) 844; *McNeely v. Langan*, 22 Ohio, 32; *Shuffleton v. Nelson*, 2 Sawy. 545, Fed. Cas. No. 12,822; *Weber v. Anderson*, 73 Ill. 439; *Davock v. Nealson*, 58 N. J. Law, 21, 32 Atl. 675; *Oollins v. Lynch*, 157 Pa. St. 246, 27 Atl. 721. The act of February 11, 1898 (section 1541, Code 1898), which requires persons claiming adverse possession of land to give notice thereof by filing in the probate office of the proper county a declaration of their claim, particularly describing the land, has no application to persons who enter upon land and assert adverse possession thereto under an honest claim of purchase. If, therefore, the jury believed from the evidence that Stein entered upon the land in controversy under an honest belief that it was a part of the land purchased by him from the railroad company, and occupied it continuously, under this belief and under a bona fide

claim of right, up to the time of his conveyance to Meyer, claiming it as his property, without regard to the true boundary line, and that he transferred this possession to Meyer at the time he conveyed to the latter the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, although the deed did not in fact describe or embrace the land in controversy, and that Meyer, through himself and his tenants, occupied the property continuously up to the commencement of this action under a bona fide claim of right, and an honest belief that it was a part of the land described in his deed, and that this combined possession continued for three years next preceding the commencement of this suit, then it was their duty to find the suggestion of adverse possession to be true. The evidence was sufficient, as we have seen, to reasonably justify the jury in finding all these facts to be true; and hence charge numbered 1, which requested the court to charge the jury that, if they believed the evidence, they must find the suggestion of adverse possession to be untrue, was properly refused. Charge 2 was properly refused, because it ignores other testimony in the case, besides hypothesized in the charge, from which the jury might have reasonably inferred that Stein claimed the land under the honest belief that it was included in his deed. Although he was told at the time of his purchase that the kiln was not on the land purchased by him, yet his possession might well have been under a bona fide claim of right, and an honest belief that, by his deed, he acquired the legal title and right to the possession of the land in controversy, if, as the testimony tends to show, the Calera Land Company had a survey of the line made before the purchase, and immediately after the purchase he also had a survey made, and according to both surveys the property was a part of the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, which he had purchased from the railroad company.

When Stein took possession of the property in controversy, there were on the land a lime-kiln and other improvements, which he occupied and used until they were destroyed by fire, six or seven years later, when he erected new improvements on the same site. There is nothing in the evidence from which it can be inferred that the destruction of the original improvements was caused by the fault of Stein or Meyer. Charges 3 and 4 are predicated on the theory that the assessment of the value of the use and occupation of the land, as required by the statute, should be based on the value of the land with the original improvements, not only from the date when Stein took possession up to the date of their destruction, but also up to the date of the trial, and that the assessment of the value of the land should be based on its value with such improvements. This theory is, we think, erroneous. The original improvements having been destroyed without Stein's

fault, the inquiry as to the value of the use and occupation of the land should cover two separate periods: First, the period from the date of Stein's taking possession to the date of the destruction of the original improvements, during which plaintiff was entitled to the value of the use and occupation of the land with said improvements; and, second, the period from the date of the fire to the date of the trial, during which he was entitled to the value of the use and occupation of the land as it was after the fire without the improvements erected by Stein. And the assessment of the value of the land was to be based on its value at the time of the trial, without any improvements erected by either Stein or Meyer, and not on its value at the time Stein took possession, with the improvements then on the land. For this reason these charges were properly refused.

It is insisted that there was no evidence offered upon which the jury could base any ascertainment of the value of the use and occupation of the land from the time Stein took possession to the date of the destruction by fire of the original improvements, and hence there were not sufficient data before the jury upon which to base a finding as to the value of the use and occupation of the land during the whole period. There was evidence tending to show that the value of the original improvements at the time they were destroyed was \$1,000, and that some years before Stein took possession the value of the use and occupation of the land with such improvements was \$40 per month, but that it was less at the time Stein took possession. This evidence was, we think, sufficient to support the verdict; but, even if not sufficient, there is no assignment of error under which its sufficiency for the purpose referred to can be questioned. Evidence as to the value of the use and occupation of the land is not to be considered by the jury for this purpose until they find the suggestion of adverse possession to be true, and therefore this evidence was not necessary, as supposed by counsel, to enable the jury to find the suggestion to be true.

The judgment describes the land plaintiff is entitled to recover under the verdict as being in the S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, instead of in the S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$. This is a mere clerical error, which will be corrected in this court. We find no other error in the record. Let the judgment be affirmed.

On Rehearing.

On the application for rehearing it is made to appear that the judgment below is incorrect or insufficient upon defendants' disclaimer. The judgment of affirmance here will be opened, the judgment below will be corrected in respect of the disclaimer, and, as corrected, the judgment of the circuit court will be affirmed.

(121 Ala. 579)

WATSON v. JONES et al.

(Supreme Court of Alabama. April 11, 1899.)

PLEADING—DEMURRER—APPEAL.

Where demurrers to a bill are overruled on all grounds except one, and sustained as to that one, the bill is out of court, unless amended, and hence demurrant cannot appeal from the decision as to the grounds overruled.

Appeal from chancery court, Russell county; Jere N. Williams, Chancellor.

Bill by Jones Bros. against Tina Watson. There was a decree sustaining one ground of demurrer to the bill, and overruling the others, and respondent appeals. Dismissed.

The bill was filed on August 4, 1898. On August 5, 1898, the defendant filed a demurrer, assigning 10 grounds therefor. On September 6, 1898, the defendant filed an additional demurrer, assigning 17 grounds therefor. On the submission of the cause upon the demurrers, the chancellor rendered the following decree: "On consideration, it is ordered, adjudged, and decreed that said demurrers be, and the same are, separately and severally overruled, except as to the fourteenth ground of demurrer, filed September 6, 1898, which ground is sustained. The complainant may amend the bill," etc. From this decree the respondent appeals, and assigns as error the overruling of the several grounds of demurrer.

A. A. Dozier, for appellant. Houston & Power and George A. Hays, for appellees.

McCLELLAN, C. J. The bill in this case was filed by Jones Bros. against Tina Watson. The respondent demurred to the bill, assigning a number of grounds. The chancellor sustained the demurrer, and the respondent prosecutes this appeal from that decree. Of course, the appeal cannot be maintained; the decree appealed from having been in favor of the appellant. It is of no consequence that, in rendering his decree sustaining the demurrer, the chancellor undertook to say that he overruled all the grounds of demurrer except a specified one; nor is it of any consequence that there were two demurrers, filed on different days, embraced in the submission, and that the chancellor assumed to say that he overruled all the assignments of demurrer set down in the one, and all that were set down in the other except one. The decree did sustain the fourteenth ground assigned in one of the demurrers; and it is a decree sustaining a demurrer to the bill, and nothing more or less. His reference to the assignment upon which he rested the decree is the mere giving of his reason for the decree, and his reference to the other assignments is to be taken as a mere expression of his opinion that the bill is not bad for the reasons stated in them. What he did, and all he did, was to sustain respondent's demurrer to the bill, and the effect of this was to put the bill out of court, unless it is amended. The respondent can take no steps in the cause

until the amendment is made. She may then, as she is advised, again demur to the bill, and appeal to this court if her demurrer is overruled. If the amendment is not made, she goes out of court with her costs. She cannot come here now to have this court declare whether the chancellor's reasons for the decree he rendered, and his views as to the bill being otherwise unobjectionable, are sound. She cannot thus have us review a decree in her favor, or render any judgment here in respect of a mythical decree—a decree never rendered, in legal contemplation—against her. The appeal must be dismissed. Dismissed.

(121 Ala. 672)

ETOWAH MIN. CO. et al. v. WILLS VAL. MIN. & MFG. CO. et al.

(Supreme Court of Alabama. April 13, 1899.)

APPEAL—QUESTIONS REVIEWABLE—EQUITY—DISMISSAL OF ORIGINAL BILL—EFFECT—CROSS BILL—DISPOSITION OF FUNDS IN COURT—LEASE—AGREEMENTS BINDING ON ASSIGNEE.

1. On appeal merely from an order dismissing a cross bill rendered subsequent to the dismissal of the original bill, the court cannot review the order dismissing the latter, though there is a joinder in error.

2. Dismissal of an original bill carries with it a cross bill unless the latter shows independent ground for equitable relief growing out of the subject-matter of the original bill.

3. A provision in a lease that at expiration thereof the lessor will take the improvements, paying a fair valuation therefor, is not binding on his assignee.

4. On dismissal of an original bill, an order dismissing a cross bill, which shows no independent equity, is unnecessary to dispose thereof.

5. After dismissal of an original bill, subsequent orders allowing amendments to a cross bill, which stated no independent equity, are void, there being no cause pending.

6. The dismissal of a bill in equity on motion of complainant annuls an order previously obtained by him directing payment of funds in court.

7. Where complainant in an equity suit dismisses the bill without retaining the cause for disposition of funds in court, and respondents acquiesce therein, the rights of the parties as to such fund cannot thereafter be adjudicated in such action.

Appeal from chancery court, Etowah county; J. R. Dowdell, Chancellor.

Bill by the Wills Valley Mining & Manufacturing Company and others against the Etowah Mining Company and others. From a decree dismissing respondents' cross bill they appeal, and the Etowah Mining Company also applies for mandamus. Affirmed, and mandamus denied.

On the 14th of March, 1894, appellees filed a bill in the chancery court of Etowah county purporting to be a creditors' bill, averring that defendant Etowah Mining Company had, on the 28th day of July, 1893, executed a deed of trust to appellant Nixon of certain mining property, etc., for the purpose of securing the creditors of the said Etowah Mining Company, averring that said Nixon

was misappropriating the trust funds and mismanaging the trust property, and asking the removal of said trustee, the appointment of a receiver, and that the chancery court would take charge of and proceed to administer the trust created by said trust deed, order a reference to ascertain the amount of the just debts due, and that the proceeds of said trust estate be applied to the payment of such debts. In said bill it is stated that on the 10th day of June, 1888, W. O. Peoples and others entered into a contract of lease with the Etowah Mining Company of the mines involved in controversy, and that subsequently the Wills Valley Mining & Manufacturing Company became possessed of all the interests of the lessors of said contract of lease, having succeeded to the rights of the lessors. The bill averred that under the terms of said lease said lease expired on the 19th day of November, 1893, but that the trustee had continued to operate the mines, and had elected to enter upon the new term of five years as provided in said lease. It further avers that the trustee wrongfully claims that the first period of five years extended to the 18th day of March, 1894, and had notified the Wills Valley Mining & Manufacturing Company that he would surrender the property on that day. On the filing of this bill a receiver was appointed by the register, and on appeal his appointment was sustained by the chancellor. From this decision of the chancellor an appeal was taken by this court, and the chancellor's decision reversed, the receiver removed, and required to turn all the property over to the trustee. On the 19th day of August, 1895, after the removal of said receiver, appellants filed an answer to the bill, and asked that the same be taken as a cross bill. Said cross bill denied the charges of mismanagement, etc. It admitted the execution of the contract of lease made an exhibit to said cross bill, but denied that it was executed on the 19th day of June, 1888, but averred that it was not fully executed till the 18th day of October, 1888, nor delivered till after that date. Under the term of the lease respondent had five months from the date of signing said lease in which to begin shipping ore, and the lease was to run five years from the first shipment of ore. The cross bill avers that the first shipment of ore was made in March, 1889, which was within five months from October 18, 1888, when it is averred the lease was executed by three of the five lessors, and that, therefore, the lease would expire in March, 1894, if respondent corporation was charged with the full period that had elapsed. But there was a clause in said lease that time unavoidably lost by the lessee by the shutting down of furnaces, striking of employes, suspension of railroad shipping facilities, or any providential hindrances should not be counted in the time of the lease or its extension. And the cross bill charges that respondents unavoidably lost time since

the first shipment of ore on account of these matters, amounting to 325 days, which they had the option of deducting. This extra time, the cross bill alleged, the complainants therein were willing to waive, as they had the option to do, and surrender the property to the Wills Valley Mining & Manufacturing Company on payment therefor as provided in said lease. The extension clause in said lease is as follows: "The parties of the first part shall have the privilege of extending this lease for five years more after the first five years shall have elapsed: provided, they notify parties of the second part four months before the expiration of the first five years of their intention of accepting the five-years extension: and provided, they shall have complied with the terms of this lease up to that time; but in case of such extension the price to be paid for said ore during the said five years of extension shall be fifteen cents per ton for both hard and soft ore, instead of ten cents per ton as in the first five years." The lost-time clause is as follows: "If the parties of the second part fail to pay any royalties within four months after due, then this lease shall be null and void, at the option of the party of the first part: provided, however, that the time unavoidably lost by the party of the second part by reason of shutting down of furnaces, striking of employes, suspension of railroad shipping facilities, or any providential hindrances shall be excepted from the operation of the above clause, and shall not be counted in the time of this lease or its extension." Another important clause in the lease is the following: "At the expiration of the lease or its extension, the parties of the first part are to take the entire plant, including live stock, tools, buildings, railroads, tramways, inclines, and all other property (except store goods or stock of merchandise in store) pertaining to the business, together with all rights of way, through property of others, and pay the parties of the second part a fair valuation therefor. And, if the parties hereto cannot agree upon the price to be so paid for the entire outfit, plants, tools, buildings, railroads, rights of way, etc., it shall be settled by arbitration, each of the two parties hereto choosing one arbitrator, and the two so chosen to select a third man, if necessary; and the finding and award of this tribunal so chosen and selected shall be final and binding on all parties concerned. But in no event shall parties of the first part be bound to pay to the parties of the second part any greater amount for said outfit, plant, etc., than the same could be built and constructed for at the time, less wear and tear then existing thereon." The prayer of the cross bill is as follows: "That your honor would, on final hearing, render a decree against said Wills Valley Company in favor of these respondents construing said lease contract, and requiring said Wills Valley Company to take said property so tendered by these respondents

ents, and offered to be surrendered to it, and pay the reasonable valuation therefor, and said complainant corporation be required to answer whether or not it agrees to the valuation set out in this bill of said property as being reasonable; if not, then to select its arbitrator, as provided under the terms of said contract of lease. Respondents further pray that, if said complainant corporation should fail or refuse after a reasonable time either to agree with these respondents as to such reasonable valuation, or to select and designate its arbitrator, as provided in said contract of lease, that your honor would decree a reference to the register of your honor's court to determine and report the reasonable valuation of said property, and that your honor would render a decree in favor of these respondents and against said Wills Valley Company for the value of said property." On the 25th day of August, 1896, the original bill was dismissed on motion of complainants. On August 27, 1896, the Wills Valley Company filed its motion to dismiss the cross bill on the following grounds: First, for want of equity; second, because it is a mere dependency on original bill, and without independent equity it falls with the original bill; third, because complainant in cross bill has adequate remedy at law. On the 27th day of August, 1896, complainants in cross bill filed an amendment to the cross bill, the material portion of which consists in amendment of the prayer. This amendment incorporated into the prayer the following: "And complainants in this cross bill further pray that your honor will, on final hearing, decree an equitable lien in favor of complainants on said property, and make such decrees and orders as may in equity and good conscience be right and proper for the enforcement of the same." On November 14, 1896, complainants in cross bill again sought to amend the cross bill. This amendment was entirely immaterial. On January 13, 1897, the chancellor rendered a decree dismissing the cross bill. This decree was rendered in vacation, and permitted complainants in cross bill to amend the same. Again, on January 25, 1897, complainants in cross bill sought to amend the cross bill. This amendment adds nothing to the equity of the cross bill, and is immaterial. On February 12, 1897, the Wills Valley Company moved to strike the amendment filed January 25, 1897, on the ground that the cross bill, after it had been drawn out of the court by the dismissal of the original bill, the cross bill at that time having no independent equity, could not be so amended as to inject equity into it; and the Wills Valley Company also again moved to dismiss the amended cross bill for want of equity. The case was submitted to the chancellor on both of these motions in term time, and held for decree in vacation. On April 5, 1897, the chancellor sustained both motions, and struck the amendments, and finally dismissed the cross

bill. From this decree the present appeal is taken.

Burnett & Cull and Pritchard & Sizer, for appellants. O. R. Hood, Dortch & Martin, and Amos E. Goodhue, for appellees.

SHARPE, J. This appeal, as appears from the certificate of the register, the notice of appeal, and the security for costs, is alone from the decree dismissing the cross bill rendered subsequent to the dismissal of the original bill. The order dismissing the original bill was a final order, and, not having been appealed from, this court is without jurisdiction to review it. *Jones v. Iron Co.*, 90 Ala. 545, 8 South. 182; *Carroll v. Richardson*, 87 Ala. 605, 6 South. 342; *Barclay v. Spraggins*, 80 Ala. 357. It could not properly be assigned for error here, and the joinder in error does not confer the jurisdiction. *Barclay v. Spraggins*, supra. A cross bill being auxiliary to the main cause, as a general rule the dismissal of the original bill carries with it the cross bill. The exception is where the cross bill shows ground for equitable relief for matters growing out of the subject-matter of the original bill which may uphold the jurisdiction of the court independent of the original bill. *Abels v. Insurance Co.*, 92 Ala. 383, 9 South. 423; *Wilkinson v. Roper*, 74 Ala. 140; *Insurance Co. v. Webb*, 54 Ala. 688. This cross bill was exhibited against the Wills Valley Mining & Manufacturing Company alone. The relief prayed is for a construction of the lease, and to compel that corporation to take and pay for betterments made and property acquired as incident to the operation of the lease, as the original lessors had by the terms of the lease agreed to do upon its expiration. A bill does not lie merely to construe a contract. *Manufacturing Co. v. Hannon*, 93 Ala. 87, 9 South. 539. The agreement sought to be enforced is an independent stipulation by its terms purporting to bind only the original lessors, and which had no effect to bind the Wills Valley Company as their assignee in the absence of an agreement on its part. There is no averment of such agreement, but the conclusion is alleged that, as transferee of the lease, that company took it subject to its burdens, and is therefore bound by its stipulation to take and pay for the property. A covenant to run with the land must relate to and concern the land itself, and does not extend to agreements of the lessor in respect to personal property, nor does it comprehend an agreement to pay for betterments upon the land which the lessee has not bound himself to make, nor even those made under such obligation, unless the covenantor has expressly bound his assigns. *Spencer's Case*, 5 Coke, 16; *Bream v. Dickerson*, 2 Humph. 126; *Hansen v. Meyer*, 81 Ill. 321. Failing to show grounds for equitable relief, the dismissal of the original bill in itself disposed of the cross bill. While an order formally dismissing the cross bill would have been appropriate, such

order was not necessary. *Wyatt v. Garlington*, 56 Ala. 576; 5 Enc. Pl. & Prac. 687. After such dismissal there was no pending cause, and the subsequent orders made in the allowance of an amendment to the cross bill and in proceedings thereunder were improvidently made, and without effect. *Ringgold v. Emory*, 1 Md. 350; *Guyer v. Wilson*, 139 Ill. 398, 28 N. E. 738; 6 Enc. Pl. & Prac. 979. Such orders were without injury to appellants, and in the dismissal of the cross bill there was no reversible error. In connection with the submission of this appeal, and to be heard with it, there was submitted an application for mandamus to require the vacating of the order of June 30, 1896, directing the payment of moneys in the hands of the register to the Wills Valley Mining & Manufacturing Company. That order was held by this court at a former term to be interlocutory, and not final, in its character. The return to the rule nisi in that application shows the dismissal of the original bill, had on motion of the complainants after they had obtained the order assailed by the application. Such disposition of the cause had the effect to annul that order, so far as it directed such payment, as if it had never been granted; so that nothing can be claimed under it by that company, and so that it concludes no one. *Loeb v. Willis*, 100 N. Y. 235, 3 N. E. 177; *Cartmell v. McClaren*, 12 Helsk. 41. There is no necessity for further proceedings to vacate it, and the application for mandamus will be denied. The action of the complainants in dismissing the bill without having the cause retained for the disposition of the funds in court, and the acquiescence therein by the respondents, has disabled the court to adjudicate in this cause the rights of parties to such funds. The remedy whether by bill to revive such rights as was had in *Griffin v. Spence*, 69 Ala. 393, or by other proceeding, is for the parties in interest to consider. The appellants will pay the costs of the appeal and of the application for mandamus.

(121 Ala. 100)

WOOD et al. v. PEBBLES et al.

(Supreme Court of Alabama. April 13, 1899.)

FRAUDULENT CONVEYANCES—TRANSFER TO WIFE—
SETTING ASIDE—BURDEN OF PROOF—
EVIDENCE—SUFFICIENCY.

1. When a conveyance by an insolvent debtor is claimed by the grantee to have been made in payment of an antecedent debt, the burden is on the parties thereto, as against a creditor attacking the conveyance for fraud, to prove bona fides.

2. In an action by a husband's creditor, attacking as fraudulent a conveyance made by a third person to the wife while the husband was insolvent, and at his instance, it was claimed that the money paid therefor was due by the husband to the wife; part of it being for a loan made 18 years, and part for one made 8 years, before. It did not appear that the husband gave her a note or other obligation, or ever recognized his liability, or that the wife ever expected, until he became insolvent, to have the

money refunded. *Held* insufficient to show that the money belonged to her.

Appeal from chancery court, Walker county; Thomas Cobbs, Chancellor.

Bill by Riley Pebbles & Co. and others against William Wood & Son and others. From a decree for complainants, defendants appeal. Affirmed.

H. L. Wathington, for appellants. Applying & McGuire, for appellees.

TYSON, J. Appellees, who were judgment creditors of William Wood & Son, filed their bill against them and the other appellants, seeking to have declared fraudulent certain conveyances held by some of the respondents to certain described property. It was averred in the bill that the said Wood & Son, and the individual members composing it, were insolvent at the date of the filing of the bill, and had been for a long time prior thereto, and were insolvent when the various conveyances attacked were made. It was also shown by the bill that the indebtedness to the complainants existed at the date of the execution of the several conveyances, and that all the respondents were either members of the family of William Wood, or near relatives, except the respondent Roddam. The bill further shows that suits were commenced by the complainants against William Wood and his son upon their respective claims during the month of January, 1894, and obtained their judgments in the month of February, 1895, and during the pendency of these suits the conveyances to each of the respondents were executed, except those held by Hannah Wood, wife of William Wood. All of the conveyances, except those held by Hannah Wood, were made by William Wood directly to the respondents holding them. As to these, the bill alleges there was no consideration paid by the respective respondents for the property conveyed, notwithstanding the recital therein of the payment of a certain sum of money. As to the two conveyances under which Hannah Wood claims title to certain property, from one Adeline Burton and husband, the bill alleges that her husband, William Wood, furnished the consideration which was paid to Mrs. Burton for the property, and had the deeds made to his wife. Each of the respondents filed separate answers, in which they denied there was any fraud; and all of them alleged in their answers, except Hannah Wood, that William Wood executed to each of them the conveyances to pay an antecedent debt which he owed, to the amount of the consideration recited in the conveyance. Hannah Wood, in her answer, alleges that as to the conveyance made to her of date December 16, 1892, by her son, who had obtained the title from Mrs. Adeline Burton on the 4th day of November, 1892, she gave the money, to wit, \$150, to her son, to make the purchase for her, and by mistake the deed was made by Mrs. Burton to him, and in order to correct

this mistake her son executed the conveyance to her. She nowhere avers where she got the money that she sent by her son to Mrs. Burton. As to the other conveyance from Mrs. Burton, under which she held certain property, her answer alleges that her husband made the contract of purchase as her agent, and that her money paid for the property, to wit, the \$350, the recited consideration of the deed. As to all of the conveyances under the allegations of the bill, and the averments of the answers of each of the respondents, except, perhaps, the first conveyance to the respondent Hannah Wood, there can be no sort of doubt that the burden of proof was upon the respondents to establish a valuable and adequate consideration. *Calhoun v. Hannan*, 87 Ala. 277, 6 South. 291; *Schall v. Well*, 103 Ala. 411, 15 South. 829; *Caldwell v. Pollak*, 91 Ala. 353, 8 South. 546; *Moore v. Penn*, 95 Ala. 200, 10 South. 343; *Buford v. Shannon*, 95 Ala. 205, 10 South. 263. And, when the wife or other relative is the grantee in the conveyance, stricter and clearer proof is required. *Robinson v. Moseley*, 93 Ala. 70, 9 South. 372; *Bank v. Smith*, 93 Ala. 97, 9 South. 548; *Sides v. Scharff*, 93 Ala. 106, 9 South. 228; *Lammons v. Allen*, 88 Ala. 417, 6 South. 915; *Wedgworth v. Wedgworth*, 84 Ala. 274, 4 South. 140. And where the conveyance is executed to the wife by a third person, at the instance of the husband, the onus is upon her to clearly and fully prove that she paid for the property with her separate funds. *Bangs v. Edwards*, 88 Ala. 382, 6 South. 764. When the conveyances by the insolvent debtor are made to pay an antecedent debt claimed by the grantee against him, this fact raises a presumption of unfairness and mala fides, and casts upon the debtor, as between him and creditors who attack the conveyance for fraud, the onus of showing that the sale was fair, and made in good faith. *Calhoun v. Hannan*, supra.

Did the respondents sustain this burden of proof? In *Robinson v. Moseley*, supra, it is said: "To lift such burden, affirmative averment of the facts relied on as constituting the consideration is essential, as convincing proof of their existence. The laboring oar was upon the defendant, not simply to deny the negative averment that there was no consideration, but to state the affirmative fact that there was such consideration, in what it consisted, and how it was paid, and to support these averments by evidence. Otherwise, the answer does not apprise the complainant of the line of defense which will be resorted to, nor afford him that opportunity for preparation to meet it which is a leading purpose of all pleading, and which the complainant is always entitled to with respect to a matter of defense affirmative in character, and relied on to defeat and overturn a prima facie case made by the bill and admissions of the answer. It is said by Mr. Daniell to be 'of great importance to the pleader, in preparing an answer, to bear in mind

that, besides answering the plaintiff's case as made by the bill, he should state to the court, upon the answer, all the circumstances of which the defendant intends to avail himself by way of defense; for a defendant ought to apprise the plaintiff by his answer of the nature of the case he intends to set up, and that, too, in a clear, unambiguous manner; and, in strictness, he cannot avail himself of any matter of defense which is not stated in his answer, even though it should appear in evidence.' The answer must put in issue all the facts on which the defendant relies in bar of the relief sought by the bill, and evidence cannot be adduced of facts outside of these issues." Confining ourselves for the present to a consideration of all the conveyances except the first one acquired by Hannah Wood, and the evidence offered by each of the respondents to prove the bona fides of the transaction, without entering into a detailed discussion of the variance between the evidence offered and the averments of the answers, a casual examination will show that the allegata and probata do not correspond. Indeed, upon a fair consideration of the evidence, there is not only a failure to establish the facts as alleged in the answers, and an utter failure to overcome the presumption of unfairness and mala fides of the transaction, but the conclusion can scarcely be resisted that the conveyances from William Wood to each of the respondents were without consideration, and were made by him for the sole purpose of defeating the complainants in the collection of their debts, and accepted by them in furtherance of this purpose. As to the conveyances under which Hannah Wood claimed, her evidence shows that the money which was paid by her son for her was gotten from William Wood, her husband, and that the \$350 which she alleges in her answer was paid by her husband as her agent was not paid to Mrs. Burton at all, but that her husband paid Mrs. Burton for the property conveyed by the deed to her in labor and building materials for her, and she allowed him a credit of \$350 on a debt he owed her. She testified that her husband, prior to December, 1893, was indebted to her in the sum of \$400, with nine years' interest, and \$600, with eight years' interest. Her husband testified that prior to December, 1893, he was indebted to her for \$400 borrowed from her in 1875, and \$600 borrowed in 1885. She further testified that when she arrived in America from England, in 1866, she had about \$500, which she had acquired from earnings by keeping boarders and doing other work while they lived in England, and from the sale of some furniture when they left there; that soon after her arrival she purchased a lot in Cleveland, Ohio, and erected a house on it, which she sold in 1875 for \$1,800, and came to Walker county, where \$500 of this sum was invested in a farm, and the loans were made to her husband out of the balance. No note or other obligation was shown by

her to have been taken from her husband for either of the sums she says she loaned him. It is not shown by a clear statement that her husband ever recognized his liability to her for either of those sums, or that she ever had any expectation of having it refunded to her until he became financially embarrassed by reason of the mercantile business which was conducted by his partner, who was his son. He was a carpenter and contractor by trade, and the mercantile business was only in existence a short time before the firm was in financial distress, and its life was of short duration. He did say, in a vague and indefinite way, that he made her some small payments at different times, but could not state what amount or amounts he had paid, or name any dates upon which the payments were made. We have, then, as against existing creditors of the husband, a husband paying for his wife \$450 to a third person for property which was conveyed directly to her, under an alleged indebtedness by him to her, a portion of which indebtedness was of 18 years' standing, and the remainder 8 years past due. Independent of the question as to whether the \$500 or the \$1,800 originally belonged to the husband, as unquestionably it did at common law, unless he renounced his marital claim, and assented to her retaining it as her separate property, we do not think, after the lapse of so great a length of time, and no attempt made by the wife to collect the money, or even require a recognition by her alleged debtor of his liability, without which, *prima facie*, it had long been barred by the statute of limitations, and other inferences unfavorable to the bona fides of the transaction deducible from the evidence, that it clearly appears that she had a bona fide and enforceable—not simulated—debt against her husband. *Gordon v. McIlwain*, 82 Ala. 247, 2 South. 671; *Bray v. Ely*, 105 Ala. 553, 17 South. 180; *Pollock v. Meyer*, 96 Ala. 172, 11 South. 385.

We find no error in the record. The decree of the chancellor is affirmed. Affirmed.

(121 Ala. 608)

VARNER et al. v. ROSS.

(Supreme Court of Alabama. April 12, 1899.)

LANDLORD AND TENANT—LIEN—WAIVER.

A landlord, with a lien on the entire crop for rent, which was to amount to three bales of cotton, wrote: "I hold W.'s rent note for three bales of cotton. I agree to waive the rent on one bale for the year 1896." *Held*, that the landlord waived his lien on one bale of the crop, and reserved it on the rest, to the extent of three bales.

Appeal from circuit court, Lee county; J. M. Carmichael, Judge.

Action by Isaac Ross against James Wairtch; W. D. Varner & Co., interveners. There was a judgment for plaintiff, and interveners appeal. Affirmed.

This was a statutory trial of the right of property, which was instituted by the appel-

lants interposing a claim to some cotton and corn upon which an attachment was levied in a suit by the appellee, Isaac Ross, against one James Wairtch. On the trial of the claim suit the facts were agreed upon, and were substantially as follows: Isaac Ross, the plaintiff, as landlord, had a lien upon the crop of the defendant, Wairtch, for three bales of cotton for the year 1896. In order to enable the defendant to get supplies to make a crop that year, the landlord furnished him with a paper in the following words: "I hold Jim Wairtch's rent note for three bales of cotton. I agree to waive the rent on one bale for the year 1896. To whom it may concern. Isaac Ross." Exhibiting this paper to claimants, defendant procured from claimants supplies to the amount of \$350, for which he executed his mortgage on his crop for the year 1896, embracing the cotton in controversy. Ross received on his rent note two bales of cotton, and the claimants received on their mortgage three bales of cotton, of said crop of 1896, which did not extinguish the mortgage debt. The plaintiff sued out an attachment against the defendant, which was levied upon the bale of cotton in controversy, and the same was claimed in due form of law by appellants.

The cause was tried by the court without the intervention of a jury, and upon these facts judgment was rendered in favor of the plaintiff. The claimants appeal, and assign the rendition of this judgment as error.

R. B. Barnes, for appellants. R. C. Smith, for appellee.

MCCLELLAN, C. J. We construe the paper writing involved in this case, which is as follows: "I hold Jim Wairtch's rent note for three bales of cotton. I agree to waive the rent on one bale for the year 1896. * * * Isaac Ross,"—to mean that the landlord waived, not his claim for three bales of cotton or any part of it, but his lien on one bale of the crop made by the tenant to secure the payment of the three bales or their value. The effect was merely to give the tenant power to dispose of one bale of the crop free from the landlord's lien. As to the remainder of the crop, including that in suit,—the one bale having been appropriated by claimants,—the landlord's lien to secure the three bales due him as rent was in force, and superior to claimants' mortgage. So held the circuit court, and its judgment is affirmed.

(121 Ala. 18)

MCCLELLAN v. STATE.

(Supreme Court of Alabama. April 13, 1899.)

INDICTMENT—VARIANCE—DISMISSAL—ORDER.

Under Code, § 4918, authorizing dismissal and another indictment when a variance is shown, and requiring the order to recite that it appeared from the evidence that there was a variance between the indictment and proof, "in this, [setting out the variance]," a recital that it appeared to the court "that the goods stolen do not agree with the indictment" is insuffi-

cient, both as to setting out the variance and as to showing that the variance appeared "from the evidence."

Appeal from city court of Mobile; O. J. Semmes, Judge.

Willis McClellan was tried and convicted under an indictment which charged that he "feloniously took and carried away from a storehouse or warehouse four bundles of twine, of the value of one dollar and fifty cents each, and two sacks, of the value of ten cents each, the personal property of Gorfried Metz, Charles Ibrach, and Frederick Gratz." The defendant filed two pleas of former jeopardy. The substance of the facts, as averred in the second plea, are stated in the opinion. To this plea the state demurred, upon the ground that it constituted no defense. The court sustained this demurrer, and to this ruling the defendant duly excepted. The defendant then pleaded not guilty, and upon the hearing of all the evidence there were verdict and judgment of guilty, and he appeals. Reversed.

Winfield S. Lewis, for appellant. Charles G. Brown, Atty. Gen., for the State.

MCLELLAN, O. J. A former indictment charged the defendant (appellant here) with the larceny of two sacks of twine from a storehouse. On the trial under that indictment, it was shown that the twine was not in sacks when taken by the defendant from the storehouse, but was put into sacks by the defendant after the caption. This was clearly a variance. The charge was of the larceny of sacks and twine contained in them, or of twine contained in sacks; the proof was of larceny of bundles of twine which had been removed from the sacks in which they were received by the owner of it and of the store; and this presents a case of misdescription of property, within the terms of sections 4917 and 4918 of the Code. The defendant refusing to consent to an amendment of the indictment correcting the description, the court was authorized to stop the trial at any time before the jury retired, and hold him to answer a new indictment. To do this, it was necessary to make and enter of record an order to the effect that it appeared from the evidence that there was a variance between the allegations of the indictment and the proof, in that the indictment charged the taking and carrying away of two sacks of twine, and the proof showed that the property taken was not two sacks of twine, but was four bundles of twine not in sacks, etc. The order which was made is as follows: "This day came the state, by its solicitor, and the defendant, with his counsel, and it appearing to the court that the goods stolen do not agree with the indictment, and the defendant refusing to allow the indictment to be amended, the case is dismissed by the state before the jury retired, and the defendant is bound over in the sum of one hundred dollars to await another indictment." It is clear to us that this order was insufficient. It is of the substance of the statutory requirement

that the record should show a variance, and, with reasonable certainty, in what it consisted; and this, whether a strict or liberal rule of construction be adopted. The court's power to take the case from the jury, and to order a new indictment, is purely statutory, and its exercise is rested upon the fact of a variance between the averments and proof, and the statute itself requires that this predicate must be set forth in the order. The order made here not only does not set out the variance, but it fails to show that any variance whatever appeared from the evidence. According to the order, the only thing that did appear was that "the goods stolen do not agree with the indictment." This might well have been true, and yet there have been no variance at all. The recital of the order would have been supported if it had appeared from the evidence that defendant took one sack of twine, and not two, as charged in the indictment, and yet, of course, such want of agreement between the averment and proof would not have been a variance. *State v. Kreps*, 8 Ala. 951; *Coleman v. State*, 71 Ala. 312. The defendant's second plea presented a good defense to this indictment, and the court erred in sustaining the demurrer to it. Reversed and remanded.

(121 Ala. 16)

FIELDS v. STATE.

(Supreme Court of Alabama. April 12, 1899.)

INDICTMENT — PRESENTMENT — RECONSIDERATION AND WITHDRAWAL — FALSE PRETENSES — INSTRUCTIONS — IMPEACHMENT OF DEFENDANT.

1. After presenting an indictment, the grand jury cannot reconsider and withdraw it.

2. Evidence tended to show that defendant obtained goods by falsely pretending to own two mules, which he mortgaged to secure payment for the goods. He did not object to the introduction of an itemized statement of an account thereof aggregating \$42.93, and of the ledger from which it was taken. The complainant testified to selling a part only of the articles mentioned therein, amounting to \$3.68; but he testified that the account was correct, and that, excepting what he sold himself, the articles were sold by his clerks. *Held*, that charges limiting the guilt of defendant to articles sold by the complainant personally were properly refused.

3. Evidence of defendant's general bad character is admissible to impeach him.

Appeal from circuit court, Madison county; H. C. Speake, Judge.

William Fields was convicted of obtaining goods by false pretenses, and he appeals. Affirmed.

After the defendant had testified as a witness in his own behalf, the state introduced one Harris Toney as a witness, and asked him the following question: "Are you acquainted with the general character of the defendant in the community in which he lives, and, if so, is it good or bad?" The defendant objected to this question. The court overruled the objection, and to this ruling the defendant excepted. The witness answered that he was acquainted with the defendant's gen-

eral character, and that it was bad. The defendant moved to exclude this answer from the jury, and duly excepted to the court's overruling his motion. Upon the introduction of all the evidence, the defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(2) If the jury believe the evidence, they cannot find the defendant guilty of obtaining more than the amount of goods sold and delivered to the defendant by Mr. Leo Marchantz. (3) If the jury believe the evidence of the state's witnesses, you cannot find the defendant guilty of obtaining the amount, to wit, \$25, charged in the indictment to have been falsely obtained." "(6) If the jury believe from the evidence that Mr. Marchantz testified that he sold goods, wares, and merchandise to the defendant to the amount of \$3.68, and that there is no evidence from any other witness that any other amount was sold to the defendant, then the defendant cannot be punished for more than petit larceny."

Richardson & Bankhead, for appellant.
Charles G. Brown, Atty. Gen., for the State.

DOWDELL, J. The defendant was indicted and tried in the circuit court of Madison county for obtaining goods under false pretenses. On the trial the defendant sought to prove by the foreman of the grand jury that found the indictment, and which was then still in session, that since said indictment had been returned into court, and after the arraignment of the defendant thereon, the grand jury had reconsidered the matter, and voted to withdraw the indictment. In the administration of the criminal law, the powers and duties of the grand jury are prescribed by the statutes. It is that branch of the court, when organized under the statute, in which all criminal prosecutions by indictment must originate. It puts in motion the organized machinery for the trial of persons charged with crime, by presenting in open court, in the name of the state, a complaint, which must be indorsed, "A true bill." By this means the court acquires jurisdiction of the particular case. The functions and powers of the grand jury as to the indictment so returned are ended when the presentment is made, and the indictment or true bill is received by the court. There was no error in refusing to permit the defendant to make this proof. It was immaterial and palpably irrelevant.

The evidence on the part of the state tended to show that the defendant obtained goods and merchandise from J. Klaus & Co. by falsely pretending that he (the defendant) owned two mules, which he did not in fact own, on which he gave said Klaus & Co. a mortgage to secure the payment for said goods so obtained. Without objection on the part of the defendant, the state introduced in evidence an itemized statement of account of the goods which the defendant obtained from

Klaus & Co. by means of his false pretense, and which aggregated \$42.93; also, the ledger from which the above account was taken was introduced in evidence without objection. The witness Marchantz, who, with Sam Levy, composed the firm Klaus & Co., testified to selling some of the articles mentioned in the account to the amount of \$3.68; but he also testified that the itemized account offered in evidence was correct, and that the goods mentioned in the account, except what he himself sold, were sold by clerks in the store. Under this state of the evidence, the court very properly refused to give the charges requested by the defendant, which limited the guilt of the defendant to articles sold by the witness Marchantz personally.

When the defendant in a criminal case offers himself as a witness, evidence of his general bad character may be introduced for the purpose of impeaching, in the same manner as in case of any other witness who is called to testify. *Mitchell v. State*, 94 Ala. 68, 10 South. 518; *McDaniel v. State*, 97 Ala. 14, 12 South. 241. We find no error in the record, and the judgment of the circuit court must be affirmed.

(121 Ala. 41)

STATE v. VAUGHAN et al.

(Supreme Court of Alabama. April 18, 1899.)

CRIMINAL LAW—FORMER JEOPARDY—PRELIMINARY EXAMINATION.

The release of a person accused of a crime on bail, after a preliminary examination, is no bar to his subsequent arrest on another complaint for the same offense, and commitment without bail.

Appeal from city court of Selma; J. W. Mabry, Judge.

Claud M. Vaughan and Roy Vaughan were arrested under warrants issued by one Stringer, a justice of the peace in Pleasant Hill precinct, Dallas county, on complainants charging them with the murder of S. M. Carter. The justice of the peace held a preliminary examination, and admitted the Vaughans to bail.—Claud M. Vaughan in the sum of \$500, and Roy Vaughan in the sum of \$1,000. Each of the defendants gave bond as required, and were thereupon released. These proceedings were had on February 11 and February 15, 1899, respectively. Subsequently, on February 20, 1899, complaint was made before one I. D. Lloyd, a justice of the peace for Selma precinct, Dallas county, charging the said Claud M. and Roy Vaughan with the murder of S. M. Carter,—the same offense for which they had been previously arrested and arraigned before the said justice, Springer, and by him released on bail, as above stated. Lloyd issued warrants of arrest for said Vaughans, and they were brought before him, and a preliminary examination was held. During this examination the said Vaughans offered to show the facts of the arrest under the warrants issued by the justice of the peace, Stringer, and their release or discharge

on bail given in the amount as fixed by said justice. Lloyd, the justice of the peace, declined to allow them to prove such facts, and upon the hearing committed each of them to jail without bail. Thereupon the said Claud M. and Roy Vaughan sued out writs of habeas corpus before Hon. John W. Mabry, judge of the city court of Selma, setting out the facts as above stated. Upon the hearing of the petition, the petitioners were released from custody, and remanded to the custody of the sureties on their bail bond. From this order, the state appeals, and assigns the rendition thereof as error. Reversed.

Chas. G. Brown, Atty. Gen., and Craig & Craig, for the State. Mallory, McLeod & Mallory and Pitts & Pitts, for appellees.

MCCLELLAN, C. J. We do not think an extended discussion of this case is necessary. We are of opinion that the point involved here is determinable against the petitioners for the writ of habeas corpus upon what is said in the case of *Ex parte Robinson*, 108 Ala. 161, 18 South. 729. It may be that what is there declared bearing upon the precise question presented here was not necessary to the decision of that case, and hence was in a sense dictum; but, whether necessary to that case or not, it is necessary to this, and, as we are fully impressed with the soundness of the principle as there expounded, we adopt that exposition as the law of this case. It is there said, as has been several times directly adjudged by this court, that no plea of former conviction, or former acquittal, or former jeopardy can be predicated upon a preliminary hearing or its result. It is there noted that there is no statutory limitation upon the number of times a person may be charged with a given crime, arrested, brought before a magistrate for preliminary investigation, and discharged, held to bail, or committed without bail. And it is there further stated, as has been expressly decided by this court "that, if the defendant be discharged upon preliminary investigation by the magistrate, he may be arrested on a second warrant." With this unquestioned state of the law as a premise, the court then proceeds in that case to draw the inevitable conclusion therefrom that where a defendant has been admitted to bail on a preliminary hearing, and has in fact entered into the bail required, and been remitted to the custody of his bondsmen, he may be again proceeded against upon another warrant for the same offense, subjected to another preliminary examination, and thereupon held without bail, or admitted to bail in other amount, or discharged. Justice Coleman, speaking for the court, said: "If this [that a defendant discharged on preliminary investigation may be arrested on a second warrant] be true, under this rule he is subject to as many arrests as there are magistrates in the county, at least until one is found who is willing to commit or require bail. But, if the order of

the magistrate is final and conclusive on other magistrates, it is because of the jurisdiction to make a final order, and not because of the particular conclusion reached by the justice of the peace. The order would be equally final and binding, whether the defendant be discharged or committed. There is no answer to this proposition. It would also conclude a warrant issued upon the finding of a coroner's inquest, for this merely secures a preliminary investigation." And the converse of this proposition is necessarily true: If the order of one magistrate is not final and conclusive upon other magistrates, it is because no magistrate has the jurisdiction and power to make any final and conclusive order in the premises; and, being without such jurisdiction, an order admitting to bail is no more conclusive than an order discharging the defendant. The want of finality and conclusiveness results from want of jurisdiction, and any possible order upon preliminary examination must be lacking in those qualities, since the magistrate can make no order possessing them. And this is precisely what is meant by Justice Coleman in *Robinson's Case*. He refers to the well-settled law that an order of discharge is not final, and that a defendant is subject to as many arrests as there are magistrates in the county, "at least until one is found who is willing to commit or require bail," as a basis for the further conclusion that, inasmuch as the doctrine, so far as the exigencies of cases have required its exposition, must rest upon the broad foundation of a want of jurisdiction to make a final and conclusive order, the doctrine itself must be applied to all orders on preliminary investigation, since in respect to them all, whether of discharge, bail, or commitment without bail, there is equal want of jurisdiction to preclude subsequent proceedings on another warrant; and this is what is intended when he says that, if the order of the magistrate is final and conclusive on other magistrates, it is because of the jurisdiction to make a final order, and not because of the particular conclusion reached by the justice of the peace; and hence the further necessary conclusion that, final jurisdiction to make a particular order having been expressly decided not to exist, there can be no jurisdiction to make any order which would bar and preclude a subsequent prosecution on another warrant for the same offense. And why is not the proposition entirely sound? What is there to stand in the way of such second proceeding against a defendant who has been admitted to bail? He has not been convicted. He has not been acquitted. He has not been put in jeopardy. There is no plea known to the law that can be interposed between him and a new investigation, followed by a new and different order. There is no statute forbidding it expressly or by implication. Confessedly there is no element of contract to bar the state in any criminal prosecution. There is no question of vested rights. The only argument against the

doctrine as applicable to a second prosecution, where the defendant has been enlarged on bail, is that it would be harassing and oppressive to him. The effect being to relieve his bondsmen of responsibility, it could be in no sense onerous to them. And as to him it would be the same kind of burden that one who has been discharged is subjected to on a second and subsequent proceeding, and which has been adjudged to furnish no ground for a different conclusion. Besides, in both cases the defendant is protected by the law from the abuse of process, and has his remedy for ill-founded and repeated prosecutions for the same offense, not actuated by proper motives. There is, we think, no merit in this argument as inconvenient, as was substantially declared in *Robinson's Case*, supra, nor in any other consideration to which our attention has been directed; and our conclusion is that the city judge erred in granting the writ of habeas corpus. His order in that behalf is reversed and set aside, and a judgment will be here entered, denying the petition for the writ, and remanding the petitioners to the custody of the sheriff under the commitment without bail. Reversed and rendered.

(121 Ala. 84)

ENSLEY LUMBER CO. et al. v. LEWIS.

(Supreme Court of Alabama. April 18, 1899.)

CONDITIONAL SALE — TITLE OF PURCHASER — CONVERSION — DEMAND.

1. A sale of personal property, where the vendor expressly retains the legal title until the price is paid, does not divest the title of the vendor; and the purchaser cannot convey a good title, even to a bona fide purchaser.

2. Notes, which by their terms stipulated that the legal title to the property for which the notes were given should remain in the payee until they were paid, were indorsed by the payee, and pledged as collateral. *Held*, that the legal title to the property for which they were given did not pass to the pledgee, and, on the payment of the debt for which they were pledged, the legal title to the property and the notes was in the payee.

3. Plaintiff sold personal property, and took notes for the price, stipulating that the legal title should remain in him until payment. The goods were moved out of the state, and the purchaser mortgaged them there. At the time of the sale and the execution of the mortgage, all the parties were residents of the state. *Held*, that the title remained in the vendor, and that, as between the residents of the state, it was unnecessary that the contract should be recorded as required by the laws of the state to which the property was removed, it not being necessarily in the state of the sale.

4. Where a conditional sale is valid in the state without recording the contract, and the goods are taken out of the state by the vendee, and mortgaged to a resident of the state, the fact that the law of the other state required conditional sales to be recorded does not affect the rights of the residents in the state, where an action to enforce such rights is brought in such state, and not in the foreign state to which the goods were removed.

5. When there has been a conversion of property by one rightfully in possession of it, no demand is necessary before the commencement of an action of trover.

6. Plaintiff sold certain personal property to

one of the defendants, and took in payment therefor notes wherein it was expressly stipulated that the legal title should remain in the vendor until the notes were paid. The purchaser subsequently, and before the payment of the notes, mortgaged the property to another, who thereafter took possession of the property, and refused to surrender possession to plaintiff on demand after default. *Held*, that it was a joint conversion by the purchaser and mortgagee, and that a joint action will lie.

Appeal from city court of Birmingham; H. A. Sharpe, Judge.

Action of trover by C. E. Lewis, doing business under the name of the Lewis Machine Company, against the Ensley Lumber Company and others. From a judgment in favor of the plaintiff, defendants appealed. Affirmed.

The action was brought to recover damages for the alleged conversion of some machinery used in a planing mill.

The defendants pleaded the general issue. Upon issue joined upon this plea, the trial was had. The evidence showed the following facts:

On March 16, 1896, the plaintiff, a married woman, was, through her husband, E. M. Lewis, as manager, doing business as a dealer in machinery in the name of the "Lewis Machine Company." On that day she made a conditional sale of the machinery involved in this suit to the Ensley Lumber Company. Part of the purchase price of this machinery was paid in cash, and for the deferred payments, notes were executed, payable at different dates. These notes were made payable "to the order of E. M. Lewis as manager of the Lewis Machine Company," and it was stipulated in said notes that the machinery sold should "remain the property of E. M. Lewis, as manager, until all notes given for said property are paid."

The contract of sale was made and the notes were executed in Alabama. At the request of the lumber company the machinery was shipped to Swainsboro, Ga., where it was received by the Ensley Lumber Company and placed in the mill at that place. On July 15, 1896, the Ensley Lumber Company executed to the defendant W. O. Shackleford a mortgage to secure an indebtedness, and in this mortgage there was conveyed, among other property, the machinery involved in this controversy. This mortgage was executed in Alabama, and was given upon machinery which was, at that time, situated in Georgia, and was in the possession of the sheriff under a levy of a certain attachment which had been sued out and issued at the instance of creditors of the Ensley Lumber Company.

After the execution of said mortgage, Shackleford, by agreement between himself and the Ensley Lumber Company and the attaching creditors, paid off the claims of said creditors and procured the discharge of the attachment, and the machinery was put in his control and possession, and he placed his agent in possession of it. At the time of the execu-

tion of said mortgage, Shackelford had no notice of the plaintiff's ownership of the machinery. The notes given for the deferred payments of the purchase price of the machinery were never paid, and, subsequent to the execution of said mortgage, the plaintiff notified Shackelford of her ownership of the machinery and demanded that it be delivered to her. This being refused, the plaintiff brought the present action of trover.

After proving their execution, the plaintiff offered in evidence the notes which were executed by the Ensley Lumber Company to her at the time of the purchase of the machinery. The defendants objected to the introduction of said notes in evidence and moved to exclude them, upon the ground that said notes were irrelevant, immaterial and showed no title in the plaintiff, but showed on their face that the title to the property described in them was in E. M. Lewis. The court overruled this objection and motion, and to this ruling the defendants duly excepted. E. M. Lewis as a witness for the plaintiff testified that after the execution of the notes by the Ensley Lumber Company he, as the manager, of the Lewis Machine Company, indorsed said notes to the Bank of Anniston as collateral security to a debt or loan by said bank to the plaintiff, and that said notes were held by said bank until the debt was paid, which was done before the institution of the present suit. Each of said notes contained the following indorsement: "Lewis Machine Company, E. M. Lewis, Mangr."

After the introduction of this testimony of the witness E. M. Lewis, the defendants moved the court to exclude said notes from the evidence, on the ground that the proof showed that they had been indorsed to the Bank of Anniston and that the legal title to said machinery was in said bank. The court overruled this motion and the defendant duly excepted.

The cause was tried by the court without the intervention of a jury, and upon the hearing of all the evidence, the court rendered judgment for the plaintiff against the Ensley Lumber Company and W. C. Shackelford. To the rendition of this judgment each of the defendants separately excepted. The defendants appeal, and assign as error the several rulings of the trial court to which exceptions were reserved.

Ward & Houghton and Tillman & Campbell, for appellants. Matthews & Whiteside and Smith & Smith, for appellee.

HARALSON, J. Trover for the conversion of personal property.

1. Under repeated decisions of this court, it is held, that when the vendor of personal property expressly retains the legal title until the purchase money therefor is paid, no title passes to the purchaser by delivery of possession, and a purchaser from him cannot defeat a recovery of such property by the orig-

inal vendor, even though he shows he was a bona fide purchaser from the vendee for value and without notice. *Warren v. Liddell*, 110 Ala. 232, 20 South. 89; *Thomason v. Lewis*, 103 Ala. 426, 15 South. 830; *Iron Works v. Smith*, 98 Ala. 644, 13 South. 525.

The evidence in this case shows without conflict, that when E. M. Lewis, as manager of the Lewis Machine Company, on the 16th March, 1896, sold the property to the Ensley Lumber Company, for the conversion of which this suit is brought, it was with the express written condition, incorporated in the notes of the purchaser, that the machinery should "remain the property of E. M. Lewis, as manager, until all notes given for said property are paid, and that on default in the payment of any of said notes at maturity, or at any time after such default before accepting payment in full of the amount then due, E. M. Lewis may resume possession of said property without liability on his part to refund any money previously paid on account of said contract." Nothing could be more explicit to show, that the title to said property did not pass by the transaction of this conditional sale, to the purchaser, but remained in the vendor. The mortgage executed by the vendee, the Ensley Lumber Company, to W. C. Shackelford, conveyed no greater interest to him, than that company owned, and he purchased and held the property subject to the legal title of the vendor. *Thomason v. Lewis*, supra; *Weinstein v. Freyer*, 93 Ala. 257, 9 South. 285.

2. The notes on their face show, that the property for the sale of which they were given, was not the individual property of E. M. Lewis, but that he was the mere manager for the person to whom it did belong. As manager he sold it, and to him as such, the notes were made payable. It is not denied and cannot be, for the evidence is without conflict as to the fact, that Mrs. C. E. Lewis, the appellee and plaintiff below, was the owner of said property and that E. M. Lewis, her husband, as manager for her, sold it to the defendant, the Ensley Lumber Company, and took said purchase-money notes therefor. It also shows, that she remained its owner to the time of the trial, and did nothing under the laws of this state, so far as appears, to divest herself of the title. It was shown that the notes, at one time, were indorsed by the plaintiff to the Bank of Anniston, as collateral to secure a loan by the bank to plaintiff, which notes were retained by said bank until October or November, 1897, when having paid the loan, the notes were returned to plaintiff by the bank before this suit was instituted. The notes bore the indorsement, "Lewis Machine Co. E. M. Lewis, Mangr." By this transaction, the legal title to the property, for which the notes were given, did not pass to the bank, and when the loan for which they were hypothecated to the bank was paid, and they were returned to the plaintiff, the legal title to the property, and of the notes as

well, was in her. *Berney v. Steiner*, 108 Ala. 111, 19 South. 806; *Land Co. v. Dromgoole*, 89 Ala. 505, 7 South. 444; *Thomason v. Lewis*, supra.

3. On the 15th July, 1896, the Ensley Lumber Company executed to defendant, W. O. Shackelford, the mortgage in evidence of that date for the considerations therein expressed. The machinery was at the time of the execution of the mortgage, in Georgia in the possession of the sheriff, levied on by attaching creditors as the property of the Ensley Lumber Company. By agreement between that company and Shackelford, he went to Georgia and paid off and procured the discharge of the attachments, and the machinery was delivered into his possession and control, and he continued in the possession, control and use of the same, through his agent, until this suit was brought. After taking possession he was notified by plaintiff, through her agent, that the title to the property was in her, and her notes for it were unpaid, and requested payment of them, and he refused to pay and asserted his right to the property as superior to hers. At the time the property was conditionally sold by plaintiff to the Ensley Lumber Company, and the notes of that company to the plaintiff, in which the title to the property was reserved, were executed, and at the time said mortgage was executed on the property by the company to said Shackelford, all of them were residents of this state, and said contract was entered into in reference to the laws of Alabama. It is a well-settled principle, upheld in all courts, that the law of the place of the contract, in the absence of stipulations to the contrary, must govern as to its validity, interpretation and construction; and as a general rule, when a contract is valid and binding, by the *lex loci contractus*, it is valid and binding everywhere. *Jones v. Jones*, 18 Ala. 248; *Evans v. Kittrell*, 33 Ala. 449; *Cowles v. Townsend*, 37 Ala. 77. It may be that a conditional sale of personal property entered into in Alabama, unless the vendor complies with the registration laws of Georgia, when the property is taken after its purchase into that state, would not be good as between the original seller and an innocent purchaser for value without notice, in that state, but that could be the case only when their rights are to be determined in Georgia courts. We know of no rule of comity between states that would give to the registration laws of Georgia an extraterritorial force, operative on contracts executed within and with the view of being enforced in this state, when rights growing out of such contracts are sought to be enforced in our own forums. The case of *Edgerly v. Bush*, 81 N. Y. 199, was one where B. executed to plaintiff a chattel mortgage in New York state, on a span of horses, both parties residing in that state. B. carried the horses to Canada and sold them to a trader, who bought in good faith without knowledge of plaintiff's claim. Under the laws of Canada, B. could not reclaim the horses without re-

funding the price paid for them by the trader. Defendant, a resident of New York, bought the horses in Canada from the purchaser and left them there. Returning to New York, on refusal to deliver them on demand, the plaintiff sued in trover for their conversion, and it was held he had the right to recover. This decision seems to be well founded in principle, and met the approbation of this court in *Weinstein v. Freyer*, 93 Ala. 257, 9 South. 285, and in the case therein cited of *Safe Co. v. Norton*, 48 N. J. Law, 410, 7 Atl. 418.

4. There is nothing in the suggestion that this suit cannot be maintained for that as alleged, no demand was made for the property before it was brought. The proof tended to show an unauthorized disposition of the property by the defendants, the lumber company and Shackelford, and when such is the case, no demand, if not made, was necessary. *Haas v. Taylor*, 80 Ala. 466, 2 South. 633; *Brown v. Beason*, 24 Ala. 466.

5. Nor is there merit in the contention, that plaintiff had no right to maintain his suit against defendants, because they were not joint tortfeasors. The rule is, that when one commits a wrongful act, co-operating with other defendants, who had notice of plaintiff's rights, a joint action for the wrongful act may be maintained against all of them; but if the wrongful act was separate and distinct, a joint action cannot be maintained against them. *Powell v. Thompson*, 80 Ala. 51; *Railroad Co. v. Greenwood*, 99 Ala. 501, 14 South. 496.

Here, as stated, the proofs tend to show a joint conversion of the property by defendants. The court below, trying the case without a jury, found the issues in favor of the plaintiff and rendered judgment against defendants, who appeal. We have been unable to discover that its judgment on the law and facts was not correct.

Affirmed.

(121 Ala. 230)

ALABAMA MIDLAND RY. CO. v. MCGILL.

(Supreme Court of Alabama. April 19, 1899.)

RAILROADS—KILLING STOCK—NEGLIGENCE.

1. It is negligence in a railroad company to run its trains at such a rate of speed that it is impossible, by the use of the ordinary means and appliances, to stop the train within the distance in which stock on the track may be seen by the aid of the headlight; and if, by reason of fog, the distance at which objects can be seen by the aid of the headlight is decreased, it is the duty of the company to operate its trains so as to permit of their being stopped within such decreased distance.

2. In an action for negligently killing plaintiff's stock, the railroad company proved that there was a heavy fog over the track at the point where the injury occurred, which prevented the engineer from seeing the track for more than 40 yards in front of the engine. The evidence also showed that on an ordinary night the engineer could see the track 100 yards in front of the engine, by the aid of the headlight. *Held*, in the absence of evidence that, at the rate the train was going, it could have been stopped within the 100 yards, this does not, in-

dependent of the fog, show that the railroad company was not negligent.

Appeal from circuit court, Dale county; J. M. Carmichael, Judge.

Action by James C. McGill against the Alabama Midland Railway Company. From a judgment in favor of plaintiff, defendant appealed. Affirmed.

This action was brought to recover damages for the alleged negligent killing of plaintiff's horse and mule by a train owned and operated by the defendant on its railroad.

Upon the introduction of all the evidence, the court, at the request of the plaintiff gave to the jury the following written charges: (1) "If the jury believe from all the evidence that the speed of the train, at the time was such as to make it impossible for the engineer to stop the train within the distance the object on the track could have been seen by a good headlight, then such rate of speed was negligent, and the defendant would be liable." (2) "The defendant cannot justify upon schedule or common rate of speed; but it was the duty of the railroad company to run their trains at such speed as would enable the engineer to stop his train within the space in which an object upon the track could have been observed by the use of his headlight." The defendant separately excepted to the giving of each of these charges, and also duly excepted to the court's refusal to give the following charge requested by it: "If the jury believe all the evidence they must find for the defendant."

There were verdict and judgment for the plaintiff, assessing his damages at \$103.65. The defendant appeals, and assigns as error the giving of the charges requested by the plaintiff, and the refusal to give the general affirmative charge requested by the defendant.

A. A. Wiley, for appellant. Doster & Sons, C. D. Carmichael, and Halloway & Halloway, for appellee.

HARALSON, J. Action against a railroad company for negligence in killing stock.

1. The principle is too well established to be longer questioned in this court, that it is negligence in a railroad company to run its trains in the nighttime at such a rate of speed that it is impossible, by the use of ordinary means and appliances, to stop the train within the distance in which the stock upon the track can be seen by the aid of the headlight on the engine and prevent injuring them, and if injury results from such negligence, the railroad company is liable to the owner thereof. *Railroad Co. v. Kelton*, 112 Ala. 533, 21 South. 819, and our cases there cited.

2. The engineer testified that he was running at the time of the accident, 45 or 50 miles an hour, which was his usual speed; that it was about 10 o'clock p. m. when it occurred; the night was very dark and foggy; that he was keeping a sharp lookout; that

the road is straight for about 300 yards west of the trestle where the animals were killed, and there was a wall of fog at that point which prevented his seeing anything, more than 40 yards ahead of his train; that on an ordinary night, he could have seen 100 yards ahead of him, and after doing all he could. It was impossible to stop the train after discovering the animals before he ran on them. He also testified, that the road ran down Claybank creek for several miles, and that the fog was all along through the swamp of the creek, and at the particular point where the mule and horse were killed, there was a dense wall of fog which prevented his seeing for more than 40 yards ahead of him. It was also shown that the track at this point, the way the train ran, was down grade.

3. On these facts, counsel for defendant seek to have this case taken from the rule laid down in the cases referred to above, on what was said in *Ingram's Case*, 98 Ala. 399, 12 South. 801,—that "if the injury is not attributed to the rate of speed, in view of the ordinary darkness of the night, but resulted from the unusual natural causes, such as fog, or falling rain or snow, those in charge of the train being, in all other respects, in the exercise of due care, the injury would be excused." But, the defendant is not relieved from liability from anything said in that case, as applicable to the facts here. It is a well-settled and just principle, that where anything in the surrounding conditions and circumstances suggests care in the operation of a railroad train to avoid peril and damages to others, the higher the duty increases to observe it. *Railroad Co. v. Harris*, 98 Ala. 334, 13 South. 377. Here, as the undisputed facts show, the train was being run at its usual speed of 45 or 50 miles an hour; that it was a dark and foggy night, and the fog was all along through Claybank swamp through which the train was running, up to the point of the accident, without any slow-up, notwithstanding the fact, that the engineer could not see animals ahead of him more than 40 yards. It was not shown that the fog was denser or more impenetrable at the point of accident, than along the road for miles before the accident occurred. The fact stated by the engineer, that at that particular point there was a dense wall of fog which prevented his seeing more than 40 yards ahead of him, does not establish its prevalence at that point in a denser form than at other places. Common prudence would have suggested the duty on the part of the engineer to run his train at a rate of speed, and to have his train under such control, as to stop it within the distance his headlight would reveal an object on the track ahead of him the size of a horse or mule. Instead of this, he plunged along at this very great rate of speed, as though the conditions were not unusual. Peril to the train itself, the passengers on it and stock that might be on the track was thereby necessarily, and for aught

appearing, very greatly enhanced. Moreover, the engineer testified that his train was a very heavy one, consisting of five or six coaches,—a mail car, two passenger and an express car and one or two sleepers. It was not shown that the train could have been stopped within a hundred yards,—the distance the engineer testified he could have seen ahead of him on an ordinary night by the aid of the headlight. It thus appears, that independent of the fog, and if it had been a clear night, he might not have been able to save the animals, and was, as for the animals on the track, guilty of negligence in running the train. The court did not err in giving the general charge for plaintiff, and refusing the like charge in favor of defendant.

Affirmed.

(121 Ala. 471)

LOUISVILLE & N. R. CO. v. LANCASTER.
(Supreme Court of Alabama. April 11, 1899.)
RAILROADS—KILLING STOCK—EVIDENCE—SUFFICIENCY—JUSTICE'S COURT—APPEAL—INSTRUCTIONS.

1. In an action in a justice's court plaintiff joined different causes of action for separate torts. The judgment was in favor of plaintiff as to one, and for defendant as to the other. Defendant only appealed, and insisted that plaintiff was precluded as to the latter tort by the justice's judgment, from which he did not appeal. *Held* untenable, since defendant's appeal vacated the entire judgment, and not a part only.

2. An animal was found near defendant's track, with bruises on side and head, from which it died. No bones were broken, but the hair was knocked off. There was no evidence that it was otherwise injured than by defendant's train. Shortly after a special train passed, a witness found the animal about the place where he heard two blasts of the whistle of the passing train. *Held*, that a motion to exclude plaintiff's testimony, as being insufficient to connect defendant with the killing, was properly overruled, as it presented a question for the jury.

3. An affirmative charge is properly refused where the evidence is conflicting.

4. A charge which withdraws all the evidence, except that of one witness, should be refused, as invading the province of the jury.

Appeal from circuit court, Elmore county; N. D. Denson, Judge.

Action by J. A. Lancaster against the Louisville & Nashville Railroad Company to recover damages for the alleged negligent killing of stock. There was a judgment for plaintiff, and defendant appeals. Affirmed.

The suit was originally brought in a justice of the peace court. The complaint in the justice of the peace court contained three counts, each of which claimed damages for the negligent killing of two steers and a milch cow. The two steers were killed on or about April 1, 1897, and the milch cow was killed on April 22, 1897, at different places. The justice found in favor of the plaintiff for the value of the two steers, and rendered judgment in favor of the defendant as to its liability for the killing of the milch cow. From this judgment, the defendant appealed

to the circuit court. In the circuit court demurrers were interposed to the complaint, which were sustained. Thereupon the plaintiff amended his complaint by substituting therefor two counts, in one of which he claimed damages for the negligent killing of two steers, and in the second claimed damages for the negligent killing of a milch cow by the defendant. To the second count of the complaint the defendant pleaded in bar the judgment of the justice of the peace. To this plea the plaintiff filed a replication, which, in effect, set up that there was but one suit pending before the justice, that he rendered but one judgment, and that the defendant in that suit appealed from said judgment. To this replication the defendant demurred upon the grounds (1) that it fails to aver or show that the cow and steers were killed at the same time; (2) that said replication fails to show that the liability for the killing of said steers and said cow arose from the same effect; (3) because said replication fails to show but that said complaint embraced two distinct torts. This demurrer was overruled. Thereupon issue was joined upon said plea and the replication. Plaintiff, examined in his own behalf, stated that in the month of April, 1897, he went to look at a cow which belonged to him, and which had been injured near what was known as "Maull's Crossing"; that the animal was lying 50 or 60 feet from the railroad on a dirt road, on the right-hand side of the railroad going from Wetumpka to Elmore, or on the north side of said railroad; that the head of the cow was turned towards the railroad, and she was bruised on the right side on her head and hip, but that the skin was not broken; that the cow was worth \$30; that she afterwards died; that he did not see her injured; and that she was not on a public road. Evans Young testified that he knew when a cow belonging to the plaintiff was found on the dirt road near Maull's Crossing, 50 or 60 feet from the railroad track, between Elmore Station and Wetumpka; that he had passed the point where the cow was afterwards found, going to his work, on the morning of April 22, 1897; that the cow was not lying on the road at that time, but on his return on the afternoon of the same day he found the cow, and tried to get her up; that he discovered she was injured about the right side of the head and on the right side; that he afterwards assisted in skinning the cow, and found bruises as above stated, and that the flesh seemed to have rotted where the bruises were shown; that the hair was knocked off where the bruises were, but the skin was not broken; and that he did not find any broken bones on the cow, but did not examine her legs. This witness described her as being on the north side of the track, as did the other witness. Will Martin, witness, testified that he passed the locality where the cow was found after the regular morning train had gone from Wetumpka to

Elmore and from Elmore to Wetumpka, and the cow was not at that point; that near the middle of the day a special train ran from Wetumpka to Elmore, about 11 o'clock, consisting of an engine and tender; that he heard this engine blow two blasts of the whistle near the crossing; and that just after this special train passed the crossing, and when it had gotten about a mile away, he went down where he heard the train blow, and found the cow lying near the railroad, as described by the other witness. Witness at one time said the cow was 50 or 60 yards, but subsequently stated 50 or 60 feet; that the cow was on the right-hand side of the road going from Wetumpka in the direction of Elmore; and that the cow was not at the place at which he found her prior to the passage of the special train running in the direction of Elmore, but he found her a few minutes after said special train had passed. Witness did not see the engine strike her, and described her merely as having bruises about the head and side,—on the right-hand side, with the hair knocked off, and no bones broken. Witness testified that the cow was when he saw her about 50 yards from Maull's Crossing. This was all the evidence for the plaintiff. The defendant examined as a witness in its behalf one J. M. Jenkins, who testified that he was the engineer in charge of the only locomotive which ran on defendant's railroad from Wetumpka to Elmore in the month of April, 1897; that it was his duty to keep a record of every trip made by his engine over the road, and on examining his record he found that he ran a special train consisting only of an engine and coach, and that said special passed the place where a cow was said to have been injured about 12:20 p. m., April 22, 1897; that it was broad daylight; that his place on the engine was on the right-hand side going from Wetumpka to Elmore, and next to the north side of the track; that there was nothing to obstruct his view of the track at or near the point where the cow was said to have been hurt, sitting where he was; and that he had no knowledge of striking the cow or any other animal on that day with the engine, and to the best of his knowledge and belief he did not strike the cow. It is further shown that Askew, the justice of the peace who tried the cause, heard evidence and rendered judgment, as set out in the pleas. It was further admitted that the cow sued for in the second count of the complaint in the circuit court was the same animal mentioned in the judgment of the justice of the peace, and it was also shown that the plaintiff's suit in the justice court was for the killing of two steers and the cow mentioned in this suit. The plaintiff filed his complaint in that suit embracing two counts,—one for the killing of the steers, and the other for killing the cow,—but it was only one suit, and tried as one suit before the justice. The defendant, at the conclusion of

the examination of plaintiff, moved to exclude his testimony, on the ground that it did not connect the defendant in any way with the injury to plaintiff's property. The court overruled this motion, and the defendant then and there duly excepted. Defendant also moved to exclude all the testimony of Evans Young, and of the witness Will Martin at the end of his evidence, for the reason that it was not shown that any servant or agent of the defendant inflicted the injury, and because the wounds described by witness did not in any way connect defendant therewith. The court overruled defendant's motion as to this witness, and defendant then and there duly excepted. At the close of the evidence for the plaintiff, the defendant again moved to exclude all the testimony offered by the plaintiff, upon the ground that the marks and bruises on said animal as described, and the testimony offered, did not shift the burden of proof, as at best it merely tended to show that the injuries were inflicted by the defendant. The court overruled said motion, and the defendant then and there duly excepted. Upon the introduction of all the evidence, the defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: "(1) If the jury believe the evidence of witness Jenkins, they must find for the defendant under the second count of the complaint. (2) If the jury believe the evidence, they must find for the defendant. (3) If the jury believe the evidence of witness Jenkins, they must find for the defendant." "(5) The court charges the jury that there is no evidence in this case that defendant's train killed the cow sued for, and there can be no recovery as to the cow." "(7) If the jury believe the evidence, they must find for the defendant under the second count of the complaint. (8) The court charges the jury, as matter of law, that the burden of proving plaintiff's replication is on him, and that, under the evidence introduced in this case, he has not proved said replication, and cannot therefore recover for the value of the milch cow sued for."

Thos. G. Jones, for appellant. H. R. Golson, for appellee.

DOWDELL, J. The suit in this case was begun in the justice of the peace court. The original complaint before the justice contained three counts. In each count damages were averred and claimed for the negligent killing by the defendant of two steers and one milch cow, property of plaintiff. The two steers were averred to have been killed on the same day and at the same time by defendant's train, and the cow was averred to have been killed on a different day. Thus two distinct causes of action for two distinct torts were averred in each of the three counts of the complaint. Without objection to this manner of pleading,

the cause was tried before the justice of the peace. The justice rendered judgment against the defendant as to the two steers, but in its favor as to the milch cow. From this judgment of the justice, the defendant sued out an appeal to the circuit court. On demurrer filed to the complaint in the circuit court, for joining different causes of action in the same count, the plaintiff amended his complaint by averring the different causes in separate counts. This was proper. *Railroad Co. v. Cofer*, 110 Ala. 491, 18 South. 110. On this trial there was a verdict against the defendant for the milch cow. It was insisted by the defendant in the circuit court, and the insistence is the same here, that the judgment of the justice in its favor for the milch cow was final, and that no appeal was taken from that judgment. The argument of counsel for the appellant is ingenious and plausible, but we think wanting in genuine merit. There may have been different causes of action in the same complaint before the justice, but there was a unity and singleness in other respects. There was one suit, one complaint, one trial, and a single judgment. There is no provision in the statute for appealing from a part of a judgment. The appeal in this case was taken under section 481 of the Code, and is governed by that section and the following sections of the same chapter as to all subsequent proceedings. Section 488 provides when and how appeals from justices of the peace shall be tried: "All such cases must be tried de novo and according to equity and justice, without regard to any defect in the summons, or other process, or proceedings before the justice." This language is broad and comprehensive, and the matter of appeal is designated by the statute as the "case." Section 484 provides that the justice shall send up to the circuit court all of the original papers of the cause, together with a statement, signed by him, of the case, and the judgment rendered by him. Then the case is to be tried in the circuit court de novo; or, in other words, as if no trial had ever been had, and just as if it had originated in the circuit court. The appeal, when taken, operates to annul and vacate the entire judgment of the justice of the peace, and not a part only of the judgment. The judgment of the justice cannot upon the trial in the circuit court be looked to as a matter of evidence or of estoppel. "The judgment of the justice is not reversed or affirmed; but a new, distinct, and independent judgment, as may be required by the merits shown on the trial, is rendered by the city or circuit court." *Abraham v. Alford*, 64 Ala. 281; *Harsh v. Heflin*, 76 Ala. 499.

The foregoing views cover and dispose of all of the assignments of error, except those relating to testimony and the written charges refused by the court. The defendant moved the court to exclude the entire testimony of the plaintiff and his two witnesses, Young and Martin. As argued by appellant's counsel, the motion to exclude the testimony of these

witnesses is upon the theory of its insufficiency, whether considered separately or as a whole, to show that the cow was killed by the defendant's train. No question is raised as to its competency or relevancy. The question of the weight and sufficiency of evidence is always left with the jury, unless its insufficiency is so patent and palpable that the court would not permit a verdict to rest upon it. Whenever evidence affords a reasonable inference of the existence of a necessary fact to the right of recovery, it should not be withdrawn from the jury. The testimony of the three witnesses, when taken as a whole, shows substantially the following facts: That, when the special train passed the point near which the cow in a few minutes afterwards was found injured and lying down, two blasts from the engine whistle were sounded; that it was near a road crossing, but not a public road; that there were marks of violence on the cow,—bruises on the right side of her head, neck, and side, and the hair "knocked" off, though no bones were broken; and that the cow afterwards died from the injuries. There was no evidence tending to show that the cow was otherwise injured than by the defendant's train. The fact of the injury to the cow by defendant's train would not be an unreasonable inference for the jury to draw from this evidence. We think the court properly overruled the motion to exclude the testimony.

Charges requested by the defendant, numbered 2, 5, 7, and 8, were, in effect, the general affirmative charge. The affirmative charge should never be given when there is a conflict in the evidence as to any material fact in issue, or where the evidence is open to reasonable inference of a material fact unfavorable to the party requesting the charge. *Anderson v. Railroad Co.*, 109 Ala. 129, 19 South. 519; *Moody v. Railroad Co.*, 99 Ala. 553, 13 South. 233; *Railroad Co. v. Daniel* (Ala.) 25 South. 197. The first and third charges requested were, in effect, an invasion of the province of the jury. These charges ignored, and withdrew from the consideration of the jury, all the evidence in the case but that of the witness Jenkins, and were therefore properly refused. We find no error in the record, and the judgment of the circuit court is affirmed.

(121 Ala. 552)

DUNCAN v. ASHCRAFT.

(Supreme Court of Alabama. April 11, 1899.)

JUDGMENT—RECORDING—LIEN.

Under Act Feb. 23, 1887, as amended February 26, 1889 (Code 1896, §§ 1920-1923), giving a judgment creditor a lien where he files in the probate judge's office a certificate of the clerk of the court in which the judgment was rendered, and requiring the judge to register the certificate in a book for that purpose, which shall show the date of the filing, and the name of the owner of the judgment, such register creates no lien unless the name of such owner is shown therein.

Appeal from circuit court, Tallapoosa county; N. D. Denson, Judge.

Action by C. W. Ashcraft, administrator d. b. n. c. t. a. of the estate of Merritt Street, deceased, against E. P. Duncan. There was a judgment for plaintiff, and defendant appeals. Reversed.

J. C. Street, as executor of the will of Merritt Street, deceased, brought an action of assumpsit against J. B. Foreman. During the pendency of this suit, J. C. Street resigned his executorship, and C. W. Ashcraft was regularly appointed as administrator de bonis non with the will annexed of the estate of Merritt Street, deceased; and the suit was continued in his name, and judgment was recovered against the defendant. Upon this judgment an execution was issued and levied upon a mule, as the property of J. B. Foreman. Upon the levy of this execution, the appellant, E. P. Duncan, interposed a claim to said mule, and the trial of the right of property was instituted as provided by statute. On the trial of this case the plaintiff offered in evidence a certificate of the judgment upon which execution issued, which certificate was as follows: "The State of Alabama, Clay County. No. 1,208. Circuit Court, Fall Term, 1898. I, J. J. Smith, clerk of the circuit court for said county and state, hereby certify that on the 13th day of August, 1895, J. C. Street, as executor of the last will and testament of Merritt Street, dec'd, plaintiff, recovered of J. B. Foreman, defendant, in the circuit court of said county, a judgment, with waiver of exemptions as to personal property, for the sum of sixty-two and $\frac{74}{100}$ dollars, and the further sum of six and $\frac{20}{100}$ dollars costs of suit, and that Knox, Bowle, and Dixon is plaintiff's attorney of record. Given under my hand this 17th day of August, 1898. [Signed] J. J. Smith, Clerk." There was indorsed on this certificate the title of the case, and the certificate of the judge of probate of Clay county that said certificate was filed in his office for record on December 16, 1895, and was recorded in the Book of Records of Liens, Judgments, and Decrees. To the introduction of this certificate in evidence, and evidence of the registration thereof, the claimant objected upon the grounds (1) that said certificate does not show the name of the owner of the judgment; and (2) because it does not comply with the statute, so as to make it a lien. This objection was overruled, and the certificate allowed to be introduced in evidence, and to this ruling the claimant duly excepted. It was shown by the evidence that the execution which was issued on said judgment was levied upon the mule in controversy in Tallapoosa county; that at the time of the levy the mule was in the possession of the claimant, and that the claimant had purchased the mule from the defendant, Foreman, in Clay county, in December, 1896; and that at the time of said purchase by the claimant from the defendant, Foreman, the latter was the owner of the mule, and had possession of him, in

Clay county. Upon the introduction of all the evidence, the court, at the request of the plaintiff, gave the general affirmative charge in his behalf. To the giving of this charge the claimant duly excepted, and also excepted to the court's refusal to give the general affirmative charge requested by him. There were verdict and judgment for the plaintiff. The claimant appeals, and assigns as error the ruling upon the evidence, the giving of the general affirmative charge requested by the plaintiff, and the refusal to give a similar charge requested by the claimant, to each of which rulings exceptions were separately reserved.

Thos. L. Bulger and P. O. Stevens, for appellant. Knox, Bowle & Dixon, for appellee.

DOWDELL, J. The sole question in this case is whether the plaintiff in the court below had a lien under his recorded judgment; and this depends upon the construction given the act of February 28, 1887, as amended February 26, 1889 (Sess. Acts 1888-89, p. 60), and which is incorporated in the Code of 1896 as sections 1920-1923. Section 1 of said act reads as follows: "Be it enacted by the general assembly of Alabama, that the plaintiff or owner of any judgment or decree rendered by any court of record for the payment of money, may file in the office of the judge of probate of any county in this state, a certificate of the clerk or register of the court, by which said judgment or decree was rendered, showing the court which rendered the same, the amount and date thereof, the amount of costs, the names of the parties and the names of the plaintiff's attorney, which certificate shall be registered by the judge of probate of such county, in a book to be kept by him for that purpose, which register shall also show the date of filing and the name of the owner of such judgment or decree, and every judgment or decree so filed and registered shall be a lien upon all the property of the defendant in such county which is subject to levy and sale under execution; and such lien shall continue for ten (10) years from the date of such registration. The registration of such judgment or decree shall be notice to all persons of the existence of such liens." The only difference between the act as above set forth, and as codified in sections 1920 and 1921 of the Code, consists in punctuation. Where in the act after the words, "in a book to be kept by him for that purpose," there is a comma, in Code, § 1920, there is a period. This change is only material in that it supports, as we think, the views hereinafter expressed as to the legislative intent of the materiality and importance of the next succeeding sentence in the section: The "register shall show also the date of the filing and the name of the owner of the judgment or decree." The plaintiff in this case procured a proper certificate from the clerk of the court in which the judgment was rendered, and filed the same in the office of the probate judge of Clay county; and

it was registered by said judge in a book kept by him for that purpose, which register showed the date of the filing, but failed to show the name of the owner of the judgment. While there have been other appeals brought to this court relating to this statute, this is the first time the question raised in this record has been directly presented for consideration and decision.

The following general propositions, and which are well-settled rules of construction, we take as our guide in dealing with the question before us: Those statutes which are in derogation of the common law, and such as create rights in their nature extraordinary, are to be strictly construed. A substantial compliance in every essential particular is required, before the benefits conferred by such statutes can be obtained or enjoyed. An omission of any material or particular requirement contained in the provisions of the statute, in an attempt to secure the benefit or right conferred by the statute, cannot be deemed a substantial compliance. That said act creates an extraordinary right, it seems to us, cannot be doubted. Without the consent of the judgment debtor, a lien is created upon all his property subject to levy and sale under execution within the county in which the judgment is filed and registered; an incumbrance not only upon such property as the judgment debtor may then own and possess, subject to levy and sale, but also of all property subject to levy and sale which may come into his ownership and possession at any time within a period of 10 years within the county of the registry of such judgment; a lien, a right, not created by the contract of the parties, nor by operation of the common law, but purely and simply by statutory enactment, giving to the owner of such judgment a security for the payment of the judgment debt tantamount to a mortgage upon all of the property of the judgment debtor within the county of the registry subject to levy and sale, and leaving it entirely to the pleasure and option of the judgment creditor, or owner of the judgment, to foreclose the same, by the issuance of an execution or by a bill in equity, at any time within a period of 10 years.

In the case of *Enslin v. Wheeler*, 98 Ala. 206, 13 South. 475, it is true that this court does say that this statute is remedial, and should be liberally construed; but in the next sentence following this enunciation the court further says, "We hold that it applies to all judgments in force at the time of its adoption, as well as those subsequently recovered." From this latter sentence, as well as from the facts of that case, it is evident that when the court speaks of the statute as remedial, and to be liberally construed, its attention was only called and directed to the question as to what judgments or decrees come within its provisions, and not as to how they should be brought within its privileges. The statute is remedial only in the fact that it contains a remedy by the issuance of an ex-

ecution for the enforcement of the extraordinary right it creates. In this conclusion we feel warranted and sustained by the later decision of this court in the case of *Sorrell v. Vance*, 102 Ala. 207, 14 South. 738. The construction given by the court to this act in that decision, on page 212, 102 Ala., and page 738, 14 South., is in the line of a strict construction, and not in consonance with the expression in *Enslin v. Wheeler*, supra, where it is said that the statute is remedial, and to be liberally construed. It is held in *Sorrell v. Vance*, supra, that notwithstanding the certificate of the clerk may in all things conform to the requirements of the statute, and be filed in the office of the probate judge of the county,—all, we may say, that the owner of the judgment can do,—still such judgment does not become a lien until it shall have been registered by the probate judge. In order to create a lien, the act provides, among other things, as follows: "Which certificate shall be registered by the judge of probate of such county, in a book to be kept by him for that purpose, which register shall also show the date of filing and the name of the owner of such judgment or decree, and every judgment or decree so filed and registered shall be a lien upon all of the property of the defendant in such county which is subject to levy and sale under execution." (The italics in the above quotation from the statute are ours.) Can it be said that the requirement of the statute that the register shall show the name of the owner of such judgment or decree is unessential? We think not. On the contrary, it is not only essential, but also a reasonable requirement; and that the legislature so intended it is shown by section 3 of said act, which provides that the law relating to the entry of credits and satisfaction of mortgages shall apply to the entry of credits and satisfaction of liens created by this act. It is true that this court decided in *Rice v. Westcott*, 108 Ala. 353, 18 South. 844, that section 3 of said act was unconstitutional, as being offensive to section 2 of article 4 of our constitution, which provides that "each law shall contain but one subject," etc.; but this in no way impairs the reasoning as to how the legislature regarded or intended the provision requiring that such register should show the name of the owner of the judgment when they embodied the same in the act. This section of the act, which was declared unconstitutional in *Rice v. Westcott*, supra, has since been re-enacted by the adoption of the Code, and forms section 1923 thereof. It was evidently the object and purpose of the legislature in incorporating this requirement in the statute that the register, upon inspection, should give information, not only to the judgment debtor, but also to his other creditors, of the ownership of such judgment, in the event any of them should desire to avail themselves of the law as to the entry of satisfaction or credits by the owner of such judgment. Upon the failure of the register

of such judgment to give the name of the owner of the judgment, as required in the statute, it will not do to say that the name of the owner may be supplied by inference from the certificate of the clerk, wherein the names of the parties to the suit are required to be stated. Such an inference is as open to error as to truth. While the statement of the names of the parties in the certificate, as required by the statute, would show the name of the plaintiff, it would by no means follow that he was the owner of the judgment at the time of its record. Both requirements in the creation of the lien are expressly provided for in the statute, and to hold that the subsequent requirement (i. e. that "the register shall also show the name of the owner of the judgment") could be dispensed with by reference to the certificate would be contrary to the common rule of construction of statutes, and to charge the legislature with a work of supererogation in the latter requirement. The very language and phraseology of the statute show that the provision as to what the register should show was additional to the preceding requirements in the statute, as to what the clerk's certificate should contain; for the language is, "which register shall also show the date of the filing and the name of the owner of such judgment or decree." It has already required that the certificate of the clerk should contain a statement of the names of the parties to the suit, which, of course, would show the name of the plaintiff. It is also plain to our mind that the language of the act, wherein it provides that the certificate of the clerk shall be registered in a book kept for that purpose by the probate judge, can be interpreted to mean nothing less than that it shall be recorded in a book kept for that purpose by the probate judge. The record (or register) of the certificate would necessarily show the name of the plaintiff, but the statute says, in plain and unambiguous terms, that "the record [or register] shall also show the name of the owner of such judgment or decree." Suppose the judgment should be transferred and assigned by the plaintiff before any filing and record of the same in the probate office under the statute, and then the certificate should be obtained from the clerk, showing the name of the parties as required by the act, and such certificate, in all other respects conforming to the requirements of the act, should be taken and filed in the office of the probate judge, and the registry thereof should fail to show the name of the assignee or owner; could it for a moment be contended that such a judgment would be a lien? Certainly the plaintiff, who is not the owner, could have no lien. The lien is incident to, or inheres in, the judgment, when the requirements of the statute are complied with. Without the judgment there would be no lien. The ownership of the judgment and of the lien must be the same. The owner of the judgment could have no lien, for the register of the judgment

would fail to show the name of the owner at the time of the attempted creation of the lien. The plaintiff in the judgment could have no lien, because he has no interest in the judgment. In such case an inference drawn from the certificate of the clerk that the plaintiff was the owner of the judgment would be untrue. The statement of this very proposition shows the importance of the requirement of the statute, and it would be unreasonable to say that it was a requirement to be conformed to in cases where judgments have been assigned before record, and to be dispensed with or ignored if there has been no assignment or transfer of the judgment. If, in the absence of a statement in the register of the name of the owner of the judgment, the omission should be supplied by reference to the certificate of the clerk, the ownership of the judgment by the party filing the certificate being essential to the creation of the lien, the result would be that upon the filing and registry of the certificate a lien would be created where there has been no assignment of the judgment, and no lien where there has been an assignment of the judgment. Such a construction of the statute, we think, would be unauthorized and unreasonable. It is an important requirement, and, under the rule of construction of statutes as above laid down, it is essential to the creation of the lien.

In *Reynolds v. Collier*, 103 Ala. 245, 15 South. 603, on page 247, 163 Ala., and page 604, 15 South., this court says, "The register did not show the name of the owner of the judgment, except as would be inferred from the certificate of the clerk." It will be noted, however, that this statement is made by the court in a summarizing of the facts in that case, and was not intended, as we understand the case, as a decision by the court that the name of the owner of the judgment could be inferred from the certificate of the clerk; for on the next page (page 248, 103 Ala., and page 604, 15 South.) it is expressly said by the court, "The only question in the case we need to consider is whether the filing and registration of the certificate of the clerk in the probate court before the claimant purchased the mules was notice to him of the waiver of exemptions as to personal property, as shown in the body of such judgment;" thus making it clear that the court did not intend by the mere statement above quoted to decide that the name of the owner of the judgment could be inferred from the certificate of the clerk, or that such would be a sufficient compliance with the requirement of the statute. In reference to the statute giving liens to mechanics, this court used the following language: "The creation and continuance of the lien given by the statute to mechanics, contractors, employes, and material men, as the parties are designated, depends upon a compliance with the requisitions of the statute. A strict, literal compliance is not exacted, but a compliance with all matters of substance." *Chandler v. Hanna*, 73 Ala. 393. Upon the

statute giving a lien for advances to make a crop, the following language was used by this court: "The statute (Code 1876, § 3236) introduces a new right, and confers a new remedy, of the class called extraordinary. Such statutes are strictly construed, and, to obtain the benefit of their provisions, the case made must meet all the substantial requirements." *Schuessler v. Gains*, 68 Ala. 556. To the effect of giving a strict construction to this same statute, the following authorities are in line: *Dawson v. Higgins*, 50 Ala. 49; *McLester v. Somerville*, 54 Ala. 670; *Tison v. Association*, 57 Ala. 323; *Evans v. English*, 61 Ala. 416. These statutes, to which a strict construction has been applied by this court, are kindred statutes to the one we have under consideration. There is, however, this difference: In the two former the right, the lien, given must rest upon a contract entered into by the parties, while in the latter the judgment creditor can, without assent of the debtor, enlarge his judgment into a security tantamount to a mortgage upon all the property of the judgment debtor subject to levy and sale, and, if the judgment be for a tort, everything the defendant has within the county of the register is covered with the lien. This statute has been recently amended by an act of the legislature approved February 23, 1899, by striking out the clause which we have been considering, as to the register showing the name of the owner of the judgment. This is additional evidence as to how the legislature considered the provision in the statute. If it had been immaterial and unimportant matter in no wise affecting the creation of the lien, it is hardly possible that the legislature would have deemed it necessary to eliminate it by amendment.

Entertaining these views, we think the court erred in giving the affirmative charge asked by plaintiff, and refusing the same charge requested by claimant. The judgment of the circuit court is reversed, and the cause remanded.

(123 Ala. 461)

INMAN et al. v. SCHLOSS.

(Supreme Court of Alabama. April 20, 1899.)

ATTACHMENT—LEVY—CLAIMS OF THIRD PERSONS—PRIORITY—EVIDENCE—QUESTION FOR JURY—ASSIGNMENT FOR CREDITORS—PREFERENCES—VALIDITY—FRAUDULENT CONVEYANCES.

1. Where, on an issue of the priority of an attachment over an assignment for creditors, it appears that the officer making the levy left the goods in possession of the assignee until the following day, claiming that he left them with him as his agent, evidence that the attorney for the assignee, at the time of making the levy, declared it to be invalid, is admissible as part of the *res gestæ*, to show that the retention of the goods by the assignee was not as such agent.

2. Code, § 2158 (1737), providing that a general assignment for the benefit of creditors shall inure to all creditors equally, in spite of preferences therein to particular creditors, does not make a partial assignment by an insolvent

for the benefit of particular creditors, to the exclusion of others, invalid.

3. Code, § 2156 (1735), invalidating conveyances made with intent to hinder, delay, and defraud creditors, does not invalidate an assignment by an insolvent of a portion of his property to pay certain of his creditors, made without reservation, and requiring the assignee to pay any surplus after paying the creditors preferred to the other creditors, even where the assignee and beneficiaries knew of the debtor's insolvency.

4. The officer levying an attachment testified that he was making the levy when an assignment of the goods was spread out, ready to be signed; that he then laid his hands on the counters and goods, stating that he levied on them, after which the deed of assignment was executed and delivered to the assignee, with the key to the store; that he left the goods in possession of the assignee under an agreement by which the latter was to hold them as his agent. Witnesses for the assignee testified that the officer merely said he levied on the goods, and that the assignment about to be executed would be subject thereto, and then left the stock of goods in the store, without any arrangement with the assignee. *Held*, that there was no doubt of priority of levy, and that the question whether the assignment was prior to the levy need not be given to the jury.

Appeal from circuit court, Barbour county; J. M. Carmichael, Judge.

Attachment by Inman, Smith & Co. against J. Oppenheimer. There was a judgment for H. Schloss, claimant, and plaintiffs appeal. Reversed.

The writ was executed by levying upon certain merchandise in a storehouse in Eufaula occupied by the defendant. After the levy, the appellee, H. Schloss, interposed a claim to the property so levied upon, basing his right thereto upon a deed of assignment which had been executed to him by J. Oppenheimer, the defendant in attachment, on December 28, 1896, in which deed, Schloss, the claimant, was made the assignee. Upon the interposition of this claim, the statutory trial of the right of property was instituted. On this trial, it was shown that the assignment was in the usual form, except that it created a preference in favor of certain specified creditors of the assignor, and was only a partial and not a general assignment of his property. There was a conflict in the evidence as to the priority of the levy of the attachment and the execution and delivery of the assignment.

The plaintiffs' testimony tended to show that the attachment was levied on the goods as returned by the sheriff before the execution of the assignment. The officer making the levy testified that he was in the store with the paper when the assignment was spread out and about to be signed; that he stated that any paper then signed would be subject to his levy; that he then laid his hands on the counters and goods and said that he levied on all the goods; that the deed of assignment was executed and delivered to the assignee, together with the key to the store; and that the assignee agreed to hold the goods as agent for the sheriff. The goods were never moved out of their place, and the next day the assignee refused to give them to the sheriff, who at-

tempted to move them when the claim bond was given.

The testimony on the part of the claimant was that, when the parties were preparing to execute the assignment, the officer said, "Whatever paper is signed is subject to a levy under" plaintiffs' attachment; that he then said he levied upon the entire stock of goods in the storehouse, but did not move them, and the assignment was immediately executed by the defendant and claimant, and delivered, along with the key to the store, where the assigned property was, to the assignee.

The testimony further showed that claimant's attorney denied that the officer had made a valid levy prior to the assignment, and the assignee said he would hold the goods for the sheriff provided the levy was valid, and the next day refused to give them up, holding the levy invalid, and did not give a claim bond until the officer insisted upon moving them out. The assignee remained in possession of the entire goods in the store until other attachments were levied upon the property and taken in possession by the sheriff, who, after making an inventory, turned them back to the assignee upon his giving claim bonds. The goods returned as levied on were in boxes and on the shelves, and what they were, was not ascertained, unless the inventory, afterwards taken by the sheriff of the stock, identified them.

Upon the introduction of all the evidence, the plaintiffs requested the court to give to the jury, among other charges, the general affirmative charge in their favor, and separately excepted to the court's refusal to give each of the charges as asked.

There were verdict and judgment for the claimant.

A. H. Merrill, G. L. Comer, and P. B. McKenzie, for appellants. S. H. Dent, Jr., for appellee.

HARALSON, J. 1. One of the questions in the case was, whether or not an alleged levy by the sheriff on the goods in question, under a writ of attachment sued out by appellants against the defendant in attachment, one J. Oppenheimer, was prior and superior to a deed of assignment executed by the defendant at or about the same time of the alleged levy, conveying to the claimant, H. Schloss, as trustee, the same goods for the benefit of specified creditors of said defendant. It is a question of competition for superiority between the attaching creditors, and the assignee in trust of said goods. The plaintiffs in attachment sought to show, from what occurred at the time, that the levy was complete, and that the goods were in the possession of the sheriff, before the said deed of assignment was executed; and the claimant, that said deed of assignment was executed and delivered by the defendant to said trustee, before the alleged levy was made. The two were so nearly coincident, that it became

a question of proof as to which was prior in point of time. The plaintiffs introduced evidence tending to show that the goods, after the alleged levy, were left by the deputy,—who was then asserting his possession and right of possession, by virtue of his levy,—with the assignee, Schloss, until the next day, as the agent of the officer, a fact the claimant denied and introduced evidence tending to disprove. After the examination in chief by plaintiffs of their witness, C. E. Cory, touching what occurred at the time, the claimant, on cross-examination, asked him,—“Did we not deny, on or about the time the levy was made, that said levy was a valid one?” The court allowed this question, against the objection of plaintiffs, that it called for illegal and irrelevant evidence. The answer was, “You, S. H. Dent, Jr., did, but Schloss and Oppenheimer did not.” Dent, as was shown, was then representing Schloss and Oppenheimer as their attorney. There was no error in allowing said question and its answer. It called for a part of the res gestæ of the transaction, competent to be shown for the proper determination of the question of fact at issue. It tended to show, that the trustee made no such agreement as that sought to be proved,—to hold the goods after an alleged levy as the bailee of the officer making it.

2. In the absence of statutory restrictions the right of a debtor to execute a conveyance or assignment for the benefit of creditors, giving preference to one or more of his creditors over others, and which amounts to an absolute exclusion even, of the nonpreferred creditors, is universally recognized. This power, says Mr. Burrill, has always been recognized and approved in the fullest manner, both by the state and federal courts, as well as by most American jurists. And the right extended to general as well as to partial assignments to a trustee for the benefit of the debtor's creditors with preferences, and by insolvents as well as by those who were solvent. Burrill, *Assignm.* §§ 13, 128. It was said by this court in *Trust Co. v. Foster*, 58 Ala. 502, 513, “It is conclusively settled, that a debtor in failing circumstances, or actually insolvent, has the right of preference among his creditors. He may assign his property for the payment or security of one to the exclusion of all others. Prior to the Code, the only limitation on this right of preference was, that the property transferred should be devoted, absolutely and unconditionally, to the payment of the preferred debts, without reservation to the debtor of any personal benefit. The whole or a part of his property could be assigned and appropriated to his creditors in equal or unequal proportions.” *Shealy v. Edwards*, 75 Ala. 418; *Crawford v. Kirksey*, 50 Ala. 590. See other authorities to the same effect, collated in 1 Brick. Dig. p. 128, § 75. The only statutory limitation on this right is, that in cases of general assignments, preferences created

by them are annulled, and they are converted into a security for the equal benefit of all the debtor's creditors. Code, § 2158 (1737). But, as we have also held, this statute was intended to operate upon conveyances or transfers of all the defendant's property for the security of his creditors, as distinguished from conveyances or transfers of parts of it for that purpose. Such partial assignments are not within the operation of the statute, except, when executed, other and successive transfers or conveyances are contemplated and afterwards executed, covering all the debtor's property, in which event, they will be construed as forming a general assignment, upon which the statute will operate. Partial assignments, stand, therefore, untouched by the provisions of the Code on that subject. *Holt v. Bancroft*, 30 Ala. 193; *Stetson v. Miller*, 36 Ala. 642; *Danner v. Brewer*, 69 Ala. 191, 200; *Bell v. Goetter*, 106 Ala. 462, 470, 17 South. 709.

As we have seen, this privilege is not taken from an insolvent, and the mere fact of insolvency of the assignor, and that his failing condition was known to the assignee and beneficiaries under the deed, does not, of itself, make the deed fraudulent under another statute, declaring all conveyances or assignments in writing or otherwise of any estate or interest in real or personal property, made with the intent to hinder, delay or defraud creditors, to be void. Code, § 2156 (1735). But assignments, whether general or partial, are void when made with the intent denounced by this statute, and only then. Although the effect of an assignment is to disappoint, hinder and delay other creditors in resorting to the property conveyed for the satisfaction or security of their debts, it will not, on that account alone, be held to have been executed with the intent to hinder, delay and defraud such creditors. *Young v. Dumas*, 39 Ala. 60; *Marshall v. Croom*, 60 Ala. 121; *Warren v. Jones*, 68 Ala. 449; *Shealy v. Edwards*, 75 Ala. 412; *Truss v. Davidson*, 90 Ala. 359, 7 South. 812; *Ellison v. Moses*, 95 Ala. 221, 11 South. 347.

In the case in hand, the assignor in the deed of partial assignment, parted absolutely with the property assigned, reserved no possible benefit to himself, imposed no burdens on the creditors, and required the assignor to sell or dispose of the property conveyed with all convenient and reasonable diligence, either at public or private sale at the best obtainable prices, and apply the proceeds to the debts of the creditors mentioned, if sufficient therefor, and ratably, if not, and if more than sufficient to pay them, then to pay the balance to all other creditors of the assignor in proportion to the amount of their respective claims. It was also shown, that the debts mentioned in the deed as owing by the assignor were valid and bona fide, and were in amount larger than the value of the goods assigned.

It is settled in this state, that the assent

of creditors will be presumed to a deed of assignment, which appropriates the property conveyed by it, absolutely and unconditionally to the payment of their debts,—the instrument being free from fraud or illegality and containing nothing which can be construed as prejudicial to their rights. *Truss v. Davidson*, 90 Ala. 359, 7 South. 812; 1 Brick. Dig. p. 129, §§ 87, 89; *Halsey v. Connell*, 111 Ala. 221, 20 South. 445.

3. To constitute the levy of an attachment on personal property, as we have repeatedly held, the officer must assume dominion over it. He must not only have a view of the property, but he must assert his title to it by such acts as would render him chargeable as a trespasser, but for the protection of the process. *Abrams v. Johnson*, 65 Ala. 465; *Kennedy v. Railroad Co.*, 93 Ala. 495, 9 South. 608. An inventory of the property seized, for the protection of the officer, to sustain the bona fides of the transaction, and to identify the property in case of doubt or litigation concerning it, is proper but not essential. An actual taking does not imply an actual touching. An assertion by the officer that he levies or takes property by virtue of a writ in his possession, if the property is within his view, and power to assert immediate dominion over it, and if necessary, take it into his custody, will be deemed an actual taking of it. *Herm. Ex'ns*, § 161; *Freem. Ex'ns*, §§ 260, 262, 263; *Murfree, Sher.* § 523. It is not necessary that the property be removed by the officer, but it must, in all cases, be put out of the control of the debtor, and the officer should assume control and keep the same in his charge, or in the charge of some one for him. His possession must not be temporary in its character, but must be continuous as long as the attachment remains in force,—so continuous, that the property cannot be removed or disturbed without his knowledge or that of his bailee in charge, otherwise, it will be regarded as abandoned. *Murfree, Sher.* §§ 261, 642; *Crocker, Sher.* § 369; *Harlow, Sheriffs & C.* § 99; 2 *Freem. Ex'ns*, § 262.

At first view our impression was that an inference might be drawn from the evidence, and that it was, therefore, a question for the jury, that the deed of assignment was delivered to the assignee, Schloss, prior in point of time to the levy on the goods by the sheriff, and that, if the levy had first been made, that the officer, thereafter, abandoned the levy. But, upon a more careful examination we are driven to the conclusion, that that impression, as to both these propositions, was erroneous. The plaintiff's evidence is direct and positive as to these issues, and leaves no doubt as to the priority of the levy, and that there was no abandonment of it. The evidence of claimant's witnesses, when closely scrutinized, though not so positive, does not conflict with the testimony of the plaintiff's witnesses. We do not deem it necessary to go to the length and trouble of an extended discussion of the evidence, but are content with

an announcement of our conclusions. It follows, the general charge as requested by plaintiff and refused should have been given. We may, therefore, pass, as unnecessary, the consideration of other assignments of error.

Reversed and remanded.

(121 Ala. 4)

DUDLEY v. STATE.

(Supreme Court of Alabama. April 13, 1899.)

ASSAULT WITH INTENT TO RAPE — EVIDENCE — QUESTION FOR JURY — CRIMINAL LAW — RIGHT TO RECALL ACCUSED.

1. In a prosecution for assault with intent to commit rape, alleged to have been committed in the nighttime in a room in which prosecutrix was sleeping, to which accused gained access by climbing through a window, evidence that there was no curtain on the window, and that an electric light on the outside shone into it, so as to enable prosecutrix to be seen from the outside, is admissible to show the intent with which accused entered the room.

2. Prosecutrix and another witness in the room at the time having identified accused, such evidence was admissible to show their ability to do so.

3. The court, in its discretion, may permit the state, after accused has testified in his own behalf, to recall him to lay a predicate for his impeachment.

4. Accused entered the room in which prosecutrix was, at night, through a window. When she awoke he was on the pallet on which she slept, and he immediately put his hand over her mouth, and when she pulled it off commenced to choke her. Two other women in the room being awakened, he jumped out of the window, but afterwards returned, caught prosecutrix by reaching through the window, and tried to pull her out. *Held*, that the question whether the assault was with intent to commit a rape was for the jury.

Appeal from city court of Mobile; O. J. Semmes, Judge.

Smith Dudley was convicted of assault with intent to commit rape, and he appeals. Affirmed.

The evidence for the state tended to show that the defendant was guilty of the offense charged. The substance of this evidence is sufficiently stated in the opinion. After the prosecutrix had testified to an electric light being near the house where she was sleeping and shining into the window through which she testified the defendant entered, upon the examination of the witness Minnie Gifner, who had testified that she was in the room at the time of the alleged assault, she was asked the following question: "Is that electric light so situated that it would shine through one of the windows" in the house where the prosecutrix was the night of the alleged assault? The defendant objected to this question, because it called for incompetent, irrelevant and immaterial evidence and asked for the opinion of the witness. The court overruled the objection, the defendant duly excepted, and the witness answered that the light was so situated. The other facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

Upon the introduction of all the evidence, the defendant requested the court to give to the jury the following charge, and separately excepted to the court's refusal to give the same as asked: "The court charges the jury that if they believe the evidence they must find the defendant not guilty of an assault with intent to rape."

Winfield S. Lewis, for appellant. Charles G. Brown, Atty. Gen., for the State.

HARALSON, J. 1. The prosecutrix testified that there was an electric light on the corner, which shone in the window of the house, and that there was no curtain to the window. It was in the nighttime, about midnight, as the evidence tends to show, when defendant raised the window to and entered prosecutrix's room. The object of this evidence was to show that defendant could see the prosecutrix through the window, as she slept on a pallet inside the room, and as tending to show his purpose in entering. It was also an important fact as furnishing opportunity of the prosecutrix and another witness in the room at the time, to identify the defendant as the guilty party, and was admissible for these purposes. This ruling applies to an objection to a similar question propounded to the witness, Minnie Gifner, constituting the next exception reserved by defendant.

2. The defendant testifying for himself stated, that he did not tell Wiley Orr at the store the next morning (after the commission of the alleged offense), "that he heard the screaming the night before, and went to the house and talked to the women; and he never did tell Orr any such thing." This appears to have been drawn out on cross-examination by the state, as a predicate for contradicting him by Orr. The state introduced Orr, who testified that he saw defendant several mornings afterwards, but not the next morning after the occurrence. The solicitor then proposed to ask him, what defendant told him about hearing the screaming, and his having gone over and talked to the women, but defendant objected because a predicate for contradicting him had not been properly laid. The solicitor then asked permission to recall defendant to lay the predicate, and defendant objected to being put up by the state, on the ground, that the state had no legal right to put defendant on the stand. The court overruled the objection, and in this there was no error. *Thomas v. State*, 100 Ala. 53, 14 South. 621; *Thompson v. State*, 100 Ala. 70, 14 South. 878.

3. The prosecutrix testified, that on 23d of last April, a man (whom she afterwards identified as defendant) came in her room; that there was a large dry-goods box in the yard and he rolled that up to the window and got up on it and came in and got on the pallet by her and aroused her by striking her foot, when she pushed him; that he was down at her feet and came up towards her head, when she called her sister who was in the room; that

he put his hand over her mouth and she pulled it off, and he commenced choking her, and she called to her sister again; that her sister got up and struck him, when, to use her language, "he got up then from over me and knocked her down, and about that time the lady friend [shown to have been Miss Gifner who was on the pallet with her] waked and says, 'Estelle, what is the matter?' and I said, 'There is a great big man in the room choking me to death;' and she got up and said, 'Estelle, take the hatchet and split his brains out;' and he jumped out of the window, and tried to get back in the window three times afterwards, and threw bricks, oyster shells and tin cans in the window, and the third time (when) we were hollering murder, and help, he threw the window up and took me by the back of the neck and tried to pull me out, and my sister got him loose; she knocked him loose and we hollered for some time and finally he went away." Prosecutrix's sister was not present at the trial and was not examined. Miss Gifner was examined, and testified to facts substantially corroborating prosecutrix. Both of them identified the defendant as the party who entered the room.

The defendant introduced evidence tending to show he was not the guilty agent.

He requested the court to charge the jury that if they believed the evidence, they could not find him guilty of an assault with intent to rape. This charge was asked, as is argued by defendant's counsel as proper, on the theory, that the evidence is wholly lacking to show that the defendant is guilty of the felonious assault charged. The proposition asserted by counsel, within which he insists the case falls, is, that a mere assault, or an assault and battery by a man on a woman is not sufficient evidence to be submitted to the jury, upon a charge of an assault to ravish; that there must be some evidence to show an intent to ravish, and that there must not only be violence used, but that there must be also something to show an intent to have sexual intercourse with the woman. To sustain the contention stated substantially in his own language, counsel cites several authorities, among them our own cases of *Toulet v. State*, 100 Ala. 72, 14 South. 403, and *Jones v. State*, 90 Ala. 628, 8 South. 383. These cases were properly decided on the facts they involved. In *Jones' Case*, the criminal purpose of the defendant was disclosed by him, but he used no violence on the prosecutrix. The court said as to the well-established rule of the decisions in such cases: "If the evidence raises a mere suspicion, or, admitting all it tends to prove, defendant's guilt is left in uncertainty, or dependent upon conjecture or probabilities, the court should instruct the jury to acquit. The evidence should be of such character as to overcome, *prima facie*, the presumption of in-

nocence. It appears that the defendant put his hands lightly on the woman's shoulders, followed her silently about sixty feet, making no threats, or effort to stop her, or attempting any coercion, or doing anything calculated to put her in terror; and when she screamed and ran off, he ran in the opposite direction, without attempting to detain her. These acts and conduct do not reasonably authorize the conclusion, that defendant intended to accomplish his purpose against her will, and by force, if necessary." The court held, that the general affirmative charge, restricted to the acquittal of defendant of the specific felony charged should have been given. It is most manifest, however, that if violence had been used, which reasonably authorized the conclusion that defendant intended to accomplish his purpose against the will of the woman, the ruling would have been different.

Toulet's Case is to the same general effect. After reviewing the authorities, the court added, applying the principle deduced to the case before it: "In the case we have in hand the accused employed persuasion to induce the little girl to do an immodest and improper act, while there was no testimony of violence, force or threats, used or made by him. If there was any intention on his part to cohabit with her, it is left to inference, as his acts, though indecent and improper, did not clearly and unmistakably indicate such purpose. Neither by word nor act of his is it shown that such was his desire,—his purpose to accomplish it at all events, regardless of opposition from her. We hold there was no evidence of an intent to ravish, which justified the submission of its sufficiency to the jury. The general charge asked by defendant ought to have been given."

Again, it is made clear from this decision, that if there had been violence, force or threats used by defendant, to clearly indicate his purpose to ravish the child, the conclusion announced could not have been reached. We know of no rule of law by which, when violence is used on the person of the prosecutrix by defendant, and an inference of his guilty intent as specifically charged may be inferred from his acts and conduct, the case may be taken from the jury in the giving the general charge in his favor. *Sims v. State*, 99 Ala. 161, 13 South. 498; *Lucas v. State*, 96 Ala. 51, 11 South. 216.

4. In the case before us, the purpose of the defendant, as indicated from the evidence, was accompanied by force of a violent character, and by threats, such as unmistakably indicate that he intended to accomplish his purpose, at all events, regardless of opposition by the prosecutrix, which might have been carried into effect, if the presence and assistance of others present had not deterred him. The general charge for defendant was properly refused.

Affirmed.

(121 Ala. 9)

BROWN v. STATE.

(Supreme Court of Alabama. April 13, 1899.)

ASSAULT WITH INTENT TO RAPE—EVIDENCE—CRIMINAL LAW—ARGUMENT OF SOLICITOR—REASONABLE DOUBT—INSTRUCTIONS.

1. The question whether an assault was with intent to ravish is for the jury, where accused came up from behind, and, when prosecutrix stepped aside to let him pass, threw her down, and said she would never get up alive, and, after choking and beating her, dragged her into bushes, and threw her into a gully, saying he intended to cut her throat, and then ran away, as he saw dogs, who were with prosecutrix at the time, coming towards them.

2. Such circumstances justified an argument of the state's solicitor that accused was a foul-hearted fiend and demon, and that the jury should convict him, to protect innocent little girls from black fiends and demons like him.

3. A conviction is warranted though the evidence is susceptible of being interpreted that another committed the crime, where such interpretation is not of sufficient force to raise a reasonable doubt of accused's guilt.

4. A doubt of the identity of accused and the perpetrator of the crime requires an acquittal only where it is a reasonable doubt.

5. The refusal of a charge that the jury must not be actuated by its passions and prejudices, no matter how much the state's solicitor may appeal to them, is not prejudicial, where the solicitor has not been guilty of any misconduct.

Appeal from city court of Mobile; O. J. Semmes, Judge.

Genle Brown was convicted of an offense, and he appeals. **Affirmed.**

On the trial of the case, Ora Savelle testified that while she was staying with her uncle, near Spring Hill, in Mobile county, Ala., and one evening when she was coming from the springs, and a short distance from her uncle's house, at a point which could not be seen from the house by reason of intervening bushes, she heard some one behind her, and stepped out of the way to let him pass, and that, just as she did, the defendant grabbed her and threw her down, and said that she would never get home alive; that he continued to choke and beat her, and then dragged her about 45 feet, and threw her into a gully, and told her that he was going to cut her throat; that there were three dogs belonging to her aunt that had gone to the spring with her, and were running about in the bushes near where the defendant had assaulted her, and that, upon their coming up, the defendant ran away. The witness further testified that the defendant did not scratch or hurt her in any way, except that when he threw her in the briars her wrist got scratched, and her face was swollen that night. This witness described how defendant was dressed at the time of the assault, and stated positively that the defendant was the man who had assaulted her. Upon being asked if another man was not brought before her for identification, she stated that he was, and, in answer to questions, further testified that, when the other man was brought before her for identification, she stated at the time that he looked like the man who assaulted her, but that she was positive that the de-

fendant was the man. Other witnesses introduced for the state testified that one Primus Hunter was arrested and carried before the said Ora Savelle for identification, and that she stated at the time that Primus Hunter looked like the man. This witness testified, against the objection and exception of the defendant, that there was a resemblance between the defendant and Primus Hunter. The evidence for the defendant tended to show that he was not at the place of the alleged assault on the day the assault was made. During the closing argument of the solicitor, the defendant objected to certain statements made therein. These statements are copied in the opinion. The solicitor stated that he withdrew such statements, but the defendant insisted upon the court ruling upon his motion to have said statements withdrawn from the jury; and thereupon, after the court had stated that he did not hear the remarks alleged to have been made by the solicitor, because he was looking over some charges requested by the defendant, the court further stated: "If the solicitor used the words, I will rule them out; but if he did not, I won't." The defendant excepted to this ruling of the court. Upon the introduction of all the evidence, the defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "The court charges the jury that, if they believe the evidence, they must acquit the defendant." (2) "The court charges the jury that, if they believe the evidence, they must acquit the defendant of the charge of assault with intent to rape." (3) "The court charges the jury that, if the evidence is susceptible of the interpretation that Primus Hunter, and not the defendant, assaulted Ora Savelle, they must acquit the defendant." (4) "The court charges the jury that, if the evidence raises a doubt as to the identity of the defendant being the man who assaulted Ora Savelle, then they must acquit the defendant." (5) "The court charges the jury that, no matter how much the solicitor may appeal to you, you must not be actuated by your passions and prejudices in making up your verdict."

Samuel B. Browne and L. H. & E. W. Faith, for appellant. Charles G. Brown, Atty. Gen., for the State.

TYSON, J. It cannot be seriously controverted that the evidence to sustain a conviction for an assault upon a girl, with an intent forcibly to ravish her, must establish the intent of the defendant to ravish beyond a reasonable doubt. That such an intent existed in the mind of a defendant at the time of an assault with force must, oftentimes, be gathered solely from his conduct, acts of violence perpetrated upon the female, the age of the female, previous relations existing between them, if any existed, time and place of the assault, and other circumstances attendant upon the occurrence. It is seldom that a case can be found where the court can, as a matter of law,

determine from the evidence that the intent to ravish did or did not exist. Where the intent rests in inference to be deduced from the facts proven, its existence or nonexistence must be submitted to the jury for their determination. The case of *Dudley v. State* (Ala.) 25 South. 742, is conclusive of the correctness of the rulings of the trial court in this case in its refusal to grant defendant's motion to exclude the testimony introduced by the state and to give charges 1 and 2 requested by the defendant.

In his closing argument to the jury the solicitor characterized the defendant as a "fiend and a demon having a foul heart," and appealed to the jury to convict the defendant "in order to protect innocent little girls from such black fiends and demons as the defendant." The clauses in quotations were objected to by defendant's counsel, and the court was requested to exclude them from the jury. Premitting all inquiry into the sufficiency of the attempt of the trial judge to exclude the remarks of the solicitor from the jury, we are of the opinion that the remarks were not unwarranted by the evidence in the case. The evidence disclosed acts of brutality indicative of a depravity attributable only to human beings of a fiendish nature or demoniacal disposition. So long as counsel confine themselves to the evidence in the case, and reasonable inferences deducible therefrom, they cannot and should not be controlled by the court as to the language employed by them, if decorous or not offensive to the court trying the cause. As said by Justice Stone in *Cross v. State*, 68 Ala. 483: "While the presiding judge should not permit wanton abuse of adversary or witness, he would occupy questionable ground if he arrested counsel in his attempt to educe inferential facts or intents from testimony in proof. Argument is but an aid to the jury, to enable that body to arrive at correct conclusions; and it would be dangerous to accord to him the right and power to intervene and declare authoritatively when an inference of counsel is or is not legitimately drawn. This is for the jury to determine, if there be any testimony on which to base it."

Charge No. 3, requested by the defendant, clearly invaded the province of the jury, and required the jury to acquit, notwithstanding the evidence convinced them of his guilt beyond a reasonable doubt. The jury may have thought the evidence susceptible of the interpretation that Hunter, and not the defendant, assaulted the girl, and yet thought such interpretation was not of such probative force as to raise a reasonable doubt of the guilt of the defendant.

Charge 4 required the jury to acquit the defendant upon a doubt of his identity, and was bad. It is a reasonable doubt which entitles a defendant in a criminal case to an acquittal.

Charge 5 was an argument evidently in answer to the closing remarks of the solicitor. We find no error in the record, and the judgment must be affirmed.

(121 Ala. 373)

ELYTON CO. v. HOOD.

(Supreme Court of Alabama. April 18, 1899.)

PRINCIPAL AND SURETY — EXTENSION OF TIME — DISCHARGE OF SURETY—NOTES—DE-LIVERY—EVIDENCE.

1. A vendee of lots, who had given his notes for the price, assigned the bond for title to one whose promise to pay the notes was accepted by the vendor; the original vendee becoming surety for the subvendee. After maturity of the first note, and before maturity of the others, the subvendee, without the knowledge of the original vendee, made two new notes for the amounts of the original notes, with interest. One of the new notes was payable before maturity of the last original note, and the other, which exceeded the principal of all the original notes, was payable in installments; the first installment falling due after maturity of the last original note. Held to extend time of payment of the original notes so as to release the original vendee.

2. A transferee of a bond for title, who had assumed payment of the original purchase-money notes, received a deed from the vendor, to whom he gave a mortgage; the parties contemporaneously executing a written agreement extending time of payment, which agreement expressly preserved the rights of the original vendee as surety for the transferee of the bond. Each of these instruments referred to notes as having been executed by the latter, which notes were dated several months before the instruments. One was payable six months from its date, and the other in semiannual installments, at intervals of six months from the date of the note. Held to show that the notes were delivered on the day they bore date, and not when the subsequent agreement was executed.

3. Where a creditor, without knowledge of the surety, accepts the principal's note, due after maturity of the debt, thereby releasing the surety, the latter is not affected by a subsequent express agreement, not consented to by him, extending time of payment, and preserving the surety's rights.

Appeal from city court of Birmingham; W. W. Wilkerson, Judge.

Action by the Elyton Company, as assignee of the Elyton Land Company, against William Hood. From a judgment for defendant, plaintiff appeals. Affirmed.

This suit counted upon a promissory note which was given by the defendant to the Elyton Land Company on November 30, 1886, and payable four years after date. The consideration of said note, as expressed on its face, was part payment of the purchase money for certain lots in the city of Birmingham. The defendant pleaded the general issue and the following special pleas: The fourth plea set out the facts as to the purchase, bond for title, transfer and the terms of the transfer of the bond for title, and that on the 12th day of October, 1888, the Elyton Land Company, without the knowledge or consent of defendant, and for valuable consideration, granted an extension of time to Abernathy, and took two notes, each dated October 12, 1888, one for \$218.14, the other for \$3,000 (describing the notes), and did extend the time for the payment of the purchase money, etc. By the fifth plea, defendant pleaded that on March 4, 1889, without the knowledge or consent of Hood, a new and independent contract had

been made between plaintiff and J. C. Abernathy, materially altering the contract theretofore existing, by executing a deed, and thus vesting in Abernathy the legal title, and taking a mortgage. By the sixth plea, defendant set up that on March 4, 1889, while he (Hood) was entitled to the security afforded by the bond for title, and the terms of the assignment, without his knowledge or consent the contract was materially altered, by an extension of time, executing a deed, and vesting the legal title, and taking a mortgage with power of sale, and a right in the Elyton Land Company to become purchaser at its own sale in case of default in payment of either of the notes or of the semiannual interest. The seventh and eighth pleas were demurred to. The demurrer was sustained, and hence no question arises on the record as to them. To the fourth, fifth, and sixth pleas the plaintiff filed a replication, in which it averred that the Elyton Land Company executed a deed to J. C. Abernathy for the land described in the note sued on, and said Abernathy contemporaneously executed notes and mortgages to secure the same on the same land, but that the only agreement made and entered into by the Elyton Company and said Abernathy in respect to the matter alleged in said pleas was the following: "Whereas, the Elyton Land Company heretofore, to wit, on the 30th day of November, 1886, sold to W. Hood, hereinafter called 'original vendee,' the following real estate in Jefferson county, Alabama, known and designated in the plan of the property of said Elyton Land Company, as now surveyed and laid off, as lots No. 9, 10, 11, and 12 in block No. 259, and executed and delivered to said original vendee a bond with condition to make title when the purchase money was paid, and said original vendee executed and delivered to the Elyton Land Company four notes, each for the sum of seven hundred dollars, due November 30th, 1887, 1888, 1889, and 1890, at its office, respectively, with interest from date for part of the purchase money of said real estate, which notes still remain unpaid; and whereas, said bond for title was transferred and assigned to J. C. Abernathy, hereinafter called 'subvendee,' who agreed with his assignor to pay said original promissory notes given to the Elyton Land Company for purchase money as aforesaid; and whereas, said subvendee has applied to the Elyton Land Company for an extension of time in which to pay said purchase money, and, as a condition of granting the same, has executed his own note to the Elyton Land Company for the balance unpaid of said original purchase money, and to secure the same note has executed to the Elyton Land Company a mortgage of said real estate, said bond for title having been surrendered for a conveyance made contemporaneously with the execution of said mortgage: Now, therefore, this agreement witnesseth that, on the payment in full by the said subvendee of said promissory notes given by him to the Elyton Land Company, the Elyton Land Company will

cancel and surrender to him said original notes given by said original vendee for said original purchase money. But, until the payment in full by said subvendee of the notes given by him to the Elyton Land Company, the said notes of original vendee remain in full force, and are not paid or discharged, except to the extent of the cash paid by said subvendee to the Elyton Land Company on account of said purchase money; said original vendee being entitled, at his option, to the extension granted as aforesaid to said subvendee. In witness whereof, the Elyton Land Company and the said subvendee have signed this agreement, in duplicate, this the 4th day of March, 1889." This agreement was signed by Abernathy and the Elyton Land Company, by its president; and in this replication the plaintiff further averred that said agreement was executed on March 4, 1889, contemporaneously with the execution of the deed of the Elyton Land Company to Abernathy, and that, therefore, said agreement, and the subsequent transaction between the Elyton Land Company and Abernathy, did not operate to release the defendant from his liability to the plaintiff. To this replication demurrers were interposed and overruled. The defendant filed several rejoinders. To all of the rejoinders, except the fifth, the court sustained plaintiff's demurrers. The fifth rejoinder set up that the plaintiff was estopped to rely on the agreement set out in the replication, and recited that the defendant had made inquiry of the Elyton Land Company, with Abernathy, satisfactorily settling the matter, and said nothing about the agreement set forth in the replication; thereby leaving the defendant to believe that he was released from liability, and induced to take no steps to protect himself.

On the trial the following facts were shown: The consideration of the note sued on was that William Hood bargained with the Elyton Land Company for the purchase of certain lots of ground in Birmingham for the price of \$3,500, \$700 of which was paid in cash; and four notes, each for \$700, due one, two, three, and four years after date, were given by Hood. At the same time the Elyton Land Company executed its bond for title, in the penal sum of \$7,000, in usual form, and conditioned to make title to said Hood, his heirs or assigns, upon the payment of said notes. On the 2d day of March, 1887, Hood transferred the bond for title to J. C. Abernathy, who assumed the payment of the notes to the Elyton Land Company; and Hood, by written transfer on the back of the bond, in which it was recited that Abernathy assumed the payments of these notes, directed the Elyton Land Company to execute a deed to Abernathy "when the said Abernathy shall pay or cause to be paid to said Elyton Land Company all the purchase money, with accrued interest thereon, due the said company." After this transfer, and during the latter part of the year 1887, about the time the first maturing note fell due, Hood, who had other dealings of similar kind with

the Elyton Land Company, was in the office of that company, settling for other lots purchased by him, when he was called on for the payment of the note then due, given for the lots which he had sold to Abernathy. He informed them that he had transferred the bond for title to Abernathy, and that he (Abernathy) was to pay the notes, and that he would see him about it. He did see Abernathy, who agreed to arrange the matter, and Hood told the Elyton Land Company of this promise of Abernathy. Some months afterwards he was again at the office of the Elyton Land Company, settling for matters owed by him (Hood), and asked whether Abernathy had settled the matter, and he was told that he had "arranged it satisfactorily." Hood was informed by Abernathy and by the public record that the Elyton Land Company had made him (Abernathy) a deed, and taken from him a mortgage. Hood was not approached again relative to the matter until the latter part of 1896, just before this suit was brought,—some nine years from the maturity of the first note, and six years, lacking a day or two, from the maturity of the last maturing note. The proof further shows that on October 12, 1888, the Elyton Land Company took from Abernathy two notes for this debt,—one for \$218.14, due April 12, 1889, and one for \$3,000,—payable in installments of \$150 and \$800 each, and payable on the 12th days of April and October of each year, until October 12, 1896, when the last installment, of \$300, fell due. This note was accompanied by interest coupons for interest payable each six months. On the 4th of March, 1889, nearly five months after taking the notes, the Elyton Land Company executed to Abernathy a deed of conveyance, vesting him with the legal title to the lots described in the bond for title, and simultaneously took from him a mortgage on the lots to secure the notes made by Abernathy, dated October 12, 1888. Both of these papers (the deed and mortgage) were filed for record and recorded March 14, 1889. The deed made by the Elyton Land Company to Abernathy recited, as the consideration thereof, the fact of the sale to Hood, the transfer by him to Abernathy of the title bond, and that J. C. Abernathy had executed to the Elyton Land Company "two notes, dated October 12th, 1888," amounting to \$3,218.14. The mortgage recited the same facts as to the sale to Hood, the transfer of the bond for title, the execution by Abernathy of two notes, dated October 12, 1888,—one for \$218.14, and the other for \$3,000. This mortgage, among other provisions, secured reasonable attorney's fees, and provided that it might be foreclosed upon failure to pay any installment of principal or interest semiannually, that sale might be made on 30 days' notice, and that the Elyton Land Company might make the sale, and might become purchaser at such sale. All of these transaction with Abernathy, the taking the notes of October 12, 1888, the making of the deed, and taking the mortgage of March 4, 1889, were wholly with-

out the knowledge or consent of Hood. It was further shown by the evidence that on March 4, 1889, contemporaneously with the execution of the deed, the agreement which was made by and between the Elyton Land Company and Abernathy, which is set out in the replication, was entered into, but that said agreement was not recorded, and that the defendant did not know of it until the institution of the suit. The cause was tried by the court without the intervention of a jury, and upon the hearing of all the evidence the court rendered judgment for the defendant, to the rendition of which judgment the plaintiff duly excepted. The plaintiff appeals, and assigns as error the rulings upon the evidence to which exceptions were reserved, and the rendition of judgment for the defendant.

Alex. T. London and John London, for appellant. George A. Evans, for appellee.

TYSON, J. It is conceded by counsel for appellant that the defendant was a surety for Abernathy after the acceptance by the plaintiff of his promise to pay the four promissory notes held by it, executed by the defendant, aggregating the sum of \$2,800, each for \$700, dated November 30, 1886, and due, respectively, one, two, three, and four years after date, with interest, for the purchase of certain lots sold by plaintiff to defendant. The mortgage executed by Abernathy, and the deed from plaintiff to him, and the agreement executed by plaintiff and Abernathy extending the time of payment of the debt assumed by him, with defendant, of date March 4, 1889, are practically the same, in substance and legal effect, as those construed by this court in *Hodges v. Land Co.*, 109 Ala. 617, 20 South. 23. The distinctive difference between the facts of that case and this one grows out of the fact that the notes executed by Abernathy to the plaintiff for the indebtedness assumed by him purport on their face to have been executed nearly five months prior (to wit, October 12, 1888) to the agreement between the plaintiff and Abernathy providing for the extension of time to Abernathy, and the preservation of the rights of the defendant as surety. If the fact is established by the evidence that the plaintiff accepted the notes of date October 12, 1888, on that day, without the consent of the defendant, this was an alteration of the terms of the defendant's contract as surety, and discharges him from all liability. And this is true notwithstanding there may have been no agreement between plaintiff and Abernathy, other than the implied one which arises out of the making of the notes by Abernathy payable to the plaintiff at a different time fixed in defendant's notes assumed by Abernathy. The contention of appellant's counsel is that as the only evidence offered in the cause in support of the averment of the plea that on the 12th day of October, 1888, the plaintiff, for a valuable consideration, agreed with Abernathy to extend the time within which to pay the notes of the defendant assumed by

him, and did on that date accept the two notes (describing them), was the notes by Abernathy to plaintiff, dated October 12, 1888, for \$218.14, payable April 12, 1889, and one for \$3,000, of the same date, and payable in 12 installments, every six months, beginning April 12, 1891, and running to October 12, 1896, coupons for the semiannual interest due upon the note, and the bond for title from plaintiff to defendant, and the assignment, this was not sufficient to establish the fact of an agreement to extend the time in which the notes executed by the defendant were to be paid. The whole theory of this insistence is based upon the fact that the \$218.14 note due April 12, 1889, and a portion of the installments, as provided in the \$3,000 note, did not extend beyond the day fixed in the note of the defendant (the foundation of this suit) for its maturity. The fallacy of this theory can be shown by a resort to the evidence, independent of its unsoundness as a matter of law. On the 12th day of October, 1888, Abernathy, the principal, owed to the plaintiff three notes, of \$700 each, with interest from November 30, 1886, due, respectively, November 30, 1888, November 30, 1889, and November 30, 1890, and a past-due note of \$700, with interest, due November 30, 1887, for the payment of all of which the defendant was his surety. The notes given by him not only extended the indebtedness evidenced by the past-due note, but extended the entire principal of the debt, beyond the maturity of the last note of the defendant, to wit, April 12, 1891. So we have not only a change in the terms of the defendant's contract as to the date of payment, but we have an extension of the time to Abernathy, beyond the date of the maturity as to the principal of the debt, of all the notes. We have no doubt this was sufficient, if the notes were delivered by Abernathy to plaintiff, to prove the allegations of the fourth plea. The taking of them by the plaintiff suspended the right of action on the debt until their maturity, although there may have been no express agreement to that effect; and the defendant, as surety on the original debt, was thereby released, unless he consented to the arrangement. *Insurance Co. v. Randall*, 71 Ala. 220; *Railway Co. v. Brewer*, 76 Ala. 135; *Haden v. Brown*, 18 Ala. 641; 2 Brandt, Sur. §§ 343, 360. As said in *Insurance Co. v. Randall*, supra: "When a note or bill is thus taken in consideration of a pre-existing debt, there may be no express agreement that indulgence shall be given on the original debt until the maturity of the note or bill, nor an express agreement that indulgence or forbearance is the consideration. The parties must be presumed to intend the legal consequences of their acts, and, as the legal consequences are the tying up the hands of the creditor during the period,—the right of action on the original debt is suspended, securing indulgence to the debtor for that period,—the transaction has the legal effect it would have, if, in express terms, it had been stipulated such effect would result. The creditor suffers

the detriment, the debtor obtains the benefit, which would be suffered or derived, if, in words, the legal consequences of the transaction had been expressed as matter of agreement."

Were the notes of Abernathy delivered to the plaintiff on the day of their date? The presumption is that they were, and their date, as shown by the face of the notes, is prima facie evidence of the true date of their making and delivery. *Aldridge v. Bank*, 17 Ala. 45; *Burns v. Moore*, 76 Ala. 339.

The introduction of these notes in connection with the bond for title, and assignment thereof by defendant to Abernathy, proved the facts alleged in his fourth plea, and shifted the burden of proof upon the plaintiff to prove the facts alleged in his special replication thereto. In this replication it is alleged that the notes of Abernathy of date October 12, 1888, were executed contemporaneously with the agreement of March 4, 1889, preserving the rights of the defendant as surety. The only evidence relied upon in support of this replication (it not being disputed that the defendant knew nothing of the execution of the notes) is the recitals found in this agreement, the mortgage of Abernathy to secure his notes, and the deed from plaintiff to him to the land. There is nothing in either of these instruments which tends in the remotest degree to contradict the date of the notes as it appears on them. On the contrary, in each of them, wherever reference is made to the notes, the words "has executed" are invariably used; and, we may add, the conclusion is inevitable, from the evidence, that the agreement was an afterthought, and not in the contemplation of the parties on the day the notes were executed. Besides, the dates fixed for the maturity of the installments, being, respectively, April 12th and October 12th, are, to our minds, conclusive of their delivery on the date they bore date. The defendant was discharged from liability when the agreement of March 4th was made, and therefore he cannot possibly be affected by any of its terms.

What we have said renders it unnecessary to review the rulings of the court upon the pleadings. The judgment of the court must be affirmed. Affirmed.

(121 Ala. 272)

ANDERSON et al. v. ENGLISH et al.

(Supreme Court of Alabama. April 19, 1899.)

SALES—EVIDENCE—BURDEN OF PROOF—INSTRUCTIONS—NEW TRIAL.

1. In an action for goods sold and delivered, a memorandum containing a true copy of the original entries in plaintiff's books, made at the time of delivery, and showing the quantity of goods delivered, may be used by a witness in refreshing his recollection as to the quantity of goods sold, where it appears that he was present when such original entry was made, and personally knew it to be correct.

2. A refusal to grant a new trial on the ground that the verdict is contrary to the evidence will not be reversed on appeal where

there is no preponderance of testimony on either side.

3. An instruction that, "In order to establish a change in the contract between the parties after it was made, the burden is upon the party asserting such change to have been made," is proper.

4. An instruction erroneously imposing upon defendant the burden of proof as to a part of plaintiff's case, is not ground for a new trial, where such instruction postulates all the facts necessary to plaintiff's recovery, which, if found to be true, leaves nothing to be ascertained by the jury under the rule announced as to the burden of proof.

5. Error in refusing a proper instruction to the jury at the request of the losing party is without prejudice where the purpose of the instruction is effected by a correction of the judgment.

6. In an action for goods sold and delivered under an express contract, an instruction, asked by defendant, that, if the jury find that the minds of the parties did not meet on the principal parts of the alleged agreement, there was no contract, and they must find that there was no express contract between the parties, was properly refused as excluding the idea of an implied contract.

Appeal from city court of Birmingham; W. W. Wilkerson, Judge.

Action by English & Webb against George L. Anderson, and another. There was judgment for plaintiffs, and defendants appeal. Affirmed.

This was an action to recover the value of certain lumber sold to the defendants, and also to establish and fix a lien on the building into which the lumber went. The defendants admitted the purchase of certain lumber from the plaintiffs, and tendered the amount due therefrom, and kept the tender good, and as to the balance they pleaded the general issue. There was a dispute between the parties, not only as to the quantity of lumber delivered, but as to the terms of the oral contract under which it was delivered. English, one of the plaintiffs below, testified, in substance, that he bought two old houses from the Elyton Land Company, 18x36 feet, and two stories high, which he was to tear down, and remove from the premises; that he entered into an agreement with Webb, by which he was to superintend the tearing down of the houses for a share of the proceeds; that Webb made a contract with the defendant below to build a fence around a lot 100 feet square out of some of the lumber in these buildings; that, after this contract was made, witness saw Anderson, who stated that he would want 2,500 feet more of lumber, which witness agreed to furnish him at \$6 a thousand; that he delivered the 2,500 feet, and afterwards Anderson said he would want more lumber; that with the first load of additional lumber thus sent, a memorandum, or receipt, showing the quantity of the lumber on the load, to be signed by the defendant Anderson, was also sent; that Anderson's agent refused to sign the receipt, and Anderson, when sent for, also refused to sign it, stating that he could not afford to stop work to measure up loads of lumber of odd sizes and dimensions, and the wit-

ness states that thereupon the following agreement was made: "That they could just go ahead, and send over all the lumber they had, and that he would use what he wanted, paying them therefor at the rate of \$6 per thousand, and what was left over he would return to them." To show what quantity of lumber had been delivered, the witness was asked: If he had any memorandum showing the amount of lumber that had been furnished by plaintiffs to the defendant, to which he answered, "Yes." The witness English was handed a paper, or rather several leaves from a book containing an account of lumber claimed to have been delivered to defendants, from which he began to testify, using the same as a memorandum. Defendants objected to witness using the paper as a memorandum, and asked to be allowed to interrogate the witness as to how the said account was made, which was allowed. In answer to questions by defendants' attorney, witness stated that the original entries were made at the time the hauling was being done, which hauling was supervised by himself and Webb; that he did not make all the entries; that he made some and Webb made some; that they were together when those made by Webb were made by him. In response to a question by the court, the witness stated that he saw Webb make the entries made by him, and knew them to be correct at the time. Witness further stated that the paper held by him was not the original entries, but a copy thereof, made by himself. The court thereupon overruled defendants' objection, and defendants excepted. Witness stated that the account, as shown by the memorandum, was correct, and that they had delivered to the defendants, 14,748 feet of lumber; that no account of the lumber has ever been given to the defendants, but he had called on the defendant Anderson, and demanded pay for the whole amount at \$6 per thousand; and that, when the said demand was made, Anderson insisted that they should go up and measure the house, and see how much of the plaintiffs' lumber was used therein, but witness declined to make such measurements, or rely thereon. Plaintiffs offered in evidence a claim of lien for \$88.48 on the foundry building of the G. L. Anderson Company, Limited, to which was attached a paper purporting to be a statement of the lumber furnished, which said claim was filed in the office of the judge of probate on the 13th of August, 1896. Plaintiffs also offered in evidence a notice to G. L. Anderson Company, Limited, of the filing of said lien. For the defendants, G. L. Anderson testified that after he had made the contract for the building of the fence around the lot upon which the house in question was built he made another contract with the plaintiffs, in which it was agreed that the G. L. Anderson Company, Limited, was to take enough of the old lumber which the plaintiffs had to inclose the front of the building, and that he would pay for such lumber at the rate of \$6 per month;

that when the first load of lumber was sent to him he refused to sign a receipt or memorandum which was sent to him, and thereupon the following agreement was made between him and the plaintiffs: That they (the plaintiffs) "would send over to the lot upon which he was building the lumber they deemed necessary, and after the work was completed they would measure it up, and he (the defendant) would pay them for it at the rate of \$6 per thousand for all that he had used"; and it was further agreed "that, if there was any lumber in the yard belonging to plaintiffs which was unused after completing plaintiffs' building, they could hold it off or sell it therefrom." The other testimony for the defendants given by G. L. Anderson and the other witnesses introduced by him was to the effect that there were not exceeding 7,000 feet of the lumber purchased from plaintiffs used by him in the erection of said building. Upon the introduction of all the evidence, the court, at the request of the plaintiffs, gave to the jury the following written charges: (1) "In order to establish a change in the contract between the parties after it was made, the burden of proof is upon the party asserting such change to have been made." (2) "If the jury find that the contract between the parties was silent as to what portion of the lumber delivered was to be paid for, and that after plaintiffs offered to deliver or began to deliver it as claimed by defendants, that it was then agreed that only such lumber as was used in the building should be paid for, the burden of proof as to such new agreement is upon the defendants." (3) "If the jury believe from the evidence that the plaintiffs delivered to the defendants lumber with which to build under a contract for payment at six dollars per thousand for so much thereof as might be used, and the remainder to be returned, then defendants would be liable at said price for all of said lumber so delivered and not returned." (4) "If the jury believe from the evidence that plaintiffs delivered to defendants lumber with which to build a house under a contract for payment at \$6 per thousand for so much thereof as should be used in said house, and the remainder to be returned, defendants would be liable at said price for all of said lumber so delivered and not returned, both that used in the house and that not so used, but not returned." The defendants separately excepted to the giving of each of these charges, and also separately excepted to the court's refusal to give each of the following charges requested by them: (1) "I charge you that under the evidence in this case the plaintiffs are not entitled to any lien." (2) "In order to make a contract, the minds of the parties must meet on all material parts of the proposed agreement, and, if you find that the plaintiffs intended one thing and the defendants understood that another thing was intended, then there would be no contract, and you must find that there was no express contract between the parties."

There was a verdict returned in favor of the plaintiffs assessing their damages at \$88.40, the amount claimed in the complaint, and declaring that the plaintiffs were entitled to a lien on the building described in the complaint for that amount. Thereupon the defendants made a motion for the court to set aside said verdict, and to grant a new trial, assigning several grounds, the substance of which was that the verdict was contrary to the evidence, and that the court erred in giving the charges requested by the plaintiffs, and refusing to give the charges requested by the defendants. Upon this motion being considered by the court, the following order was made: "Plaintiffs consenting thereto, the judgment in this cause is amended by declaring a lien in plaintiffs' favor on the property described in the complaint for only \$42, and thereupon this motion is overruled." To this ruling the defendants duly excepted. The judgment was entered in accordance with the verdict of the jury. The defendants appeal, and assign as error the several rulings of the trial court to which exceptions were reserved.

Alex T. London and John London, for appellants. Benners & Benners, for appellees.

TYSON, J. The trial judge did not permit the memorandum made by one of the plaintiffs from the original entries to be introduced in evidence. He only permitted each of the plaintiffs, who testified as witnesses, to use this memorandum in refreshing their recollections of the quantity of lumber claimed by them to have been delivered to the defendants. Each of them testified that they were present when all the lumber claimed to have been delivered was hauled, and each had a personal supervision of "each load" delivered; that the original entries showing the quantity of lumber in feet were entered at the time of the delivery, and were made by each of the witnesses in the presence of each other, and each knew them all to be correct; that the memorandum used by them was a correct copy of the original entries, and each knew it to be correct. Each testified that they knew the quantity of lumber, as shown by the memorandum, had been delivered to defendant. There was no error in the ruling of the court in allowing the witnesses to use the memorandum for the purpose of refreshing their recollection. *Acklen's Ex'r v. Hickman*, 63 Ala. 494; *Oalloway v. Varner*, 77 Ala. 541, and authorities there cited. It may be regarded as a settled rule of law in this state that this court will not reverse the decision of the trial court refusing to grant a new trial on the ground that the verdict of the jury was contrary to the evidence, unless, after allowing all reasonable presumptions of its correctness, the preponderance of the evidence against the verdict is so decided as to clearly convince the court that it was wrong and unjust. *Cobb v. Malone*, 92 Ala. 630, 9 South. 738, and authorities there cited; *Terst*

v. O'Neal, 108 Ala. 250, 19 South. 307; Davis v. Miller, 109 Ala. 539, 19 South. 699.

The matter of serious dispute, stating it succinctly, upon the trial, between the parties litigant, was as to what were the terms of the contract under which the plaintiffs sold and the defendants purchased the lumber,—the subject-matter forming the basis of values upon which the plaintiffs predicated their rights of recovery. The plaintiffs' contention was that by the contract of sale the defendants were to use so much of the lumber delivered and to be delivered upon defendants' lot by them as they (defendants) needed in the construction of their building, paying them therefor at the rate of six dollars per thousand, and the remainder they were to return to them. This contention was made out by their testimony, if believed by the jury. The defendants' contention was that they only purchased lumber from plaintiffs to construct their building, and that, if there was any lumber in the yard (their lot) belonging to the plaintiffs, unused, after they completed their building, they were to haul it away, and make sale of it; and their contention was supported by their testimony and one other witness. So, practically, resolved to the last analysis, we are presented with the question as to whether this court will reverse the rulings of the trial court for refusing to disturb the verdict of the jury when the contest over the main issue is supported by the testimony of two witnesses upon each side. To do so would clearly violate the rule above stated as governing this court in the revision of the decisions of the trial courts in refusing new trials.

The only other assignments of error insisted upon in argument relate to the giving of written charges requested by the plaintiffs, and the refusal to give two charges requested by the defendants. Charge No. 1 given at the request of plaintiffs was abstract, but asserts a correct proposition of law. The giving of it was not a reversible error. *Schaungut's Adm'r v. Udell*, 98 Ala. 302, 9 South. 560; *Payne v. Crawford*, 102 Ala. 387, 14 South. 864. Charge No. 2 given at the request of plaintiffs, in my opinion, misplaced the burden of proof. In the count of the complaint seeking to fix a material man's lien for the lumber which the plaintiffs furnished to defendants it is averred that the lumber furnished by plaintiffs was used by defendants in the construction of their building under their contract of purchase. Certainly they were bound to prove the existence of such contract, and had to establish the liability of the defendants to them for all lumber sold to them under it as well as all furnished outside of it. Under the terms of the contract as insisted upon by plaintiffs the burden was upon them not only to prove to the reasonable satisfaction of the jury the quantity and value of the lumber used by defendants in the building, but the quantity and value of the remainder they were to return to them.

The evidence disclosing a special contract under which the greater portion of the lumber was sold by plaintiffs to defendants, the onus was upon the plaintiffs to prove every term of the contract by which the liability of the defendants became fixed. This is true, notwithstanding the complaint contains only the common counts alleging such indebtedness. *Railroad Co. v. Nabors*, 37 Ala. 489; *Snedicor v. Leachman*, 10 Ala. 330. Charges 3 and 4 given at the request of plaintiffs were free from error. Charge 1 requested by defendants should have been given. But the correction by the court of the judgment relieved the erroneous refusal of it of all injury to the defendants. I am of the opinion that charge No. 2 requested by defendants should have been given. It asserts the elementary proposition of law that there must be a meeting of the minds of the plaintiffs and defendants on all material terms of the contract, in order that an express contract can exist between them. There could have been no recovery upon an implied contract under the evidence in the cause, and therefore, if there was no meeting of the minds of the parties upon every material term of the special contract which was shown without dispute to have existed between the parties, the plaintiffs were not entitled to recover. *Snedicor v. Leachman*, supra. A majority of the court are of the opinion that there was no error committed by the trial court with respect to the two charges. They construe charge 2 given for the plaintiffs to postulate all the facts which, if found by the jury to be true, left nothing to be ascertained by them, and therefore no room for the application of the doctrine of burden of proof invoked in the last clause. Charge No. 2 refused to the defendants they think was properly refused, because in asserting that in the absence of aggregatum there would be no contract, excludes the possibility of an implied contract. Affirmed.

(121 Ala. 429)

BRINDLEY v. BRINDLEY.

(Supreme Court of Alabama. April 20, 1899.)

HUSBAND AND WIFE—SUIT FOR SEPARATE MAINTENANCE—TEMPORARY ALIMONY—COUNSEL FEES.

1. On decreeing, on the merits, that a wife is not entitled to a separate maintenance, it is error to compel performance of a decree for alimony pendente lite; the decree allowing it being interlocutory, and subject to future modification.

2. An allowance of a solicitor's fee, made during the pendency of the action by a wife for her separate maintenance, should be canceled on the entry of a final decree on the merits in favor of the husband, where it appears that counsel were prosecuting the suit for the wife under a champertous agreement.

Appeal from chancery court, Cullman county; William H. Simpson, Chancellor.

Bill by Annie Brindley against B. P. Brindley, husband of the complainant, for the al-

lowance of alimony without the granting of a divorce. The grounds upon which the alimony was asked, and the facts of the case, are sufficiently stated in the opinion. Upon the final submission of the cause upon the pleadings and proof, the chancellor decreed that the complainant was not entitled to the relief prayed for in her bill, and permanent alimony was denied the complainant. It was, however, adjudged by the chancellor that "the decree for alimony pendente lite must be observed and performed. The complainant was entitled to that as a matter of right under the statute, and it is still a subsequent liability solemnly decreed by the court, and is not affected by the failure of the complainant to obtain relief on the final hearing"; and in accordance with this holding the chancellor declared a lien on the defendant's lands for the payment of the monthly allowances as theretofore ascertained by the register, up to the rendition of the final decree, and for the complainant's solicitor's fee, and accordingly ordered the sale of said lands if such allowances and solicitor's fee were not paid within 60 days after the date of the rendition of the decree. From this decree the defendant appeals, and assigns the rendition thereof as error. Reversed.

J. B. Brown, for appellant. A. L. Brown and J. J. Curtis, for appellee.

HARALSON, J. It is firmly settled by the decisions of this court, in consonance with the decisions of the courts of other states,—although it may be that the weight of authority in England and this country is opposed to the doctrine,—that courts of equity have jurisdiction to grant alimony to a married woman in the nature of maintenance, unconnected with any proceedings for divorce. *Hinds v. Hinds*, 80 Ala. 225; *Murray v. Murray*, 84 Ala. 363, 4 South. 239; *Brindley v. Brindley*, 115 Ala. 474, 22 South. 448.

In this state, we have no statute providing for alimony disconnected with a suit for divorce, and as for independent proceedings in that behalf, we are remitted to the general principles of equity courts in the adjudication of rights between the parties. But in divorce suits, the statute does provide that "pending a suit for divorce, the court must make an allowance for the support of the wife out of the estate of the husband, suitable to the condition of his estate and the condition in life of the parties." Code 1896, § 1495 (2331). Under the construction placed on this statute, the allowance of temporary alimony, or alimony or support pending the suit, is matter not of discretion, but of right. *Edwards v. Edwards*, 80 Ala. 97. Independent of statute providing otherwise, it is the generally conceded rule, that the allowance of alimony pendente lite in suits for divorce, is not a matter of absolute right, but rests in the sound discretion of the court. 2 Am. & Eng. Enc. Law (2d Ed.) 101. In a suit prosecuted

by the wife for alimony alone, it is manifest, therefore, that a court of equity in this state is not bound by the section of the Code above quoted, to allow it as a matter of right.

Another well-recognized principle in divorce suits, uninfluenced by statute, is, that "although alimony pendente lite should be allowed without an examination of the merits of the case, yet a prima facie case must be shown in behalf of the wife, and where she is the libellant or plaintiff, it should appear that the suit is brought in good faith, and not merely for the purpose of obtaining money from her husband; for if it appears that the suit is without just or reasonable foundation, or is prompted by malice or oppression towards her husband, or that the husband's success is very apparent, no allowance should be made to the wife." 2 Am. & Eng. Enc. Law (2d Ed.) 101.

In *Spitler v. Spitler*, 108 Ill. 124, it was determined, and, as for the case we have in hand, pertinently said, that "in the absence of statutory provisions controlling the question, when the husband obtains a divorce on account of the misconduct of the wife, the latter will not be entitled to alimony. 2 Blsh. Mar. & Div. (4th Ed.) §§ 376, 377. Looking at the question on principle, the rule is certainly in harmony with other general rules governing the marital relation, as, for instance, the common-law duty of the husband to support the wife is not absolute. He is bound to support her at the common home, and not under another's roof, unless his own improper conduct has forced her to seek shelter elsewhere. Hence if she abandons her home without cause, the right to support from her husband at once ceases." And this is true not only where the wife abandons the husband without justifying cause, but where, from her own fault, he abandons her. *Angelo v. Angelo*, 81 Ill. 251; *Thompson v. Thompson*, 3 Head, 527; *Bogges v. Bogges*, 4 Dana, 307, 309; *Martin v. Martin*, 8 N. J. Eq. 563; *Begbie v. Begbie*, 7 N. J. Eq. 98; *Anon.*, 4 Desaus. Eq. 94; *Kock v. Kock*, 42 Barb. 515. If these principles uncontrolled by statute are correct for the allowance of alimony pendente lite in suits for divorce, they apply with equal or greater reason to proceedings for alimony alone independent of divorce.

The court, on the prima facie case presented in complainant's bill, ordered a reference to ascertain the defendant's faculties and what would be a proper allowance. The register upon evidence taken, reported \$6 a month and \$25 solicitors' fees to be proper, which report was confirmed. An appeal was taken and the decree affirmed. 115 Ala. 474, 22 South. 448. It was said in that case, in review of the lower court's action, "We have examined the evidence taken before the register, and are reasonably satisfied that the allowance made is not excessive. The amount allowed by the court upon the report of the register is merely interlocutory, and subject to the further

orders of the court. The amount may be increased or diminished during the further progress of the cause, as the necessities of the parties and justice may demand." When the cause returned to the lower court, the testimony was taken on both sides upon the merits, and the case was submitted thereon for final decree, which was afterwards rendered. From that decree this appeal is prosecuted.

From the evidence, the complainant utterly failed to make out the charges she preferred against her husband as grounds for alimony. Instead of his abandoning her, it is made plain that she abandoned him without any legal excuse therefor. The allegation that he "accused her of adultery, and made base and vile charges against her, without shadow of foundation for them," finds no support in the evidence, but is satisfactorily disproved. In his opinion the chancellor, employing language much more temperate than he would have been justified in employing, said: "She was guilty of the abandonment and manifested no willingness to continue to reside with her husband, and furthermore was guilty of improprieties with other men." A careful examination of the evidence leads us to approve this conclusion. It satisfies us, as it did the court below, that the complainant's suit is oppressive and entirely wanting in merit. The defendant, so far as the evidence tends to show, while not profuse in his attentions to her, accountable for reasons that are pardonable, was never harsh or cruel to his wife. He was poor and perhaps unable to supply more abundantly than he did, and seems to have manifested a submissive rather than a revengeful spirit under most provoking circumstances. In such a case, can it be maintained on any principle known to a court of equity, that the respondent should be made by its decree to contribute of his means to such an unjust and oppressive demand as is presented in this case? Its disposition to administer justice would be seriously questioned, if not displayed to prevent exactions so shocking to the sense of justice. While ascertaining that complainant's bill on the facts, was without merit, the learned chancellor fell into the inadvertent mistake of holding that the previous interlocutory decree for temporary allowance was beyond the power of the court to control. He says in his opinion, "The complainant was entitled to that (alimony pendente lite) as a matter of right under the statute, and it is still a subsisting liability solemnly decreed by the court, and is not affected by the failure of the complainant to obtain relief on final hearing." And so, he declared a lien on defendant's lands for the payment of the monthly allowances as ascertained by the register, up to the rendition of the final decree and for the solicitors' fee, and ordered the sale of said lands therefor, if not paid within a designated time. In this there

was manifest error. That former decree, as we rightly held on the former appeal, was "merely interlocutory and subject to the further orders of the court," and no statute in this state makes an allowance of alimony a matter of right in a suit of this character.

On her cross-examination the complainant testified, "I made arrangements to bring this suit. I employed counsel. My father [who is her next friend] done [did] it for me. It is a fact that I am going on nineteen, and will be nineteen in November. My lawyers are to get half of what I get out of this case, I think." It was not shown that she was mistaken as to this agreement with counsel. In *Sharon v. Sharon*, 75 Cal. 1, 16 Pac. 345, it was held, as it seems very properly, that pending an action for divorce, the wife has no necessity entitling her to an allowance for counsel fees, when her attorneys are faithfully and satisfactorily acting for her, in pursuance of an agreement whereby they have, as compensation for their services, a contingent interest in the result of the litigation. In his work on *Divorce & Separation* (section 881) Mr. Nelson observes, that "an agreement with the wife that her attorneys shall receive a portion of the amount of alimony obtained, is champertous. Agreements for contingent fees are objectionable in ordinary actions, but in actions for divorce this kind of agreement is particularly vicious. The wife's attorney becomes an interested party in the proceeding, and ceases to act as a legal adviser and an officer of the court. * * * The courts discourage such agreements; and if, in the progress of the trial, the court discovers that an attorney has rendered his services upon a contingent fee, no allowance for attorney's fees will be made." *White v. White*, 86 Cal. 212, 24 Pac. 1030. It is true in the case at bar, the fee of \$25 allowed by the register, was allowed and afterwards sanctioned by the court, without any proof of this agreement between complainant and her next friend with her solicitors, and without any reference to such an agreement. But, it is moreover true, that its allowance, though the fact of their contingent fee was unknown at the time, was a contribution to that extent in aid of the champertous agreement. It was an allowance which would enable them the better to prosecute the case in their own interests in procuring as great an amount as possible for alimony, one-half of which they were to get. The allowance of that fee rests on no more substantial basis than the one for alimony, and both in the end should have been disallowed.

A decree will be here entered, reversing the decree of the court below, setting aside the decrees allowing alimony and a solicitors' fee, and dismissing the suit out of the court below.

Reversed and rendered.

(121 Ala. 567)

MABEL MIN. CO. v. PEARSON COAL & IRON CO.

(Supreme Court of Alabama. April 18, 1899.)

TEMPORARY INJUNCTIONS—DISSOLUTION—MATTERS WHICH MAY BE CONSIDERED—MINING—APPEALS.

1. A bill in equity charged that defendant, an adjoining owner, trespassed and mined on complainant's lands, so as to throw the water from defendant's mines in and on the mineral lands of complainant, causing it great damages, which will continue unless restrained. The answer admitted the mining on complainant's land, but avers that the water could not flood complainant's mine unless the latter should "negligently and foolishly" drive its entries into the opening and mines of defendant. *Held*, that the answer is not sufficiently direct and positive to warrant the dissolution of the temporary injunction.

2. Affirmative matter, not responsive to the bill, or matter of confession and avoidance, set up in the answer, cannot be considered on a motion to dissolve a temporary injunction.

3. An answer, though in form a denial, which states facts in the nature of a confession and avoidance, will not avail to dissolve a temporary injunction.

4. A temporary injunction against the removal of ore from the mining land of complainant will not be dissolved because of defendant's solvency.

5. On a motion to dissolve a temporary injunction, the chancellor may consider the relative degree of injury or benefit to the parties which would result from a continuance on the one hand or a dissolution on the other; and if less damage would probably result from a continuance than from a dissolution of the injunction, it is a wise exercise of his discretion to continue the injunction until final hearing.

6. On an appeal, under the statute, from an interlocutory decree on a motion to dissolve a temporary injunction, the propriety of refusing a motion to require complainant to give a larger bond cannot be considered.

Appeal from chancery court, Jefferson county; Thomas Cobbs, Chancellor.

Bill by the Mabel Mining Company against the Pearson Coal & Iron Company. From a decree denying a motion to dissolve the temporary injunction, defendant appeals. Affirmed.

In its bill the complainant averred that it owned and was in possession of certain real estate, to wit, section 13, township 14, range 3 W., in Jefferson county, and that upon this land there was a coal mine of great value, from which the complainant was mining coal, especially from the N. E. $\frac{1}{4}$ of said section; that the defendant company owned and is mining the coal upon the adjoining section of land, to wit, the S. E. $\frac{1}{4}$ of section 12, township 14, range 3 W.; that the coal seam upon the lands in sections 12 and 13 dips to the south, and water from the mining of the coal flows towards the south. These facts are substantially the averments of the first four sections of the bill. The fifth and sixth sections of the bill were as follows: "(5) That the defendant company, without the consent of your orator, some two years ago continued its mining through said section 12, and began the mining of coal from the lands of your orator in said section 13, by driving what the defendant calls a 'dip entry.' That the de-

fendant had driven this entry into your orator's land some two hundred feet before your orator discovered the trespass. That on the 28th day of January, 1897, the defendant company being engaged in trespassing upon your orator's property, to wit, upon the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of said section 13, your orator demanded of the defendant to desist from said trespass upon orator's property; a copy of which letter is hereto attached and made Exhibit A. The superintendent of the defendant then and there promised your orator that they would desist, and would not again trespass upon the property of orator. But your orator charges that in violation of said promise, and in violation of the rights of your orator, the defendant has continued and is now trespassing upon the property of your orator, to wit, upon the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of said section 13, T. 14, range 3 W., with a large force of men and is mining and carrying away the coal therefrom; that the defendant is now engaged with a large force of miners in driving an entry south upon and into said section 13, and has driven this entry a large distance, to wit, about five hundred feet, and is taking the coal therefrom; and is also with a large force of men driving an entry southwest upon said N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, and is taking the coal therefrom. That the defendant has taken and carried away from your orator's said property a large quantity of coal, to wit, some two thousand tons, all of which the defendant has converted to its own use, and in violation of the protests and rights of your orator, and has greatly damaged and injured your orator's property, to wit, four thousand dollars, which sum your orator claims of the defendant for the damages already done to its property. That the driving of the said entry south by the defendant is throwing the water coming from the defendant's land lying north of your orator's land upon the land of your orator, and on account of your orator's mining the same land running its entries northeast, if the defendant is allowed to drive the entries now being driven by defendant, there is great danger of throwing all of the water from said defendant's land north to your orator's land upon and flooding the mines of your orator with large quantities of water, and rendering the property and mines of your orator valueless. (6) That in 1896 your orator and defendant entered into a contract by which orator was to mine a certain strip of land off of the property of the defendant in the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of said section 12, containing about two and one-half acres of coal. That, in exchange for this, orator agreed that the defendant should take a like quantity of coal off of the north edge of said section lying along south of said section 12, to be thereafter agreed upon by the parties. That in January, 1897, your orator wrote the defendant that it must discontinue mining coal or entering upon said section 13, except that they would be allowed to take the two and

a half acres of coal mentioned above off of the northern edge running along the side of defendant's land, to wit, a space of 60 feet wide by one-half mile long, which space was lying along the side and most convenient for defendant's entry then running west on section 12; and that your orator in the same communication notified the defendant that in no case would your orator consent or allow defendant to enter further south upon your orator's land. That the defendant, through its superintendent, L. K. Moss, then and there promised your orator that they would not attempt to enter further into your orator's land. But your orator avers that the defendant has, in violation of its said promise and the rights of your orator, willfully violated this agreement and promise, and still willfully violates the rights of your orator, and is now trespassing upon the property of your orator, and taking the coal of your orator, and converting it to its own use, as fully set out above; and your orator avers and charges that by reason of the insolvency of defendant irreparable damage has already been done and is still being done to your orator, and to the property of your orator, by the defendant and its men, and will so continue unless restrained and enjoined by this honorable court." The prayer of the bill was that an injunction be issued restraining and enjoining the defendant company from entering upon any part of complainant's lands, and from mining coal off of said land, and, further, that an accounting be had to ascertain the damages already sustained by the complainant on account of the trespass of the defendant. Upon the filing of this bill, the chancellor ordered that upon the complainant entering into a bond in the sum of \$300, with sureties, payable and conditioned as required by law, that an injunction issue. This bond for \$300 was given, and a temporary injunction was issued.

The defendant, the Mabel Mining Company, filed its answer to the first four sections, by which it admitted the allegations of the first four sections of the bill. The answer then continued as follows: "Fifth. In answer to the fifth and sixth paragraphs of said bill said defendant denies the facts as therein set forth, and, while there are some few allegations therein which may contain some truths, the entire contents thereof, in the manner and form thereof, as therein stated, are wholly untrue, and are hereby denied, and in lieu thereof and in contradiction thereof the defendant avers the facts and the truth to be as follows, to wit: Orator and this defendant owned coal land, respectively, in sections 12 and 13, Tp. 14, R. 3 W., in Jefferson county, lying contiguous to each other, and each were working mines and taking coal therefrom. A part of defendant's coal lands lying in the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 12 was near to orator's mine, and at some distance from the opening and shaft of defendant's mine, which

was on the eastern side of said quarter section. This body of coal deposit was from five to six acres in quantity. Orator, fully apprised of all these facts, desired and was anxious, on account of proximity and convenience, to work said body of coal for its own benefit, and to appropriate to its own use the coal thereon. On the 9th day of May, 1896, orator made propositions to defendant looking to that end, and agreeing to allow defendant in lieu, exchange, and payment for the privilege to mine coal thereon "to enter upon and mine a like number of tons or acres in section 13, T. 14, R. 3 W., belonging to orator (the Pearson Company), and which lay in front and in reach of the entries then being driven by the defendant (Mabel Mining Company), known as 'dip entry.' Defendant agreeing to said proposition on that day, orator and defendant entered into a written agreement, a copy whereof is here appended, marked 'Exhibit A,' and prayed to be taken and regarded as part of and embodied in this manner. Under and by virtue of this contract, orator opened from its mine the necessary entries with the said adjacent lands belonging to defendant, and proceeded without objection and interference from defendant to take and remove therefrom the coal thereon. In this way the defendant is informed, believes, and states that orator worked out and received the benefit of the coal on about 4.48 acres of land, and took, carried away, and appropriated to its own use from twelve to fifteen thousand tons of coal. And defendant avers that for the entry upon its said lands, driving entries therein, and all the said coal mined and carried away, defendant has never been paid anything or received any benefit therefor except the rights and privileges covenanted to him in said contract hereto appended as Exhibit A. And defendant avers and solemnly states that the allegations in paragraph 6 of said bill, that in exchange for the rights granted orator the defendant should take a like quantity of coal off of the north edge of said section 13, T. 14, R. 3 W., lying along south of said section 12, to be thereafter agreed on by the parties, is wholly untrue, and here now denied. And defendant avers that the only contract entered into by orator and defendant is contained in Exhibit A hereto. In further answer to paragraph 6 of said bill, this defendant avers and states all the allegations therein in reference to a letter sent to defendant, and its contents and demands made therein, and the alleged promises made by its superintendent, L. K. Moss, in the manner and form and substance as stated in said bill, is a flagrant misrepresentation of the facts, and wholly untrue. But defendant, intending to be fair and just, desiring to conceal nothing, nor to make misstatements, but willing that everything concerning the whole transaction be laid before your honor, states and avers the facts to be as follows: In accordance with the

letter and spirit of the contract between them (Exhibit A), defendant allowed orator, without disturbance or molestation, to push entries from its mines into said lands of defendant, and mine the coal therein; and some short while before orator had completed its said mining thereon this defendant began operation to utilize the benefits secured to it in said contract. The defendant began to push its said 'dip' entry in a southerly direction until it reached the lands of orator referred to in said contract, and out to which it was allowed to dig coal to like amount or acreage which orator might use of its lands. When this entry was being opened, defendant did receive a letter from R. H. Pearson, president, requesting that work be stopped, and asking for reply at once. Immediately thereafter, L. K. Moss, defendant's superintendent, had an interview with Mr. Pearson, president, and notified him that he would continue to get the benefits covenanted to defendant in the contract Exhibit A, and would continue the entry to a point sufficient for that purpose, and would then turn the entry off his lands into lands of defendant; and defendant avers that this was substantially all that passed between the parties. And defendant states that no promise was ever made other than this; that neither defendant nor Moss, its superintendent, ever violated any contract, or committed any trespass or injury to or on orator's rights or property, and that the statement as set forth in reference thereto in paragraph 6 of said bill is misleading, and wholly untrue, as set forth. Defendant further shows to your honor that the allegations contained in the fifth paragraph of said bill that it 'has carried away a large quantity of coal, to wit, some two thousand tons,' in violation of the protests and rights of orator, and greatly damaged and injured orator's property, to wit, \$4,000, is wholly and entirely untrue. But defendant shows to your honor that he has taken no coal from said land of orator except to open an entry that it might mine coal, and get the benefit of his said contract with orator; that the amount of coal thus removed in opening the entry did not exceed from 250 to 300 tons; that in pushing said entry to enable him to mine, the same was opened where it was the least liable to damage orator,—that is, was done on the extreme part of the eastern side,—and only extended southward sufficiently far to enable defendant to do the mining it was authorized under said contract to do, and was then turned off orator's lands. Defendant states that no damage was done thereby to orator's rights or property. Defendant further represents that said entry was made through the lands which were authorized to be mined by it under said contract; that he was authorized to mine as many tons of coal or as many acres of land of orator's as orator mined as aforesaid of it; that defendant selected a block of land of same dimensions as orator had mined of its under said contract;

that said block was situated on the extreme eastern limit of orator's land in section 13, adjacent to defendant's land, immediately south of and a continuation of the 'dip' entry referred to in the contract, most convenient for and cheapest mode of hauling coal by defendant, least injurious and most beneficial to orator. Herewith defendant files with this answer, and prays that the same may be taken as part thereof, a diagram or map of said lands, ways, and entries, executed by D. S. Milner, the legal surveyor of the county, and thoroughly skilled in the profession. Defendant further represents that it was never contemplated or agreed that in mining coal on orator's land under the contract (Exhibit A) defendant should be confined to a strip of land running along the whole northern line of section 13, not exceeding 60 feet in width. The purpose, and sole purpose, of said contract was for each company to mine the lands most convenient and least expensive to each. This was done by orator without molestation, and now to demand or require the working of a strip along the northern boundary of section 13 would be unjust and inequitable. The expense of cutting so long an entry and the long haul of the coal would entail expense, damage, and loss on defendant, and would violate both the letter and spirit of the contract between the parties. Defendant further represents to your honor that, while it is true and admitted that the water in the process of mining in both mines in sections 12 and 13 flows southward, it is wholly untrue, as stated, that by reason of anything done by defendant in the making of said entries that water overflows the mines or works or lands of orator; and it is equally and wholly untrue that the water could penetrate or flood or injure the mine of orator unless orator should willfully, negligently, and foolishly drive its entries into the openings and mines of defendant. No damage can thereby possibly arise to orator except by its own wrong and folly. On the contrary, great wrong and injury will result to defendant by reason of the injunction granted in this cause, whereby defendant is not only deprived of the right of mining coal under said contract, but deprived of the use of all his engines, machinery, apparatus, and fixtures necessary to carry on the business of mining said lands and to pump the water out of said mine, and which would necessarily accumulate, and would require a long while—perhaps a month—to remove, and would entail, therefore, great expense and irreparable loss. And in furtherance of this view defendant represents to your honor that it has now in process of fulfillment, and binding on it, a large contract for the delivery of coal, coupled with penalty in large amounts for failure to deliver as per contract, and if said injunction continues, and defendant obeys the same, which it is bound to do, irreparable and large damage will be done to defendant.

The injunction bond in this cause is wholly inadequate to the enforcement of said injunction, and continuance thereof may damage defendant more than ten times the amount thereof. Defendant further represents to your honor that the charge contained in the latter part of said paragraph, that 'by reason of the insolvency of defendant' irreparable loss has already been done and is still being done to your orator, etc., is wholly untrue. On the contrary, the defendant is entirely solvent, and able to respond to any damage justly to be claimed by orator."

The exhibit referred to in the bill and answer was attached. The defendant moved to dissolve the injunction upon the denials of the answer. On the submission of the cause upon the motion to dissolve the injunction, the chancellor rendered a decree overruling said motion. From this decree the defendant appeals, and assigns the rendition thereof as error.

A. A. Coleman and Emery O. Hall, for appellant. R. H. Pearson, for appellee.

DOWDELL, J. This appeal is taken from the decree of the chancellor overruling a motion by appellant to dissolve the temporary injunction granted in the cause. The allegations of the bill are to the effect that the complainant and defendant, both private corporations, are adjacent owners of certain described mineral lands; that the defendant company, without the consent and authority and against the protest of the complainant company, is trespassing upon the lands of complainant, and with a large force of men is mining and taking coal therefrom; that the same is being done in such a manner as to throw the water from defendant's mines in and upon the mineral lands of complainant, thereby rendering the same valueless; that complainant has already suffered great damage, and will suffer irreparable injury unless the defendant is restrained. The prayer is for injunction, and for an accounting for damage already done. These averments are sufficient to give the bill equity. High, Inj. § 730. But this we need not further discuss, as the equity of the bill, based upon the truth of its allegations, is not questioned. The only question we have to deal with is whether the chancellor erred in refusing to dissolve the injunction upon the denials contained in the answer. The defendant's answer admits the averments contained in the first, second, third, and fourth paragraphs of the bill. Proceeding to answer the fifth and sixth paragraphs of the bill, the defendant says: "In answer to the fifth and sixth paragraphs of said bill, said defendant denies the facts therein set forth, and, while there are some few allegations therein which may contain some truths, the entire contents thereof, in the manner and form thereof, as therein stated, are wholly untrue, and are hereby denied, and in lieu thereof and in contradiction thereof the de-

fendant avers the facts and the truth to be as follows, to wit;" and then follows a statement of the defendant's side of the case, with a denial of some of the facts charged in the bill, while as to other facts charged matters in confession and avoidance are set up. Parts of the answer also are statements of affirmative matter not responsive to the bill. In its denials the answer is inconsistent or evasive, and far from being direct and positive. It says "some few allegations in the fifth and sixth paragraphs contain some truths." Which allegations are true, and which untrue? Unless informed by the answer, this question must remain unanswered, and the court be left to indulge in speculation. The defendant does, however, follow this with the statement, "the entire contents thereof [i. e. paragraphs 5 and 6], in the manner and form thereof, as therein stated, are wholly untrue," etc., but this presents an inconsistency in averments, and (when we look to the statements of facts as charged in the bill) renders the answer in its nature evasive. Following this general denial in the answer, the defendant proceeds to answer certain specified charges of the bill with a qualified denial. In that portion of the answer wherein the defendant undertakes to state the true history of the facts, it is denied that the defendant has mined from the complainant's land the amount of coal charged in the bill, but the mining of a smaller quantity is admitted. Again, the denial is not full as to the flow of water upon complainant's land as charged in the bill. In respect to this the answer is as follows: "That while it is true and admitted that the water in process of mining in both mines in section 12 and 13 flows southward, it is wholly untrue, as stated, that by reason of anything done by defendant in the making of said entries that water overflows the mines or works or lands of orator; and it is equally untrue that the water could penetrate or flood or injure the mines of orator unless orator should willfully, negligently, and foolishly drive its entries into the opening and mines of the defendant. No damage can thereby possibly arise to orator except by its own wrong and folly." It is clearly admitted from this statement that the water from the defendant's mines would flood and injure the mines of complainant, but that such could only occur by reason of what, in the opinion of the defendant, would be the folly of complainant. For aught that appears from this denial, nothing that complainant might do to operate and utilize its mines would escape the defendant's criticism of "complainant's folly." Such denials as these are not characterized with that degree of directness and positiveness necessary to overcome the allegations of fact in a sworn bill containing equity, and to work a dissolution of the temporary injunction. Affirmative matter, or matter in confession and avoidance, set up in the answer, cannot be considered upon a motion to dissolve the injunction. The con-

tract, which is made a part of the defendant's answer as an exhibit, and upon which the defendant excuses the wrongs charged against it in complainant's bill, is affirmative matter, not responsive to the bill, and cannot be looked to in determining the motion to dissolve. "It is a well-settled rule that upon a motion to dissolve an injunction the answer can be regarded only so far as it is responsive to the allegations of the bill." *Rembert v. Brown*, 17 Ala. 670; *Farris v. Houston*, 78 Ala. 250. In the case of *Railroad Co. v. Witherow*, 82 Ala. 194, 3 South. 23, this court uses the following language: "The answer can be considered, on a motion to dissolve the injunction, only so far as it is responsive to the allegations of the bill; and new or affirmative matter, not so responsive, but defensive in its nature, will not be considered for any purpose. Nor will the mere denial of legal conclusions properly deducible from the facts stated in the bill avail anything. The denial must be of material facts alleged in the bill, and must be full, clear, and complete, without ambiguity or equivocation." An answer, though in form a denial, which states facts in the nature of a confession and avoidance, will not avail to dissolve an injunction. *Jackson v. Jackson*, 91 Ala. 292, 10 South. 31. In cases of this character the question of the solvency or insolvency of the defendant is immaterial. "In trespasses to mining property greater latitude is allowed courts of equity than in restraining ordinary trespasses to realty, since the injury goes to the immediate destruction of the minerals, which constitute the chief value of this species of property. Where, therefore, the trespass consists in the removal of ore from the complainants' mines, the legal title being clearly established in complainants, they are entitled to an injunction, even though an action at law would lie." *High, Inj. § 780*; *Chambers v. Iron Co.*, 67 Ala. 353. The proposition of law, however, is well settled that upon a motion to dissolve the temporary injunction great latitude of discretion is left with the chancellor. It is proper for him to consider and weigh the relative degree of injury or benefit to the complainant and respondent which may follow from the continuance of the injunction on the one hand or its dissolution on the other, and, if less damage and injustice would probably result from a continuance of the injunction than from its dissolution, a wise exercise of the discretion would be to continue the injunction to await the final hearing. *Turner v. Stephens*, 106 Ala. 546, 17 South. 706; *Jackson v. Jackson*, 91 Ala. 292, 10 South. 31; *Harrison v. Yerby*, 87 Ala. 185, 6 South. 3; *Bank v. Lanchelmer*, 102 Ala. 454, 14 South. 776. Testing the answer in this case by the foregoing principles, we think the chancellor was right in denying the motion to dissolve the temporary injunction.

The appellant complains that the chancellor committed error in refusing appellant's (respondent in court below) motion to require

complainant to give a larger bond. The appeal in this case is taken under the statute, from an interlocutory decree, on the motion to dissolve the injunction, and this is the only question properly before us for consideration and decision. It will, however, not be improper for us to say that we think the bond in this case was fixed in too small a penalty. The object and purpose of the bond being to protect the defendant from any wrongful interference with his rights, and to reimburse him for all damages and costs incurred by reason of an injunction improperly issued, the probable damage to defendant by reason of the injunction, in the event of its dissolution should always be an important element of consideration in determining the penalty of the injunction bond. No fixed rule can be laid down, but, as the writ of injunction is always to be sparingly used, because it is an extraordinary remedy, the bond required in each case should be not only such as to prevent an abuse of the remedy, but also reasonably commensurate with the probable costs and damage to the defendant in the event of its dissolution. We find no error in the record, and the decree of the chancellor is affirmed.

(121 Ala. 591)

**DAVIDSON v. WATTS MINING CAR
WHEEL CO. et al.**

(Supreme Court of Alabama. April 18, 1899.)

FRAUDULENT CONVEYANCES—CONFESSION OF JUDGMENT BY INSOLVENT—ADEQUACY OF PAYMENT—SECRET BENEFITS.

1. An insolvent corporation confessed judgment to D., on an understanding that D. should at once levy on the mules belonging to the company, and the stock of goods in its commissary, sell the property, which was all the company owned that was subject to execution, buy it in, turn the mules over to the company for its use, carry on the commissary, allow the company 10 per cent. of the gross sales out of it to the company's employes, and purchase all of the company's output. The agreement was carried out, and D. reimbursed himself out of the proceeds of the corporation's output for the 90 per cent. of the wages paid to the company's employes in supplies, and for other outlays he made to enable the company to carry on its business. *Held*, that the transaction was fraudulent, because not an absolute transfer in payment of an adequate debt.

2. It was also fraudulent because secret benefits were reserved to the debtor.

Appeal from city court of Birmingham; W. W. Wilkerson, Judge.

Bill by the Watts Mining Car Wheel Company and others against T. M. Davidson. From a decree for complainants, respondent appeals. Affirmed.

The bill in this case was filed by the appellees against T. M. Davidson, who was doing business under the name of the Bank of Warrior. The purpose of the bill was to set aside, as fraudulent, a confession of judgment made in favor of the Bank of Warrior by the Watts Coal & Iron Company, and to have condemned, and subjected to the pay-

ment of a judgment which the complainants had recovered, the property which had been sold under an execution issued on such confessed judgment. The facts averred in the bill showed that the confession of judgment was not for the legitimate purpose of collecting a debt due the Bank of Warrior, but was for the purpose of covering up the property of the Watts Coal & Iron Company from its creditors, thereby hindering, delaying, and defrauding its creditors, and that by such confession of judgment there was a benefit reserved to the Watts Coal & Iron Company. It is deemed unnecessary to set out in detail the facts disclosed at the hearing of the cause. On the final submission of the cause on the pleadings and proof, the chancellor decreed that the complainants were entitled to the relief prayed for, and ordered accordingly. From this decree the respondent appeals, and assigns the rendition thereof as error.

Smyer & Smyer, for appellant. Mountjoy & Tomlinson and W. R. Houghton, for appellee.

McCLELLAN, C. J. We experience no difficulty in reaching the conclusion in this case that the Watts Coal & Iron Company, an insolvent corporation, confessed the judgment to Davidson on an understanding between them that the latter should proceed at once to levy upon the mules belonging to the former, and the stock of goods in its commissary, sell the property, which was all the company owned subject to execution, buy it in, turn the mules over to the company to be used in its mining operations, carry on the commissary, and allow the company 10 per cent. of the gross sales out of it to the company's employes, and purchase all of the company's output. It is clear, too, that it was the purpose and intent of both parties to get the leviable property of the company, in this way, out of the reach of other creditors, who were taking steps to subject it to their claims, and at the same time for it still to be used in the company's business. In the effectuation of this purpose and intent, the property was sold under an urgency execution sued out by Davidson, and was purchased by him; and the mules were turned over to, or retained by, the company, and continued to be used by it, and Davidson operated the commissary, paying the wages of the company's employes in goods, and allowing the company 10 per cent. upon all sales thus made, and Davidson took all the output of the mines, and out of the proceeds thereof reimbursed himself for the remaining 90 per cent. of the wages thus paid, and for other outlays he made for the company to enable it to carry on its business. On the case thus made, there are two infirmities fatal to the integrity of the transaction between Davidson and the Watts Coal & Iron Company: It was not the absolute transfer of property in payment of an adequate debt, and hence was meretricious, on

account of the intent which actuated the parties; and in it there were secret benefits reserved to the debtor, and hence it was fraudulent, regardless of actual covinous intent. *Comer v. Heidelberg*, 109 Ala. 220, 19 South. 719; *Alabama Nat. Bank v. Mary Lee Coal & Railway Co.*, 108 Ala. 295, 19 South. 404; *Coal Co. v. Hooper*, 105 Ala. 665, 17 South. 118; *Stephens v. Regenstern*, 89 Ala. 561, 8 South. 68.

Affirmed.

(121 Ala. 126)

BURKE et al. v. MORRIS et al.

(Supreme Court of Alabama. April 20, 1899.)

CREDITORS' SUIT—JURISDICTION—VERIFICATION—FRAUD—DISCOVERY—DEMURRER—MULTIFARIOUSNESS—PARTIES.

1. Under Code, § 814, authorizing a judgment creditor, whose execution has been returned unsatisfied, to go into chancery to compel the discovery of any property belonging to the debtor or held in trust for him, a bill alleging that the debtor had fraudulently conveyed his interest in lands, and that it was held in trust for him, and seeking a discovery, will not be dismissed for want of equity.

2. An unverified creditors' bill is insufficient, so far as it seeks a discovery of legal assets belonging to the judgment debtor.

3. That a creditors' bill, so far as it seeks a discovery of defendant's legal assets, is insufficient for want of a verification, does not render the bill, as a whole, demurrable.

4. Equity has jurisdiction of a creditors' suit to subject the equitable interest of defendant, in land held in trust for him, to the payment of the judgment, independent of statute.

5. When discovery is sought in a creditors' suit as merely incident to relief in matters of ordinary equitable cognizance, the bill need not be verified.

6. Where an allegation of fraud is necessary only to uphold certain portions of a creditors' bill, a general demurrer to the bill, for insufficient allegations of fraud, is bad.

7. When the single object of a creditors' bill is to subject lands alleged to be held in trust for the judgment debtor to the payment of the judgment, the fact that such lands are held by different persons, under separate conveyances, does not render the bill multifarious.

8. A creditors' bill to subject the interest of a joint tenant in land to the payment of the judgment need not make the other joint owners parties, when their interests are not sought to be sold or otherwise affected.

9. The objection that a creditors' bill, seeking to subject to the judgment land in which the judgment debtor is alleged to have an interest, and seeking a discovery as to the persons claiming to own the land, is defective, in that it fails to allege that defendant can make such discovery, is not raised by a general demurrer, on the ground that such persons were not made parties.

Appeal from city court of Montgomery; A. D. Sayre, Judge.

Creditors' suit by Josiah Morris & Co. against Michael Burke and others. From a decree overruling a demurrer and motion to dismiss the bill, defendants Burke and Charles Landsdell appeal. Affirmed.

The bill in this case was filed by the appellees against the appellants. As amended, the bill averred the following facts: Josiah Morris & Co. recovered a judgment against

Michael Burke, and upon this judgment execution was issued, and returned, "No property found." It was then averred that Michael Burke owned an undivided one-half interest in and to a certain specifically described lot near the city of Montgomery, but that, although the said interest in said property in fact belonged to Michael Burke, the legal title thereto was held by one Charles H. Scott, who, as a matter of fact, held the undivided one-half interest in the lot in trust for said Burke. It was further averred that Burke owned certain other lands in the county of Montgomery; that he conveyed an undivided one-half interest in such lands to one Charles B. Landsdell, who was his grandson, and resided with him, and who, at the time of this conveyance, was a minor, and that said Landsdell was never in possession of said property, nor exercised control over it, but the conveyance was made to him by Burke for the purpose of defrauding his creditors; that the other one-half interest in and to the land in Montgomery county was conveyed by Burke to one Susie Caldwell, who, immediately thereafter, conveyed the said interest to Elizabeth W. Burke, the wife of M. Burke, and that said conveyance was made by Burke to his wife without consideration, and for the purpose of defrauding his creditors, and that, although said property is owned by, and belongs to, said Burke, the legal title thereto is nevertheless held by said Landsdell and Elizabeth W. Burke, in trust for said Burke. It was then averred that Elizabeth W. Burke died intestate shortly after the execution of this conveyance to her; that no administrator of her estate has been appointed, and that the names of her heirs are unknown to the complainants, who, after diligent inquiry, have not ascertained their names nor the place of their residence; that the disabilities of minority of Charles B. Landsdell had been removed by decree of a court of competent jurisdiction. It was then averred that M. Burke also owned an interest in certain lands lying in Lowndes county, Ala., the precise description of which was unknown to complainants; and that he also owned an undivided one-half interest in and to certain lands located in Lowndes county, jointly or in connection with the estate of John V. McDuffie, deceased, the particular description of which lands is unknown to the complainant; and that the legal title to the property in Lowndes county does not stand upon the records of said county in the name of said Burke, but is held by some other persons in trust for him or for his use and benefit. It was also averred that M. Burke owned certain lands in Elmore county, a correct description of which was unknown to the complainant. In reference to each of these parcels of land, it was averred that a discovery of the facts in regard thereto was necessary to establish the right of the complainants to have the interest of said Burke thereto ascertained, and applied to the payment and satisfaction

of said judgment which the complainants had recovered against him. M. Burke and Charles B. Landsdell and Charles H. Scott and the administrator of the estate of Elizabeth W. Burke, deceased, were made parties defendant. The prayer of the bill was that an administrator ad litem be appointed to represent the estate of Elizabeth W. Burke, and that the proper orders be made to bring in the heirs of said Elizabeth W. Burke, deceased, as parties defendant, and that upon the hearing of the bill the defendants be required to answer said bill, so that the complainants should have full, complete, and perfect discovery touching the several properties mentioned in said bill, together with all other property which M. Burke owned or was entitled to, and that any interest of said M. Burke in said property should be subjected to the payment of the judgment recovered against him by the complainants. There was also a prayer for general relief. The defendants M. Burke and Charles Landsdell moved to dismiss the bill as amended, for the want of equity, and also demurred to the amended bill upon the following grounds: "(1) The said bill fails to show that this defendant had any creditors at the time of the execution by him of the deed mentioned in the fourth paragraph of said bill to Charles Landsdell; and the bill also fails to show that at the time of the execution of the deeds named in said paragraph to Susie Caldwell, and by her to the late Elizabeth Burke, this defendant had any creditors, or that he contemplated at that time becoming indebted to the complainants or to any one else. (2) That said bill fails to make the heirs at law of the late Elizabeth Burke parties to the same, though it shows on the face that she left surviving her such heirs. (3) The bill fails to make the heirs or personal representatives of J. V. McDuffie parties defendant, though the said bill, as amended, shows that the estate of said McDuffie is interested in that portion of the lands mentioned in said bill as being situated in Lowndes county, Ala. (4) The bill fails to show that the complainants have made any efforts to discover who are the heirs at law of the said Mrs. Elizabeth Burke, or to give any sufficient excuse for not making such heirs parties thereto. (5) That the said bill is a bill of discovery merely, and yet fails to aver that the complainant is unable to prove the facts he seeks by other testimony, or that such discovery is indispensable to the enforcement of his alleged claim. (6) Defendant demurs to paragraph No. 4 of said bill, on the grounds that it fails to aver that the conveyance of defendant of the real estate therein mentioned to his said wife was made without consideration and for the purpose of defrauding creditors. (7) That the said bill is a bill of discovery, and yet is not sworn to, as required by the law and the rules and practice of this court. (8) That said bill is multifarious, in this: that it attempts to join therein matters which have no connection, as

disclosed by the bill. (9) That there is a misjoinder of parties defendant to the said bill, in this: that Charles Landsdell is made a party defendant thereto, and required to make answer to the said bill, and all of it, when it is apparent that he has no interest in, and can have no knowledge of, the greater part of the matters averred in said bill. (10) That said bill makes the said Landsdell a party defendant thereto, and yet fails to pray any relief against him." On the submission of the cause on the motion to dismiss and upon the demurrers, the chancellor rendered a decree overruling both the demurrer and the motion. From this decree the respondents M. Burke and Charles Landsdell appeal, and assign the rendition thereof as error.

Gordon Macdonald, for appellants. George F. Moore, for appellees.

SHARPE, J. Unquestionably this bill contains equity, under section 814 of the Code, which authorizes a judgment creditor whose execution has been returned unsatisfied to go into chancery to compel the discovery of any property belonging to the debtor or held in trust for him. The motion to dismiss the bill for want of equity was therefore properly overruled.

So far as it seeks a discovery of legal assets belonging to the defendant, the bill is insufficient for lack of verification by oath. *Lawson v. Warren*, 89 Ala. 585, 8 South. 141; *Railroad Co. v. McKenzie*, 85 Ala. 546, 5 South. 322; *Sweetzer v. Buchanan*, 94 Ala. 574, 10 South. 213. Such insufficiency, however, does not extend to the whole bill.

The bill alleges that the property conveyed by Burke to the defendants Scott and Landsdell, respectively, as well as that in which the legal title has passed to the heirs of Elizabeth Burke, is held in trust for Burke, so that his interest therein is only equitable. As to such interests, the chancery court had jurisdiction, originally as well as now, under the statute, for the purpose of subjecting them to a judgment whereon legal remedies had been exhausted. *Brown v. Bates*, 10 Ala. 432; *Martin v. Carter*, 90 Ala. 93, 7 South. 510; *Floyd v. Floyd*, 77 Ala. 353. When discovery is sought as merely incident to relief in matters of ordinary equitable cognizance, the bill need not be sworn to. *Dinsmore v. Crossman*, 53 Me. 441.

Independent of the discovery which the complainants seek in other matters, they are entitled to maintain the bill for relief and for discovery respecting the several interests so alleged to be held in trust for Burke, and the demurrer, for want of verification, being to the bill as a whole, does not reach the defect which exists in its aspect as a bill for discovery of legal assets. A demurrer for such cause, to a bill as an entirety, when the bill is both for relief and for discovery, and when it is sufficient for relief, is properly overruled. *Beall v. Lehman-Durr Co.*, 110

Ala. 443, 18 South. 230; *Tillman v. Thomas*, 87 Ala. 321, 6 South. 151; *George v. Railroad Co.*, 101 Ala. 608, 14 South. 752; *Story*, Eq. Jur. § 443; *Livingston v. Story*, 9 Pet. 632; *Story*, Eq. Pl. § 548; *Metler v. Metler*, 19 N. J. Eq. 457.

For like reason, the ground of demurrer assigned to paragraph 4, upon insufficient allegations of fraud, is bad, since fraud is not necessary to uphold the equity referred to, and need not be alleged in a bill filed for its enforcement. *Brown v. Bates*, 10 Ala. 432.

The object of the bill is single, being the subjection of the property of Burke to the satisfaction of complainants' judgment, and the relief, if granted, must be substantially the same as to any portion of such property, whether held by the debtor or in trust for him by another or by several; and, in such case, the fact that it is held by different persons, under separate conveyances, or that the relief is sought upon different theories, does not render the bill multifarious. *Lehman v. Meyer*, 67 Ala. 396; *Couse v. Powder Co.* (N. J. Ch.) 83 Atl. 297.

No interest of the McDuffie estate or heirs is sought to be partitioned, devested, sold, or otherwise affected under the bill, and the alleged fact of their joint interest with Burke in lands does not make it necessary that such heirs or the personal representative of the estate be made parties to the suit.

In the absence as parties of the heirs of Elizabeth Burke, no decree can be rendered devesting them of the title to, or affecting their interest in, the lands descended to them; but the bill seeks discovery as to their identity, and, if discovered, they may be made parties, and so brought before the court that a decree may be had respecting their then interests. Code, § 814. The bill may be imperfect, as one for such discovery, in failing to show that Burke can make discovery of those heirs, or it may be otherwise defective; but such questions are not raised by the demurrer assigned to the bill as a whole, upon the ground that those heirs are not made parties, or by any ground stated in the demurrer. When a bill seeks discovery of persons interested, a demurrer for want of those persons as parties will not hold. 1 *Daniell*, Ch. Prac. 619; *Iron Co. v. Goodall*, 39 N. H. 223, 75 Am. Dec. 219. There was no error in the decree of the city court, and it will be here affirmed, at appellants' cost.

(121 Ala. 442)

COCHRAN et al. v. ADLER et al.

(Supreme Court of Alabama. April 19, 1899.)

VENDOR AND PURCHASER — BOND FOR TITLE — ASSIGNMENT—RECORDS—MORTGAGES—PRIORITIES.

1. A bond for title to land, and writings assigning it, need not be recorded, under Code 1896, § 1005 et seq., requiring conveyances of unconditional estates, and mortgages and instruments in the nature of mortgages, to be recorded.

2. The assignee of a bond for title, providing for a deed upon payment of the purchase price, who pays the price and receives a deed from the owner, acquires a title which is not subject to a mortgage given by the assignor of the bond after the assignment, but before the execution of the deed, although the assignment was not recorded.

Appeal from city court of Birmingham; W. W. Wilkerson, Judge.

The bill in this case was filed by the appellants, Cochran & Ramsey, against the appellees, Albert Adler, Milow Robbins, George P. Moore, administrator of the estate of Mrs. M. E. Freeman, deceased, and the Jefferson County Savings Bank, and sought to have foreclosed a mortgage executed to the complainants by Mrs. M. E. Freeman. The facts of the case are sufficiently stated in the opinion. Upon the final submission of the cause on the pleadings and proof, the judge of the city court, sitting as chancellor, rendered a decree adjudging that the complainants were not entitled to the relief prayed for, and ordering the bill dismissed. From this decree the complainants appeal, and assign the rendition thereof as error. Affirmed.

John Vary and Bush & Bush, for appellants. B. C. Jones, for appellees.

TYSON, J. The appellants filed their bill to foreclose a mortgage executed to them by Mrs. M. E. Freeman, dated March 31, 1889, upon certain described real estate. The controversy is whether the Jefferson County Savings Bank, and those claiming under it through mesne conveyances, acquired such a title as is superior to the alleged rights claimed by complainants under their mortgage. On the 23d day of August, 1887, Albert Adler, the owner of the lot in controversy, executed to Milow Robbins his bond for title, covenanting to execute to him (Robbins) a warranty deed to the lot upon the payment of certain purchase-money notes designated in said bond. On December 20, 1887, Robbins, by an instrument in writing, transferred this bond for title to the mortgagor, Mrs. Freeman, she assuming the payment of his notes to Adler. On the 28th day of February, 1888,—more than one year before the execution of complainants' mortgage, and in about two months after the transfer to her,—Mrs. Freeman and her husband transferred this bond to the Jefferson County Savings Bank. On the 24th day of May, 1889,—about two months after the mortgage to complainants was recorded,—the bank surrendered to Adler the bond and the transfer thereof, paid to him the purchase money, and obtained a deed from him to the property. Neither the bond for title, nor the transfer from Robbins to Mrs. Freeman, nor the transfer from Mrs. Freeman and her husband to the bank, were ever recorded.

The contention of appellants is that as the transfer of the bond to the bank was not recorded, and as it acquired title from Adler subsequently to the execution of the mortgage and its recordation, its rights to the prop-

erty were subordinate to the lien of the mortgagees; the complainants not being shown to have had any actual notice of the transfer when the mortgage was delivered. By the bond, Adler bound himself to make a warranty deed to Robbins upon the performance by him of the condition of paying the purchase-money notes. Failing, in the event of a performance, Adler would have become liable for damages, it may be, to the extent of the penal sum named in the bond. By the acceptance of the bond and the execution of his notes, Robbins bound himself to pay to Adler the sum specified in the notes, and became entitled to the possession of the lot, if it was one of the terms of the contract that he was to have the possession. When Mrs. Freeman became the transferee of the bond, she was invested with the same rights which Robbins had,—no more and no less. As to the lot, the subject of the contract of sale, she became the owner of an imperfect equity in it. She had the right to discharge the notes held by Adler, and demand of him a deed in accordance with the terms of the bond. And, doubtless, after paying to Adler the amount of the purchase-money notes, upon his refusal to execute to her a deed she could have enforced a specific performance of the contract in a court of equity, or maintained a suit at law against him for a breach of the condition of the bond. *Gravlee v. Williams*, 112 Ala. 539, 20 South. 952. But, as a condition precedent to her right to enforce either of these remedies, she had to pay or tender to him the purchase money; and a compliance with this condition by her would have given her an equitable title to the lot, which she could have conveyed by deed or mortgage. She, however, did not ripen this imperfect equity into a perfect one, but chose, long before making the mortgage to complainants, to part with the bond, the only means by which she could, or under which she had the right to, ever acquire either the legal or equitable title to the lot. She could, if she had desired, have abandoned her rights in the property, and thereby compelled Adler to enforce his contract of sale as the remedies of the law afforded. It is not contended that the complainants acquired by their mortgage a superior title to Adler to the lot, and, indeed, there is no room for such insistence, since the bill alleges, and the evidence shows without dispute, that Mrs. Freeman acquired her rights by transfer of the bond from Robbins. While it is true that Mrs. Freeman is regarded in a court of equity as the owner of the lot as between her and Adler, this equitable ownership could not extend beyond the period in which she had the right to enforce the terms of the bond. She cannot, therefore, be so regarded after she transfers it to another, clothing her transferee with this equitable ownership, which he may ripen into a perfect equitable or legal title. The bond for title, and the writings assigning it, conveying no estate, either legal or equitable,

were not required to be recorded, under our registration statutes, providing protection to creditors and purchasers against dormant conveyances and loans. They were not conveyances of an unconditional estate in the lot, nor were they mortgages or instruments in the nature of a mortgage. Code 1896, § 1005 et seq; *Brown v. Chambers*, 12 Ala. 697.

In addition to what we have said above, there is another reason which is conclusive to our minds against the right of the complainants to recover. The bank did not derive its title, legal or equitable, to the lot from Mrs. Freeman, the mortgagor through whom complainants claim, but acquired from her, long before complainants' mortgage was made, the right to pay to Adler the debt, and receive as it did from him the deed conveying to it the title. This right acquired by the bank from Mrs. Freeman could not be defeated of its legitimate consummation by any act of hers. The decree is affirmed.

(121 Ala. 380)

BIRMINGHAM SHOE CO. et al. v. TORREY et al.

(Supreme Court of Alabama. April 19, 1899.)
CREDITORS' SUIT—PLEADING—ADEQUATE REMEDY AT LAW.

A creditors' bill, filed by the creditors of a company to recover goods alleged to have been fraudulently conveyed by the company, will not be dismissed on the ground that there is a remedy at law, although the bill alleged that the ones to whom the goods were sold were the real stockholders in the company, and already the owners of the goods.

Appeal from city court of Birmingham; H. A. Sharpe, Judge.

Creditors' bill by Torrey, Curtis & Tirrell and others against the Birmingham Shoe Company and others. From an order overruling a motion to dismiss the bill, defendants appeal. Affirmed.

Caboniss & Weakley, for appellants. H. K. White and Mountjoy & Tomlinson, for appellees.

MCLELLAN, C. J. This is a creditors' bill filed by the individuals composing the firm of Torrey, Curtis & Tirrell, and others, against the Birmingham Shoe Company, a corporation, Steiner Bros., a corporation, and others. Complainants' debts were due prior to the transactions between said corporations which are complained of. The bill alleges that the Birmingham Shoe Company was indebted to the complainants in the several sums stated, and that said shoe company, being hard pressed by its creditors, collusively and fraudulently confessed a judgment to Steiner Bros. for an amount equal to the value of all its assets; that the pretended debt upon which said judgment was confessed was simulated; and that the confession was made, and the property immediately levied upon and sold, and purchased by Steiner Bros., with the intent on the part of the debtor and Steiner Bros. to

hinder, delay, and defraud complainants and other creditors of the said shoe company. It is further alleged that Bach, the manager of the shoe company, was without authority to confess said judgment, and that the same for this reason, also, is void. The bill also contains the following paragraph: "Orators are informed and believe, and therefore charge, that the said Steiner Bros. were, at the time judgment was confessed in their favor for \$6,037.02, the real owners of all the capital stock and property of Birmingham Shoe Company, and had been such real owners ever since said company was incorporated, on the 27th day of November, 1893. The \$5,000 capital stock with which said company was incorporated was furnished by B. Steiner, S. Steiner, and Leo K. Steiner, who are brothers; and the said Leo K. Steiner was the holder of a portion of the capital stock of said Birmingham Shoe Company when it was incorporated, and was an officer and director in the company. He afterwards transferred his stock, as a matter of convenience, to J. Levy, who is a protégé of Steiner Bros., and who operates, and has operated for several years, a livery stable owned by Steiner Bros., called 'City Stable,' on First avenue, between Twenty-first and Twenty-second streets, Birmingham, Ala. The said Bach is a close relative of Steiner Bros., and is another protégé of theirs. He clerked for them several years at their store in Hamburg, Hale county, Alabama, and afterwards operated a store for them at Bolligee, Greene county, Alabama, for a few years prior to the time he came to Birmingham, in November, 1893, when the Birmingham Shoe Company was organized. The entire capital stock of said Birmingham Shoe Company, \$5,000, was furnished in money by Steiner Bros., but they had the nominal ownership of 98 of the 100 shares of said stock, of \$50 par value, amounting to \$4,900, placed in the name of J. Bach, though it was well understood between them and Bach that all receipts of money from said business should be deposited in Steiner Bros.' bank, and that Steiner Bros. should have all the profits arising from said business, except the amounts which it was agreed that Bach should draw for his services as manager of the said business. During its whole existence the Birmingham Shoe Company sold its goods exclusively for cash, and deposited its receipts in the bank of Steiner Bros. These deposits were only checked against by said Birmingham Shoe Company to pay the expenses of running its business, and for goods to replenish its stock. The profits were always greater than expenses, until within the few months preceding the failure of said shoe company, when business was generally very dull, and the legitimate profits became so small that the parties interested in said business concluded that it would be more profitable to fail. To this end they commenced in summer of 1896 to buy large quantities of goods on credit from every shoe manufactory

and wholesale dealer who would extend them credit. During the period of, to wit, 90 days preceding the confession of said judgment in favor of Steiner Bros., the Birmingham Shoe Company purchased and received goods, on which nothing was paid, of the invoice value of, to wit, \$11,561.31, from 27 different manufacturers and wholesale dealers in 19 different cities in 10 different states of the United States; said cities extending as far west as St. Louis, and as far east as Aurora, Maine. The invariable method of obtaining credit for these goods which were so purchased from complainants in this bill was substantially as follows: The said Bach would write letters to them, signing the same, 'Birmingham Shoe Co., J. Bach, Mgr.' and refer them to 'Steiner Bros., Bankers,' who, when inquiry was made of them in pursuance of said references, would recommend the Birmingham Shoe Company as highly worthy of credit, perfectly solvent, and very prompt in meeting its obligations. Upon such a flattering report from the 'Banking House of Steiner Bros.' the credit solicited and recommended was invariably extended. During the period of about one month preceding the retirement of the Birmingham Shoe Company from the active marts of competitive trade, cases of shoes came rapidly pouring in, as from a 'horn of plenty' which had been rubbed with the 'wonderful lamp' of a Steiner Bros., Bankers,' recommendation, and the Birmingham Shoe Company branched out into a wholesale business, which was conducted without warerooms or traveling salesmen, by simply re-marking the cases of shoes as they were received, and reshipping them to various retail dealers in Bessemer and other towns in the vicinity of Birmingham; but one important difference from the manner in which these goods were bought was prudently observed by said Birmingham Shoe Company when these goods were sold, to wit, that, whereas all these goods were bought from the manufacturers on credit, they were sold by the said Birmingham Shoe Company strictly for cash. Thus, Steiner Bros., Bankers, with a rare versatility of genius for affairs, operated said shoe business for their own benefit under the name of Birmingham Shoe Company, while the said J. Bach, J. Levy, and L. Levy, who were nominally the board of directors and stockholders of said corporation, owned no real interest therein, but were in fact mere employes of Steiner Bros." There is an alternative averment in the bill, but it has no bearing on the question now presented. The prayer is that Steiner Bros. be held as trustees in invitum of the property purchased by them at the execution sale, and be required to account to complainants for the value thereof, etc. The respondents moved to dismiss the bill for want of equity. That motion was denied, and from the order overruling it this appeal is prosecuted.

The theory upon which respondents based their motion is thus stated by their counsel: "The ground on which the motion to dismiss

the bill for want of equity was predicated is that, by the averments of the bill, Steiner Bros. were the owners of the property of the Birmingham Shoe Company, and hence complainants could not have been prejudiced by any dealings which Steiner Bros. may have had with reference to such property. And it appears, moreover, from the averments of the bill, that Steiner Bros. were the Birmingham Shoe Company, and that they operated the business for their own benefit under that name, while the nominal directors and stockholders of said Birmingham Shoe Company owned no real interest therein, but were in fact mere employes of Steiner Bros." It is clear, of course, and not denied for appellants, that the bill, without the averments of the paragraph we have quoted, states a perfectly good case of equity jurisdiction, under section 818 of the Code. And it is thoroughly well settled that the existence of an adequate remedy at law in a particular case does not bar the creditor of his remedy by bill in equity to reach and subject property or the proceeds of property which has been fraudulently conveyed by his debtor, by holding the transferee answerable for the property or its value. Nor is it of consequence that the bill may show that Steiner Bros.' dealings with this property could not prejudice the complainants, for that it belonged to them before they bought it at the execution sale. Whatever the fact be in this connection, complainants dealt with the Birmingham Shoe Company as a corporation. That company contracted these debts. That company at the time had this property. And complainants have a perfect right to treat that company alone as its debtor, and to treat this property as having belonged to it, and to subject it as the property of that corporation, though the fact may be, and it may so appear by the bill, that that company was a mere figurehead covering Steiner Bros., who in reality constituted it. Not only so, but the relations averred in the bill between Steiner Bros. and the shoe company may well be looked to in support of the fraud averred in respect of the confession of judgment, and the passing of the property into Steiner Bros. under that judgment. The question here involved is really decided against the appellants in the case of *Weingarten v. Marcus* (at the present term) 25 South. 852; and, upon the views we have expressed and that case, the decree overruling the motion to dismiss the bill for want of equity must be affirmed. Affirmed.

(121 Ala. 435)

BALCH et al. v. KLEIN FURNISHING CO. et al.

(Supreme Court of Alabama. April 18, 1899.)
CREDITORS' SUIT—PLEADING—ATTACHMENT BONDS.

A creditors' bill to reach what the debtor is entitled to recover on an attachment bond executed in an action by another creditor is demurrable, where it does not allege that the

debtor had a cause of action on the bond, and that the attachment was wrongfully issued.

Appeal from city court of Birmingham; H. A. Sharpe, Judge.

This was a general creditors' bill, filed by Balch, Price & Co. and others against the Klein Furnishing Company, a corporation, the Jefferson County Savings Bank, a corporation, E. F. Enslen, and C. F. Enslen. The bill averred: That the complainants had recovered judgment against the Klein Furnishing Company, upon which execution had been issued, and returned "No property found." That the Klein Furnishing Company had brought two suits,—one against E. F. Enslen and C. F. Enslen and the Jefferson County Savings Bank, on an attachment bond executed by said E. F. Enslen as principal, and the other two parties as sureties; and the other suit was a suit against the Jefferson County Savings Bank as principal, and E. F. Enslen and C. F. Enslen as sureties, on the attachment bond. Both of these suits were pending in the city court of Birmingham. That said suits were brought to recover damages for wrongfully suing out attachments against the Klein Furnishing Company, and having the same levied upon its stock of goods, and said goods sold under said writs of attachment. It was then averred that the goods of the Klein Furnishing Company so sold under the attachments were liable to the satisfaction of the debts of the complainants and the other creditors of the Klein Furnishing Company, and that the levy and sale of said goods damaged the complainants and other creditors, in that they have taken away and deprived said complainants and other creditors of the Klein Furnishing Company of said goods wherewith to satisfy their debts. The complainants then averred that said two attachment bonds, and the liability of the obligors on the bonds, as well as the suits thereon, are equitable assets of the Klein Furnishing Company, liable to the satisfaction of the debts of the complainants and other creditors of said furnishing company. The complainants further averred that, since the institution of said suits by the Klein Furnishing Company on the attachment bond, the Jefferson County Savings Bank, or E. F. Enslen, or C. F. Enslen purchased 29 out of the 30 shares of the capital stock of the Klein Furnishing Company, and had said stock transferred to persons other than the original holders thereof, for the purpose of compromising or dismissing said suits on the attachment bond, and that such dismissal or compromise would deprive the complainants and other creditors of the Klein Furnishing Company of all relief for the payment of their debts, and, unless prevented, the purchasers of said stock will release the obligors on the attachment bond from all liabilities thereon, and prevent the further prosecution of said suits. It was then averred that there was also another suit pending in the city court of Birmingham

by E. F. Enslen against the Klein Furnishing Company, and that the defense of this suit was necessary for the successful prosecution of the two suits upon the attachment bond. The prayer of the bill was "that, upon the final hearing of this cause, that your honor will render a decree subjecting the said suits, or the proceeds thereof, or the cause of action upon which said suits are based, to the debts of your orators, and such other creditors as will come into this suit; that, in the meantime, that your honor will appoint a receiver in this suit to take charge of and prosecute said suits for the benefit of your orators and the other creditors of said Klein Furnishing Company; that your honor will grant a writ of injunction out of this honorable court, enjoining and restraining said Klein Furnishing Company from dismissing or compromising said suits; and that your honor will enjoin said defendants, the said Jefferson County Savings Bank, E. F. Enslen, and C. F. Enslen, from setting up in defense or in bar of said suit any alleged agreement or compromise of said suits, or sale or transfer of the cause in action upon which said suits are based, or otherwise interfering with said suits. Your orators pray for such other, further, or general relief as they may be entitled to in equity and good conscience, and they will ever pray." The defendants demurred to the bill upon several grounds, the substance of which may be summarized as follows: (1) That it appears in and by said bill that this respondent has not taken steps or done anything to contribute to the matters complained of in said bill. (2) That it appears by the bill that this respondent is not in position to contribute or do anything towards carrying out the matters complained of in the bill. (3) That no facts are stated in the bill from which the court can infer or conclude that there will ever be any proceeds from the said suits on the attachment bond. (4) That it does not appear from anything stated in said bill how the defense of the suit of E. F. Enslen against the Klein Furnishing Company is necessary for the successful prosecution of the two suits on the attachment bond; the allegations of the bill in that particular being a conclusion of the pleader. (5) No facts are stated from which the court may conclude or infer that the compromise or dismissal of said suits on the attachment bonds would be a wrong or fraud to or upon the complainants. (6) That it does not appear in and by said bill that the said suits on the attachment bond were brought by or with the knowledge and consent or authority of the Klein Furnishing Company, or any one authorized to bind said company. (7) That a suit, in and of itself, is not an asset, legal or equitable. (8) That a cause of action, if there be a cause of action on said attachment bond, is not an equitable asset, and a receiver cannot be appointed by the court to bring such action as is sought by the prayer of the

bill. The defendants also demurred to the bill for the want of equity. On the submission of the cause upon the demurrer and motion to dismiss, both the demurrer and the motion were sustained, and the bill ordered dismissed. From this decree the complainants appeal, and assign the rendition thereof as error. Affirmed.

Mountjoy & Tomlinson, for appellants.
Tillman & Campbell and J. A. Mitchell, for appellees.

MCLELLAN, C. J. There may be two or more grounds upon which the conclusion of the city court might be sustained, but we will consider one only; regarding that as quite sufficient to an affirmance of the decree. It is this: The bill fails to aver that the Klein Furnishing Company has any cause of action or right of recovery against the other respondents, the Enslen and the Jefferson County Savings Bank, in the actions now pending on the attachment bond. The theory of the bill is, and it can only be maintained upon the idea, that Enslen wrongfully sued out an attachment against the Klein Furnishing Company, the complainants' debtor, and had it levied on the debtor's property. If the attachment was not wrongful, not only are complainants not injured by it, since its operation only is to give priority to the diligent creditor, which the law favors, but the common debtor, the Klein Furnishing Company, has no claim whatever against the attaching creditor; and, when the bill fails to aver the wrongfulness of the attachment, it also fails to show the existence of the alleged equitable assets which it seeks to subject to the debts of the complainants. The demurrer was therefore properly sustained, and the bill dismissed; the complainants not desiring to amend. Affirmed.

(121 Ala. 485)

KILGORE v. REDMILL.

(Supreme Court of Alabama. April 18, 1899.)

REFORMATION OF INSTRUMENTS—PLEADING—DISMISSAL—IN VACATION.

1. In an action to reform a deed for an alleged mutual mistake in the description of the land, the complainant must allege what land was intended to be conveyed, and in what respect he would have the deed reformed.

2. In an action to reform an instrument for mistake, if the mistake is not admitted, it must be proved by satisfactory evidence; the presumption being that the contract, as executed, contains the conclusion of all previous negotiations, and is the final agreement of the parties.

3. Where the only amendable defect in a bill to reform a conveyance of land for mutual mistake is in the description, and the cause is submitted and held for decree in vacation, it is not error to dismiss in vacation without leave to amend, where the testimony was all taken as though the bill was not defective.

Appeal from chancery court, Walker county; Thomas Cobbs, Chancellor.

Bill by J. R. Kilgore against W. H. Redmill to have enjoined an action of ejectment, and to reform a deed to a small tract of land, executed by the complainant to the defendant. The second and third paragraphs of the bill were as follows:

"(2) That on the 23d day of January, 1893, orator sold unto W. H. Redmill a small tract of land described as follows: Beginning at the southwest corner of the northwest $\frac{1}{4}$ of the northwest quarter of Sec. 9, Tp. 14, range 7 west, and run north 327 feet, more or less to fence corner, thence easterly along said fence 512 ft. more or less to Camak's Mill road, thence north 15 feet, thence westerly parallel with said fence 512 feet more or less to the section line, thence south to the beginning corner, the said tract being the strip 15 feet wide now used as a road by W. H. Redmill; and said respondent purchased the same to be used as a private road and took possession thereof, and paid orator the sum of \$17 as the purchase price therefor; that a deed was executed by orator to respondent, intending to convey said lands, a copy of which is hereto attached, marked 'Exhibit A' and made a part of this bill; that orator and respondent thought that the deed correctly described the land sold, but owing to their mutual mistake in the description, the deed described lands a few feet south of the lands sold and intended to be conveyed.

"(3) That the said W. H. Redmill has instituted suit in the circuit court of Walker county, Ala., against the orator for the recovery of the following lands, to wit: N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of Sec. 9, Tp. 14, range 7 west; that the tract of land described in the deed as stated in section 2 in this bill, Exhibit A, is embraced in the said suit."

It was alleged in the fourth paragraph of the bill that the complainant tendered a deed to the defendant with a true description of the land sold, demanded a quitclaim deed from the defendant to the lands described in the deed attached to the bill as Exhibit A, but the defendant refused either to accept the deed tendered or to give the one requested. In the deed, which is attached as Exhibit A to the bill and which was executed by the complainant to the defendant, the lands conveyed are described as follows: "Beginning at the southwest corner of the northwest $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of Sec. 9, Tp. 14, R. 7 west, and run north 324 ft., thence east 542 feet more or less to Camak's Mill road, thence north 15 ft., thence west 542 ft. more or less to the section line, thence south to the beginning corner, together with all and singular the tenements and appurtenances thereunto belonging, or in any wise appertaining." The other facts of the case are sufficiently stated in the opinion.

Upon the final submission of the cause on the pleadings and proof, the chancellor adjudged that the complainant was not entitled to the relief prayed for, ordered the injunction dissolved, and decreed that the bill be dismissed. From this decree the complainant

appeals, and assigns the rendition thereof as error. *Affirmed.*

Norvell & Smith, for appellant. Coleman & Bankhead, for appellee.

HARALSON, J. Suit to enjoin an action for the recovery of land, and to reform a deed for an alleged mutual mistake in the description of land in a deed of conveyance.

The description of the land conveyed is set out in section 2 of the bill, and the deed executed by complainant to defendant is made an exhibit, A, thereto. But nowhere in the bill is it clearly alleged in what the mistake, which complainant would have corrected, consists. In sections 3 and 4 are to be found the only attempts to indicate the mistake. In the third it is averred, that the defendant, Redmill, has instituted a suit in the circuit court against the complainant for the recovery of a certain 40-acre tract of land in a designated section, and that the tract of land described in complainant's deed, Exhibit A, is embraced in said suit. This is an averment merely, that the tract conveyed, and not that intended to be conveyed, but which by mistake was not conveyed, is embraced in said 40-acre tract. Nor does section 4 of the bill contain any description of the land intended to be conveyed but which was not. It merely states that complainant tendered a deed to defendant, with the true description of the land sold to him, but does not attach that deed to the bill; and one is left—as for any averment in the bill—in the dark as to what land was really intended to be conveyed, and in what respect complainant would reform his deed to defendant. The principle is familiar, that in an action to reform a written instrument, the complainant should allege the mistake, and set forth the agreement as made, and that which the parties intended to make. 20 Am. & Eng. Enc. Law, 720; *Campbell v. Hatchett*, 55 Ala. 548. Another familiar principle is, that courts of equity proceed with very great caution in reforming written instruments, and if the mistake as alleged is not admitted, it must be proved by clear, exact and satisfactory evidence, the presumption being that the contract as executed, contains the conclusion of all previous negotiations on the subject, and is the final agreement of the parties. *Campbell v. Hatchett*, supra; *Hertzler v. Stephens* (Ala.) 24 S. W. 521.

The defendant in his answer denies that there was any mistake in the description of the land in the deed, of which Exhibit A to the bill is a copy, and avers that the land he bought of complainant is correctly described in said deed.

The controversy is about a 15-foot strip of land the defendant bought from complainant for a private road, at the price of \$17. The complainant's contention is, that this road was to be run on its southern border along-

side of a plank fence, which ran east and west, between the lands of complainant and defendant. The complainant's evidence tended to show that this fence had been built prior to the execution of his deed to defendant,—on the 23d January, 1893; and that on the part of defendant, that the fence was not built till the spring of 1893, after he had bought and been put in possession of the land. If the fence was in existence at the time complainant sold to defendant, it would tend to show that complainant's contention as to the location of the road he sold was true, since the fence, just outside of which the road was to be run, would be established as a landmark. If defendant's evidence is to be taken as correct, it would appear that the fence had nothing to do with the location of the road he bought, and that the deed contains a correct description of the land complainant sold him. In examining the evidence on both sides, the chancellor came to the conclusion, that the alleged mistake in the description of the land conveyed had not been established with sufficient clearness and freedom from doubt required in such cases, and we approve his conclusion in this respect.

The bill was demurred to for that it failed to allege that the parties intended that the deed should embrace land other than that described, and defendant moved to dismiss for want of equity. Neither of these motions seem to have been acted on prior to a submission for final decree.

At the fall term, 1898, of the court, the cause was submitted on pleadings and proofs, as noted by the register, and was held by the chancellor for a decree in vacation. The decree ascertained that the complainant was not entitled to relief, dissolved the injunction and dismissed the bill.

If a dismissal be on demurrer, and for a defect that can possibly be amended, it is error to dismiss in vacation without allowing complainant an opportunity to amend. But, when a cause is submitted on pleadings and testimony for final decree, and held up for decree in vacation, it is not error to pronounce the decree in vacation, without granting complainant leave to amend, unless the dismissal is based on some amendable defect. *Wright v. Dunklin*, 83 Ala. 317, 3 South. 597; *Gilmer v. Morris*, 80 Ala. 78. The only amendable defect in the bill is a lack of averment of the description of the land intended to be conveyed, instead of that which was conveyed. The testimony was all taken without reference to any defective averment, and as though the bill contained all the necessary definiteness of allegation in this respect. So treating the bill, it is manifest the court did not err in dismissing it in vacation, without leave to amend. *Authorities supra*; *Bell v. Light Co.*, 103 Ala. 275, 15 South. 569.

Let the decree be affirmed.

Affirmed.

(121 Ala. 352)

BIRMINGHAM RAILWAY & ELECTRIC CO. v. SMITH.**(Supreme Court of Alabama. April 18, 1899.)
STREET RAILROADS — COLLISION WITH BUGGY —
WILLFUL INJURY.**

Where a horse and top buggy, inclosed by curtains, moving in the same direction as, and about 100 feet ahead of, a street car, running five or six miles an hour, turned to cross the tracks, and the motorman, though he saw the buggy turn, failed to slacken speed or give warning, and the car struck the buggy, his conduct amounted to a willful injury.

Appeal from city court of Birmingham; H. A. Sharpe, Judge.

Action by J. S. Smith against the Birmingham Railway & Electric Company. From a judgment entered on a verdict for plaintiff, defendant appeals. Affirmed.

The complaint contained two counts; the first count charging simple negligence, and the second count charging that the servant of the defendant, in charge of the car inflicting the injury, willfully and intentionally run it against the plaintiff's horse and buggy, throwing the plaintiff from the buggy, and causing the injuries complained of. The tendencies of the evidence are sufficiently stated in the opinion. At the request of the defendant, the court instructed the jury that they must find for the defendant under the first count of the complaint. The defendant then requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "I charge you, gentlemen of the jury, if you believe the evidence, that the defendant is not guilty of willfulness or wantonness." (2) "I charge you that, if you believe the evidence, you must find for the defendant under the second count of the complaint." (3) "I charge you that, if you believe the evidence, you must find for the defendant." (4) "I charge you that the evidence in this case shows that the motorman did everything to stop the car that he could have done after he saw the perilous position of plaintiff's buggy." (5) "I charge you that you must render a verdict in favor of the defendant, unless you believe from the evidence that the car was standing on the south side of Avenue B, when plaintiff started his buggy across the tracks." (6) "I charge you that you must render a verdict in favor of the defendant if you believe from the evidence that the car was moving towards the point where the plaintiff attempted to cross the track with his buggy, at the time plaintiff began to make the crossing." There were verdict and judgment for the plaintiff, assessing his damages at \$267. The defendant appeals, and assigns as error the refusal of the court to give the charges requested by it.

Walker, Porter & Walker, for appellant.
Gregg & Thornton, for appellee.

TYSON, J. There were two counts in the complaint; one charging simple negligence,

and the other that the servant of the defendant in charge of the car willfully and intentionally ran it against the plaintiff's buggy and horse, which resulted in the injury complained of. The judge trying the case, at the request of the defendant, instructed the jury that plaintiff was not entitled to recover upon the count of the complaint charging simple negligence, but submitted to the jury, for their determination from the evidence, as to whether the defendant's servant was guilty of willful and intentional misconduct.

It was contended by defendant's counsel in the court below, and that contention is renewed here, that the evidence fails to establish such a state of facts as entitled the plaintiff to have the question of willful or intentional injury submitted to the consideration of the jury; that, upon the most favorable construction of the entire evidence, it proved no more than simple negligence on the part of defendant's motorman, which was overcome by the contributory negligence of the plaintiff himself. The soundness of this contention involves the necessity of stating the tendency of the testimony introduced by each of the parties litigant, and the natural and logical inferences to be deduced therefrom. The evidence introduced by the plaintiff tended to prove that while driving along Twentieth street, in the city of Birmingham, between Avenues B and C, in a top buggy enclosed by curtains to protect its occupants from the rain, about halfway between the east track of defendant—there being two tracks of defendant over which it operated its cars between these avenues—and the sidewalk, at a point about 170 feet from Avenue B, he turned his horse and buggy towards the west side of Twentieth street, and drove diagonally across the tracks of defendant. The plaintiff, and the witness who was in the buggy with him, testified that, as they approached the east track, they looked back, and saw the car standing at the south side of Avenue B, on the west track; that they, without looking up or down the tracks again, and without stopping and listening, drove across the east track, and were on the west track, crossing it, when the car, coming from the north and from the direction behind them, ran into the buggy, causing the injuries complained of. The evidence further tended to show that the horse was in a walk, as he crossed the street and tracks, and when the car struck the buggy plaintiff and the witness who was in the buggy were thrown out of the buggy, and while in the act of falling the plaintiff testified he heard the motorman in charge of the car say: "Look out! This is the second time you have driven before me this morning, and it will teach you to keep out of the way." The other person thrown from the buggy testified that the motorman on the car said: "Look out! This is the second time you have driven across in front of me this morning." That no signal of any kind was given of the approach of the car. Another witness for

plaintiff located the moving car at about 100 or 125 feet from the plaintiff when he started across the tracks, and that the car was running "pretty fast." Its speed was unchecked until its collision with the buggy, and the motorman was looking straight ahead in front of the car. The evidence on the part of the defendant tended to prove that the plaintiff was driving along the street, within a few feet of the front end of the car, from Avenue B to point of collision; that the plaintiff suddenly, without looking or stopping, turned his horse and buggy diagonally across the track, but immediately in front of the moving car, within a few feet of it, which was running at a rate of speed of 5 or 6 miles per hour. The motorman testified that when the buggy started to cross the track he did all that he could to stop the car and prevent the collision, but, on account of the close proximity of the two, it was impossible to do so; that the car stopped almost immediately after striking the buggy. In addition to the testimony of the motorman and a passenger on the car, the defendant introduced a correct map of the street, showing the tracks of the car line on this street between Avenues B and C, and the distance from Avenue B to the point of collision to be about 250 feet, and the tracks between them to be straight, with nothing to obstruct the view.

Unquestionably, if the testimony of the witnesses examined by the defendant was true, the injuries complained of were the result of the carelessness of the plaintiff; and the motorman, if guilty of any negligence, could be chargeable only with simple negligence for failing to give the proper signal of the approach of the car, upon perceiving the horse being turned for the purpose of crossing the track upon which his car was moving. *Electric Co. v. Bowers*, 110 Ala. 323, 20 South. 345. But was it true that when the plaintiff began to turn his horse and buggy for the purpose of crossing the tracks, a distance of from 25 to 35 feet from the track upon which the collision was had, that the car, moving at a rate of speed of 5 to 6 miles an hour in the direction of the buggy, was only 100 or 125 feet away, and nothing to prevent the motorman seeing it? If true, would the jury be authorized to find that the motorman saw the buggy when it was approaching the track for the purpose of crossing it? If he saw the horse and buggy approaching the track, for the purpose of crossing it,—knowing, as he was bound to know, that its occupants could not see or hear the approaching car, on account of the top of the buggy being inclosed by curtains,—in time to stop the car before the collision, his conduct amounted to that reckless indifference or disregard of the natural and probable consequences of his acts to which may be imputed to him the same degree of culpability as wantonness, and must be held the equivalent of willful injury. The facts of this case are clearly distinguishable from the facts of the case last above cited. In that

case, the deceased could see the approaching locomotive, and the engineer had a right to presume that he did see and hear it, and to rely upon his getting off the track. Here, if the evidence of the plaintiff's witnesses was to be believed, it was apparent to the motorman that plaintiff could not see or hear the car as it approached, and that he was, on account of being inclosed by the buggy top, insensible of the danger. Under the circumstances, he had no right to presume or rely upon the plaintiff hastening to cross the track or not attempting to cross it; the danger being known to him only, and not to plaintiff. Presumptions should not be indulged, to relieve a party from the natural consequences of his act, against circumstances so strong as to lead the mind to the conclusion that the act was the result of wanton or reckless indifference to probable consequences. The tendencies of the testimony in this case being in conflict as to whether the motorman saw and knew the plaintiff was going to cross the track, circumstanced as he was, in ample time to avoid the collision, the court properly submitted the evidence to the jury. We have considered the only assignment of error insisted upon in the argument of appellant's counsel. It follows, from what we have said, there was no error in refusing the written charges requested by the defendant. The judgment is affirmed.

(121 Ala. 252)

COFER v. REINSCHMIDT.

(Supreme Court of Alabama. April 20, 1899.)

CERTIORARI TO JUSTICE — TRIAL DE NOVO — REVIVOR.

1. A statutory certiorari, brought by a claimant of attached property to review a judgment by a justice against defendant, and condemning the property for payment thereof, annuls the entire judgment, and transfers the cause to the circuit court to be tried de novo.

2. A plaintiff is not entitled to attached property, as against a statutory claimant, where defendant dies after certiorari by claimant to review a justice's judgment condemning the property to the payment of a judgment for plaintiff, and plaintiff fails to revive the action against defendant's personal representative within the time required by Code 1886, § 2803, in view of section 3013, providing for the issuance of an execution against a claimant, to whom attached property has been delivered, on the recovery of judgment by plaintiff against defendant in attachment.

Appeal from circuit court, Cullman county; H. C. Speake, Judge.

Daniel Reinschmidt sued out an attachment against W. F. Griffin in a suit against said Griffin to recover the rent due from him as the tenant of the plaintiff, Reinschmidt. This writ of attachment was levied upon certain property as belonging to the defendant, Griffin. Thereupon W. T. L. Cofer interposed a claim to said property, and instituted a claim suit for the trial of the right to said property, and the suit was commenced before a justice of the peace, and the justice rendered judg-

ment against the defendant, and condemned the property to the satisfaction thereof. This judgment was rendered on November 21, 1891. On December 17, 1891, the claimant, W. T. L. Cofer, sued out a writ of certiorari, to have the cause removed from the justice of the peace court to the circuit court, and the cause was revived in May, 1892. While the cause was pending in the circuit court, the defendant, Griffin, died, in September, 1893. On September 16, 1895, the death of the defendant, W. F. Griffin, was suggested, and upon motion an order was made allowing the plaintiff to revive the suit against the personal representative of W. F. Griffin, when known. On September 24, 1896, there was a motion to revive the cause against R. J. Fuller, as administrator of the estate of W. F. Griffin, deceased. Issue having been made up between the plaintiff and the claimant for the trial of the right of property levied upon under the writ of attachment, the claimant, when the cause was called for trial, on September 20, 1897, filed a plea in abatement, in which he set up that the plaintiff should not further prosecute the suit, because the defendant in said cause was dead, and there had been no revivor of said suit or of the judgment within 18 months after the death of said defendant. The claimant also made a motion to abate said cause on the same ground. The plaintiff demurred to the pleas in abatement filed by the claimant, upon the ground that the death of the defendant, and the failure to revive the judgment, is no defense to the issue in this cause. This demurrer was overruled, and the claimant duly excepted. The motion to abate the suit was also overruled, and to this ruling the claimant duly excepted. Under the opinion in this case, it is unnecessary to set out in detail the facts of the case showing the rulings of the court upon the evidence and upon the charges requested. There were verdict and judgment for the plaintiff. The claimant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved. Reversed.

J. B. Brown, for appellant. W. G. Brown, for appellee.

TYSON, J. This appeal is prosecuted by the claimant from a judgment rendered against him in the circuit court in a claim suit for the trial of the right of certain personal property levied upon by a writ of attachment sued out by the plaintiff against the defendant in attachment for the enforcement of a lien for rent alleged to be due by the defendant as his tenant. The attachment and claim suits originated in a justice court, and were tried there at the same time, and only one judgment was rendered by the justice. It appears from his judgment entry that, after ascertaining that the defendant was in default, he proceeded to judgment against him by default, and then condemned the prop-

erty to the satisfaction of plaintiff's writ of attachment, presumably against the claimant. We say presumably, for the reason that it does not appear from his transcript of the proceedings in the case that the claimant was present, and litigated with the plaintiff the question of their respective claims to the property. It does appear that this must have been true, for the reason that the bond of the claimant was declared forfeited by the officer, as required by section 3368 of the Code of 1886. After the five days had elapsed within which the claimant could prosecute his appeal from this judgment, the claimant sued out a writ of certiorari under the statute, for the purpose of having the trial and judgment of the justice of the peace annulled, and the cause removed to the circuit court, and there tried de novo.

The first question presented for decision arises upon the rulings of the court upon the sufficiency of the claimant's plea in abatement alleging the death of the defendant in attachment since the suing out of the writ of certiorari, and the failure to revive the suit against his personal representative within 18 months after his death, as required by section 2803 of the Code of 1886. Independent of the effect of the action of the justice in trying the attachment suit against the defendant before, or contemporaneously with, the trial of the claim suit upon the judgment rendered by him, in violation of the mandate of the statute requiring the claim suit to be first tried (Code 1886, §§ 3012, 3018; *Abraham v. Nicrosi*, 87 Ala. 178, 6 South. 293), the writ of certiorari operated, under the peculiar facts of this case, to annul the entire judgment, and to transfer the causes to the circuit court to be tried de novo, just as an appeal in each would have done. 3 Brick. Dig. 591, § 42. As between the plaintiff and the claimant, the issue to be tried was whether the property upon which the writ of attachment was levied was the property of the defendant in attachment, upon which the plaintiff had a lien for rent, and leviable to the satisfaction of the writ of attachment, and the burden was upon the plaintiff to establish these facts. Code 1886, §§ 3006, 3006, 3012. See, also, Code 1896, and authorities noted under it. As said in *Selsel v. Folmar*, 103 Ala. 494, 15 South. 851: "It is a controlling principle in the statutory trial of the right of property, levied upon by attachment or execution, that the claimant must recover on the strength of his own title, not because of the weakness or want of title in the defendant in the process." Nor can the plaintiff be permitted to recover upon the weakness of the title of the claimant, unless he shows the property to be the property of the defendant, and subject to his attachment, and, in the case under consideration, the additional fact that he had a lien upon it for rent due him by the defendant. It was a matter of no concern to him if he had no lien as landlord, whose property it was, if it did not belong to the defendant.

Dryer v. Abercromble, 57 Ala. 497; Allison v. Pattison, 96 Ala. 159, 11 South. 194.

We have stated the issues for the purpose of determining the inquiry here involved, as it grows out of the nature and character of a claim suit under our statutes. It has its origin in the making of an affidavit by a stranger to the writ of attachment or other process levied upon personal property, claiming the property, and giving a bond, payable to the plaintiff in the writ, conditioned to deliver the property for the satisfaction of the plaintiff's claim, if it be found liable therefor. Code 1896, § 4141 (Code 1886, §§ 3004, 3012, 3014, 3365); *McAdams v. Beard*, 34 Ala. 478; *Lassiter v. State*, 106 Ala. 292, 17 South. 725. After the making of the affidavit and the giving of the bond, the plaintiff in the process becomes the actor, and, as we have said, on him rests the burden of proving the affirmative fact asserted by the levy of the process, and, in case of attachment to enforce a statutory lien, the existence of that lien, and, of necessity, a valid debt against the defendant in attachment. As said by Walker, C. J., in *McAdams v. Beard*: "The trial of the right of property, under our statutes, is a proceeding altogether *sui generis*. There is no precedent for it known to us in the English law." It is not an independent suit, but derives its existence out of the pendency of the attachment suit. Without the issue and levy of the writ of attachment, no such suit could possibly come into being. As said in the case of *Jackson v. Bain*, 74 Ala. 328: "Soon after the attachment was levied, Bain, the appellee, interposed a claim to the property levied on. He filed his affidavit of ownership, and executed the necessary claim bond to institute the statutory action known in our jurisprudence as a 'trial of the right of property.' This is not an independent suit, which parties may inaugurate in the first instance. It is statutory and consequential in its nature." Proceeding with a discussion of other questions not necessary here to note, the learned justice, after showing the burden of proof to be upon the plaintiff, said further: "The attachment in this case being void, it had no greater validity than if no attempt had been made to issue it. The claimant can take advantage of it, because it is void, not merely irregular. He can take advantage of it, because it is the first and fundamental evidence of plaintiff's right, without which he cannot recover. Being void, the first step cannot be taken in showing a *prima facie* right of recovery. He falls before he reaches the adversary's outworks." If his writ be regular, what becomes of his attack upon his adversary, should it be shown that he has no valid enforceable demand to support his lien against the defendant in attachment at the time of the trial? Suppose the defendant had paid his rent to the plaintiff after the institution of the claim suit, or suppose the plaintiff had dismissed his attachment against the defendant after the in-

stitution of the claim suit; we do not apprehend there can be a serious controversy that, if either of these supposititious facts had actually existed, the claimant could invoke either of them to defeat the suit against him. The claim suit, being consequential and dependent upon the main, independent attachment suit, can no more stand, unsupported and alone, than it could have come into being without the previous and contemporaneous existence of the attachment suit. Besides, the statute (Code 1886, § 3013) expressly provides that "when property levied on under an attachment, and delivered to claimant, is not by the claimant delivered to the sheriff within thirty days after judgment against him, the sheriff must return the bond forfeited; and upon the recovery of judgment by the plaintiff against the defendant in attachment, execution must be issued upon such forfeited bond within the time required for the issue of executions on judgments." It is too clear, from this language, to require argument, that, even though there is a judgment against the claimant, he cannot be required to deliver the property, under the conditions of his bond, until the plaintiff had obtained a judgment against the defendant. This, of course, could not be done, if he is dead, without a revivor of the attachment against his personal representative within 18 (now 12) months after his death. These considerations, to our mind, are conclusive that the claimant had the right to interpose the defense that the action had abated, as against him; on account of the failure of the plaintiff to revive the attachment suit, within the period prescribed by the statute, against the personal representative of the defendant.

There are many other assignments of error, based upon the rulings of the court upon the introduction and exclusion of evidence during the trial, to which exceptions were reserved by the claimant; but as the point upon which the cause is reversed is conclusive against the right of the plaintiff to further prosecute the suit, if it is a fact that the defendant has been dead for more than 18 months, we do not think it necessary to review them. Reversed and remanded.

(121 Ala. 527)

COTTINGHAM v. BAMBERGER et al.

(Supreme Court of Alabama. April 4, 1899.)

ATTACHMENT—CLAIM BOND — LIMIT TO LIABILITY — INJUNCTION.

Where execution has issued on a forfeited claim bond to satisfy judgments against the claimant's vendor to an amount largely in excess of the agreed value of the property in question, and the claimant has previously paid to the clerk of the court, for the benefit of said judgment creditors, a sum greater than said agreed value, the claimant is entitled to have said creditors and the sheriff enjoined from seeking further to subject his property to the payment of said judgments.

Appeal from chancery court, Bibb county; W. H. Tayloe, Chancellor.

Bill in equity by J. M. Cottingham against Bamberger, Bloom & Co., Richardson Bros. & Co., and Hodges Bros. Decree for defendants, and complainant appeals. Reversed.

The bill in this case was filed by the appellant, J. M. Cottingham, against the appellees, Bamberger, Bloom & Co., Richardson Bros. & Co., and Hodges Bros. The bill of complaint shows the following facts: On the 19th of December, 1892, E. N. Cottingham & Co., doing business in Blocton, Ala., conveyed to J. M. Cottingham, the complainant herein, and one M. A. Suttle, a certain stock of goods. Subsequently Armour Packing Company, Hodges Bros., Bamberger, Bloom & Co. and Richardson Bros. caused to be levied certain attachments on said stock of goods in the hands of the claimants, J. M. Cottingham and M. A. Suttle. The Armour Packing Company obtained the first levy of attachment, Hodges Bros. the second levy of attachment, Bamberger, Bloom & Co. the third attachment and Richardson Bros. the fourth levy of attachment. The attachments referred to as shown by the returns of the sheriff were in and upon the same stock of goods. The said J. M. Cottingham and M. A. Suttle instituted claim suits in the respective attachments, and the issues in all the cases being the same, an agreement was had by and between the attorneys of record that the three cases of Hodges Bros., Bamberger, Bloom & Co. and Richardson Bros., the appellees herein should stand upon the docket of the circuit court of Bibb county until the issue in the claim suit in the case of Armour Packing Company against E. N. Cottingham & Co. defendants and J. M. Cottingham and M. A. Suttle claimants should be decided (which case went to the supreme court, 109 Ala. 421, 19 South. 842) and that they should take the same course as that decided in the Armour Packing Company's case. The judgment entries in the several claim suits above referred to condemn the property. The allegations of the bill show that the property conveyed under said bill of sale to J. M. Cottingham and M. A. Suttle by E. N. Cottingham & Co. was agreed to be of the value of \$3,000, but in truth and fact was less than that amount in value. The bill shows that the complainant herein, J. M. Cottingham, has paid the sheriff of Bibb county on said claim judgments the sum of \$3,995.67, an amount in excess of the value of the property agreed upon in the sum of \$995.67. And the complainant claims in equity that he is not required to pay any more.

The prayer of the bill was that the defendants and the sheriff be enjoined from further proceedings against the complainant in the sale of complainant's lands under the levy of the executions issued upon the several judgments in favor of the defendants, and that the complainant be relieved from further liability on any of said judgments and executions. The defendants filed a motion to dissolve the temporary injunction which

was issued, upon the ground that the bill was without equity.

On the submission of the cause upon this motion, the chancellor rendered a decree sustaining said motion and ordering the injunction dissolved. From this decree the complainant appeals, and assigns the rendition thereof as error.

J. M. McMaster and W. W. Lavender, for appellant. Lane & White, for appellees.

HARALSON, J. The four attachments mentioned in the bill were levied on the same goods, at different times, and have priority of lien according to their respective priorities of levy. The defendant in attachment did not replevy the property under section 555 (2964) of the Code; but, J. M. Cottingham, the complainant, who was not a party to the writs of attachment, interposed a claim thereto and executed a claim bond under section 4141 (3004) of the Code, to try the right of property in said goods. The goods attached were valued by consent of parties at \$3,000. Moneyed judgments were obtained in each of the attachment suits, and a judgment of condemnation of the property levied on was entered in each. There was one claim bond, executed in the sum of \$12,000, payable to all the attaching creditors jointly, more than four times the value of the goods levied on. The bond, on failure of claimant to return the property within the time required by law, was duly returned forfeited by the sheriff, and executions issued by the clerk of the court in each case against the claimant and his sureties, aggregating in amount more than the value of the property attached. The complainant has paid to the sheriff towards the satisfaction of these executions the sum of \$3,995.65, which was sufficient, if properly applied, to satisfy all said judgments and costs, except a balance on the judgment of Richardson Bros. & Co., whose attachment was the one last levied.

It is shown, that these several executions have been levied on complainant's lands, and the sheriff has advertised them for sale. This bill was filed to enjoin that sale, and to obtain relief from further liability on said executions.

We have heretofore construed the statutes under which these claims were interposed, and the claim bond executed, holding "that when the execution issues on a forfeited claim bond, in cases of this character, involving trials of the right of property, it should be for the assessed value of the property replevied by the claimant, not to exceed, in any event, the amount of plaintiff's judgment, besides the assessed damages (if any) and costs. It is only when the property levied on is replevied by a defendant in execution or attachment, that the execution, on a forfeiture of the replevy bond, runs against the obligors for the whole amount of the judgment and costs." *Maas v. Long*, 70 Ala. 237.

The case of *Jaffray v. Smith*, 106 Ala. 112, 17 South. 218, is substantially on all fours with the one before us, in which case the court reaffirmed the principles announced in the case above cited, and held that complainants, situated as the one here is, had a standing in a court of chancery for relief against so manifest an injustice. It is unnecessary to supplement what was said in these cases, so well considered, as we can add nothing by way of elucidation to what is there settled.

The court erred in dissolving the injunction.

Reversed and remanded.

(121 Ala. 287)

WALLEN et al. v. MONTAGUE et al.
(Supreme Court of Alabama. April 18, 1899.)
FRAUDULENT CONVEYANCES—CONVEYANCE TO RELATIVES—CONSIDERATION—PRE-EXISTING DEBTS.

1. Where the undisputed evidence shows that the consideration for a conveyance by a solvent debtor to a relative, made on the eve of threatening litigation, was a payment in cash and the satisfaction of a pre-existing debt, and that the price was reasonable, a finding that it was fraudulent against creditors is not warranted.

2. A finding that a conveyance by a solvent debtor to a relative in payment of a claim for services was fraudulent against creditors is not warranted where the evidence shows the performance of the services, the indebtedness therefor, and that the price allowed for the property was reasonable.

Appeal from chancery court, Morgan county; William H. Simpson, Chancellor.

Bill by Montague & Lewis against Ed M. Wallen and others to set aside certain conveyances. From a decree for complainants, defendants appeal. Reversed.

S. T. Wert, for appellants. Speake & Russell, for appellees.

DOWDELL, J. This is a common creditors' bill filed by the complainants against their common debtor, Wallen, and his co-respondents, F. T. and Nellie Sherlock, as fraudulent grantees of certain lands conveyed to them by Wallen. The bill avers, among other things, the relationship of Wallen to the Sherlocks as that of brother-in-law, and that the said conveyances so executed by him to these grantees were voluntary; that the recited consideration in the said conveyances was simulated and fictitious, and in fact and reality no consideration existed, and that the same were made and executed with the intent and purpose to hinder, delay, and defraud the creditors of said grantor; and that said grantees knowingly participated in said fraudulent acts on the part of said Wallen. There is no averment in the bill that the defendant was at the time of the execution of the conveyances in question insolvent or in failing circumstances, but the theory of the bill rests upon the proposition and averment that the said conveyances were voluntary.

The record only presents for revision the

decision of the chancellor on questions of fact. Subdivision 1, § 3828, of the Code of 1896, provides that, "in deciding appeals from the chancery court, no weight shall be given the decisions of the chancellor upon the facts, but the supreme court shall weigh the evidence and give judgment as they deem just." It was formerly the rule in this court, in appeals of this character, not to disturb the finding of the chancellor upon the facts in the case unless the evidence should clearly show that his conclusions were erroneous. This rule, however, has been changed by the section above quoted. As we have observed, the bill in this case contains no averment of the debtor's insolvency at the time of the making of the conveyances assailed. The facts and circumstances which under the law would avoid a conveyance by an insolvent debtor, or one in failing circumstances, would not necessarily avoid a conveyance by a solvent debtor. In either case, however, the fraudulent act of the grantor debtor, if knowingly participated in by the grantee, when done for the purpose of hindering, delaying, or defrauding creditors, would invalidate the conveyance. A conveyance by an insolvent or failing debtor for a present cash consideration from the grantee, with knowledge on the part of such grantee of such insolvent or failing condition of the grantor, under the law, renders the conveyance, as to existing creditors of such grantor, fraudulent and void; but such would not be the result as to a conveyance executed by a solvent debtor for a present cash consideration, the same being reasonable and fair. It is, however, a well-settled proposition of law that a voluntary conveyance is void as to existing creditors of the grantor, regardless of the question of solvency or insolvency of such grantor. The vital question, then, in this case, is one of fact, and is as to whether the recited consideration in the conveyances assailed is simulated and fictitious, which, if true, would make such conveyances voluntary, and, of course, fraudulent and void, as a matter of fact and of law, as to the existing creditors of the grantor. In transactions of this character, where the parties—that is, grantor and grantee—are closely related, greater scrutiny of the evidence as to the bona fides of the transaction should be indulged than in cases between mere strangers. The fact, however, of close relationship, is not, in itself and of itself, evidence of fraud. Where the transaction between such parties is reasonably shown to be honest and fair, and the consideration just and commensurate, it should be as firmly upheld by the courts as though the parties were entire strangers. *Moog v. Farley*, 79 Ala. 246; *Cadiere v. Guidry* (La.) 7 South. 232. While the testimony of Wallen and F. T. Sherlock relating to the conveyance by Wallen to said Sherlock may be open to some criticism as to the lax manner in which their dealings with each other were carried on, still it is not unreasonable nor inconsistent.

ent with honesty and fairness. Too nice a particularity of dealings and transactions between parties so nearly related as these would as justly and reasonably invoke unfavorable criticism, and perhaps more, than the loose and lax manner of their dealings as shown by the evidence in this case. We think the evidence of these witnesses, which is undisputed by any other evidence, reasonably shows that Wallen was indebted to F. T. Sherlock in the manner and for the reasons given in their respective testimony. That Sherlock worked and labored for Wallen is also shown by the testimony of other and disinterested witnesses.

Under the averments in the bill, it is immaterial whether the consideration paid Wallen for the land conveyed by him to Sherlock was a cash consideration, or the conveyance made in payment of a pre-existing indebtedness from Wallen to Sherlock. The undisputed evidence shows, however, that the consideration was made up both in satisfaction of a pre-existing debt and part cash. We think, also, the evidence, when fairly considered, shows that the consideration paid by Sherlock to Wallen was reasonable, fair, and commensurate, and not disproportionate to the actual value of the real estate conveyed.

What we have said with regard to our conclusions on the evidence as to the transaction between Wallen and F. T. Sherlock applies with equal, if not more, force as to the transaction between Wallen and Nellie Sherlock. The evidence of Wallen, F. T. Sherlock, and Nellie Sherlock clearly shows, without contradiction, the indebtedness of Wallen to Nellie Sherlock. The testimony of other disinterested witnesses also shows that Nellie Sherlock was employed by Wallen as his bookkeeper, and that as such she worked for him for 15 or 18 months. The evidence, without dispute, shows that for her services as such bookkeeper she was to receive as compensation the salary of \$35 a month. Wallen had paid her nothing for her services up to the time of the execution of the conveyance in question. The undisputed evidence is that the consideration named in her deed was a fair and reasonable valuation of the property conveyed.

The recited consideration of the several deeds being made up in part by the pre-existing indebtedness of Wallen to the Sherlocks, and part cash, and being bona fide, as we think the evidence in this case reasonably shows, and not disproportionate to the value of the land conveyed, the mere fact of the conveyances having been executed upon the eve of pending or threatened litigation against Wallen would not in itself invalidate the conveyances. We cite the following authorities as sustaining our conclusions in this case: *Wilkinson v. Buster* (Ala.) 22 South. 34; *McAllister v. Honea* (Miss.) 14 South. 264; *Levy v. Williams*, 79 Ala. 171; *Moog v. Farley*, supra.

The decree of the chancery court, being in-

consistent with our conclusion on the facts, must be reversed, and a decree here rendered dismissing the bill as to the respondents, but, as to the respondent Wallen, without prejudice.

(121 Ala. 162)

CARTER et al. v. ODOM.

(Supreme Court of Alabama. April 20, 1899.)

STATUTE OF FRAUDS—AGREEMENTS TO ANSWER FOR DEBT OF ANOTHER—ACCOMMODATION INDORSEMENT—NOTES—BONA FIDE PURCHASER—PROTEST—NOTICE—EVIDENCE—PLEADING.

1. An accommodation indorsement of a negotiable note, made contemporaneously with the execution of the note by the maker, is an original contract, and not an agreement to answer for the debt of another, within the statute of frauds.

2. A note taken in payment of an antecedent debt is taken for value in due course of business.

3. Error in holding pleas bad on demurrer is harmless where the matters set up in them, under the undisputed facts in the case, would not have been a defense.

4. Where the complaint on a note alleges its due protest and notice thereof to an indorser, a special plea by the latter that he was never legally notified of the protest is demurrable where he also pleads the general issue, since, the allegation of notice in the complaint having been necessary, the special plea was merely a repetition of the plea of the general issue.

5. A finding that the indorser of a note was duly notified of its protest, based on proof of the service of protest by mail, and evidence that in the town where the note was protested that manner of giving notice was customary, will not be disturbed on the ground that, the payee and indorser residing in the same town, personal notice was necessary, where the objection was by demurrer to the evidence, which admits the competency of the evidence, and merely presents the question of its sufficiency for determination.

Appeal from circuit court, Walker county; E. H. Cabaniss, Special Judge.

Action by James Odom, Sr., against D. K. Carter, John B. Carrington, and John B. Shields on a promissory note. The complaint, as amended, contained five counts. Demurrers were sustained to all of the counts except the third, but, the appeal being taken by the defendants, it is unnecessary to set out the counts to which the demurrers were sustained or the demurrers themselves. The third count was as follows: (3) "Plaintiff claims of defendants the further sum of \$708.50, due from them to plaintiff, with interest since the 1st day of January, 1896, for that on the 6th day of February, 1895, the Jasper Stone-Quarry Company, a corporation, through said F. A. Gamble, now deceased, as its president, made to plaintiff its promissory note for said sum of \$708.50, due and payable on said 1st day of January, 1896, at the Jasper Trust Company's office, Jasper, Alabama, in words and figures, to wit: '\$708.50. Jasper, Ala. Feb. 6th, 1895. On the first day of Jan. (1896) after date we promise to pay to the order of James Odom, Sr., seven hundred and eight and 50/100 dollars, value received, at the Jasper Trust Company's office, Jasper, Ala.,

and all right to claim any exemption under the constitution or laws of this or any other state as against this debt is hereby expressly waived by the makers and indorsers of this note. Jasper Stone Quarry Company, per F. A. Gamble, President.' And the said F. A. Gamble, D. K. Carter, John B. Carrington, and John B. Shields then and there indorsed said promissory note in blank, and delivered it to plaintiff, and the same is yet due and unpaid. Plaintiff avers that said indorsers, each for himself, by so indorsing said promissory note, expressly waived his exemption as to personal property. Plaintiff further avers that on, to wit, the 4th day of January, 1896, said note was duly and legally presented for payment by John A. Gravlee, notary public, to the said executors of F. A. Gravlee, then deceased, and to the said other defendants in person, and payment thereof was then and there duly demanded and refused. Then and there the same was duly protested by said John A. Gravlee, notary public, and notice of protest then and there given to said executors and said other defendants; wherefore plaintiff sues." To the third count the defendants demurred upon the following ground: The said counts fail to allege that suit was brought on said note against the maker thereof to the first term of the court to which it could properly be brought after the indorsement thereof by defendants. This demurrer was overruled, and the defendants duly excepted. Thereupon the defendants filed the following pleas: "(1) Come the defendants, and for answer to the third count of the complaint say that the contract sued on was without consideration. (2) For further answer to the third count respondents say that the said contract sued on was a promise to answer for the debt, default, or miscarriage of another, and no note or memorandum thereof in writing expressing the considerations was signed by this defendant, or by any one thereunto by him lawfully authorized in writing. (3) In further answer to third count of the complaint these defendants say that he was never duly and lawfully notified of the protest of said note. (4) In further answer to the whole complaint these respondents deny all the material allegations therein contained. (5) Come the defendants, and for answer to the complaint say that the contract sued on was a special promise to answer for the debt, default, or miscarriage of another, to wit, the Jasper Stone-Quarry Company, and no agreement or note or memorandum thereof expressing the consideration was made in writing, and subscribed by the party to be charged therewith, or by any person thereunto lawfully authorized in writing; and these defendants further say that they indorsed the note sued on for accommodation in the hands of the payee." To the second and fifth pleas the plaintiff demurred upon the following grounds: "(1) The statute of frauds has no application as a defense to the said third count of the complaint. (2) It is not necessary that the contract of

indorsement of a promissory note should show or express any consideration therefor." To the third plea the plaintiff demurred upon the following grounds: "(1) It was not necessary or obligatory upon the plaintiff to give defendants notice of said protest. (2) Said note is made payable at a specified place of payment named therein, and protest at said place of payment is all that the law requires." The demurrers to the second, third, and fifth pleas were sustained, and to each of these rulings the defendant duly excepted. Issue was joined upon the remaining pleas. On the trial of the case the following evidence was introduced by the plaintiff: (1) The note sued on. (2) The notary's certificate of protest hereto attached, and marked "Exhibit B." (3) It was admitted in open court that the money which is expressed in said note as the consideration was loaned by plaintiff to defendant; that the note was made and indorsed at one and the same time, and as one and the same transaction, for security for said loan of money; and that F. A. Gamble was president, and the said defendants John B. Shields, J. B. Carrington, and D. K. Carter were officers and stockholders, in said Jasper Stone-Quarry Company at the time said note was made and delivered as aforesaid; and said note has never been paid. Plaintiff also proved by John A. Gravlee, notary public; that he notified defendants of the said protest by mail; that notice or notices by this means was the custom. The note introduced in evidence was the same as that set out in the third count. There was attached to the note introduced in evidence the protest of the notary public. There was no evidence introduced for the defendants. The defendants demurred to the evidence of the plaintiff. Upon the consideration of the demurrer and the evidence it was overruled, to which ruling the defendants duly excepted. Judgment was thereupon entered for the plaintiff. The defendants appeal, and assign as error the several rulings of the trial court to which exceptions were reserved. Affirmed.

Coleman & Bankhead, for appellants. Apple & McGuire, for appellee.

TYSON, J. The note sued upon was a negotiable instrument, and governed by the commercial law as to days of grace, protest, and notice. Code, § 869, and authorities cited under it. The record shows that the defendants admitted in open court that the note was given by the maker for borrowed money, and the indorsements by the defendants were executed by them contemporaneously with its execution by the maker. There was, then, a valuable consideration for their indorsements, and the statute of frauds has no application. The consideration expressed in the note will support the contract of indorsement, and it need express none other than the consideration which the note upon its face implies to have passed between the original parties. *Moses v. Bank*, 149 U. S. 298, 13 Sup.

Ct. 900; *De Wolf v. Rabaud*, 1 Pet. 476; *Read v. Rowan*, 107 Ala. 386, 18 South. 211; *Phillipe v. Harberlee*, 45 Ala. 597. And when a creditor takes a note of his debtor, with accommodation indorsements, in payment of an antecedent debt, he is a purchaser for value in due course of business equally as if he had advanced money on the faith of it. When such indorsement is made in blank, to be used by the maker in the payment of an antecedent debt due the payee, the indorser is liable to the payee, although the note was not put in circulation by him. *Marks v. Bank*, 79 Ala. 550. Such a contract of indorsement was not a collateral promise to answer the debt, default, or miscarriage of the maker, but was an original, substantive contract founded on a present, valuable consideration moving from the payee to the maker. *Dunbar v. Smith*, 66 Ala. 490; *Rutledge's Adm'r v. Townsend*, 38 Ala. 706; *Underwood v. Lovelace*, 61 Ala. 155; *Espalla v. Wilson*, 86 Ala. 487, 5 South. 867; *Thornton v. Gulce*, 73 Ala. 321. If there was error in sustaining the demurrer to the pleas of the statute of frauds, it was without injury, since, under the undisputed facts, matters set up in them would have been no defense.

The court sustained a demurrer to a plea of defendants alleging they were never legally notified of the protest of the note. The count of the complaint to which this plea was interposed as a defense expressly averred—as it was necessary to have been done to state a good cause of action—a presentation to the maker of the note for payment, its refusal after demand, and a protest for nonpayment, and notice to the defendants. This special plea was simply the general issue, and there was no error in the ruling of the court in sustaining the demurrer to it. The defendants, being indorsers, though their indorsement was what is known as an "irregular indorsement," were entitled to the same protection as to protest and notice as are indorsers of negotiable instruments made in the regular manner and mode. In other words, the payee cannot be permitted to recover of them without proof of demand for payment of the maker at maturity, and due notice of nonpayment. *Hooks v. Anderson*, 58 Ala. 238; *Milton v. De Yampert*, 3 Ala. 648; *Price v. Lavender*, 38 Ala. 389. The note being made in Jasper, and payable there, no protest for nonpayment was absolutely necessary to bind the defendants as indorsers. A notice given to them by the holder, or his agent, of its dishonor, and that he looked to them for payment, was all that was required. 3 *Rand. Com. Paper*, 1144; *Shelton v. Carpenter*, 60 Ala. 201; *Knott v. Venable*, 42 Ala. 186; *Leigh v. Lightfoot*, 11 Ala. 935. But the protest of such an instrument and the notice to them will operate to hold the indorsers if they received the notice. The contention here is that the mailing of the notices was insufficient; that the defendants were entitled to personal notice of the dishonor. This is true,

as a general rule, where the holder and indorsers live in the same place, provided the custom is not otherwise. *Tyson v. Oliver*, 43 Ala. 455; *Isbell v. Lewis*, 98 Ala. 550, 13 South. 335; *John v. Bank*, 57 Ala. 96. But mailing notices of the protest is sufficient, if mailed within the prescribed time, where the holder and indorsers reside in different places. 2 *Daniel, Neg. Inst.* (3d Ed.) § 1021; 2 *Rand. Com. Paper*, § 1298; *Phillipe v. Harberlee*, 45 Ala. 597; *Bibb v. McQueen*, 42 Ala. 408; *Gindrat v. Bank*, 7 Ala. 324; *Greene v. Farley*, 20 Ala. 324; *Tyson v. Oliver*, *supra*. And this is the rule though the holder resides in the town where the instrument is protested, and the indorsers, though residing in another, receive their mail through the post office of the same town in which the holder resides, or if the notice is in fact received by the indorsers, though they reside actually in the same town with the holder, and it is shown that the mailing of the notice is the customary mode of giving such notice. *Greene v. Farley*, 20 Ala. 322; *Ray v. Porter*, 42 Ala. 327; *Gindrat v. Bank*, *supra*; *Isbell v. Lewis*, *supra*; *John v. Bank*, *supra*. There is no evidence in the record as to the residence of the holder of this note, the appellee; but whether we will presume that he resided at Jasper is not necessary, under our view of the law of the case in the manner in which the question is here presented. Nor does it become necessary to decide between the conflicting opinions to be found in *Tyson v. Oliver*, *supra*, and *Shelton v. Carpenter*, 60 Ala. 201, upon this question. Section 891 (1177) of the Code has no application to this case in the absence of any proof that Jasper is a place of 10,000 or more inhabitants, or in which there is a free postal delivery. *Isbell v. Lewis*, *supra*.

The defendants interposed a demurrer to the evidence in the court below, and it was from a judgment of the lower court upon their demurrer that this appeal is prosecuted. By adopting this mode of defense, they admitted the truth of every fact, and every reasonable inference deducible from the evidence, and cannot here test its competency. This method substituted the trial judge for the jury to decide the weight and sufficiency of the evidence, and admitted its competency for all purposes, leaving the only question to be determined whether the issues upon the evidence were for the plaintiff or defendants. *Buffington v. Cook*, 39 Ala. 64; *Railroad Co. v. Roquemore*, 96 Ala. 236, 11 South. 475. In the case of *Foster v. McDonald*, 5 Ala. 376,—involving the same question as presented here, and upon practically the same state of facts,—the effect of a demurrer to evidence is learnedly discussed. And it was there said: "It is further objected that there is no proof on the record that the notary put a letter containing the notice in the post office, because his certificate to that effect on the protest is not proof of the fact. The authority of the notary to certify the fact of notice is derived from a statute of this state, which it is ar-

gued does not extend to such a case as the present. We decline the examination of this question, because by demurring to the evidence the defendant admitted its competency, and referred to the court the question of its legal sufficiency to establish the fact it was offered to prove. If, as now contended, it was not competent evidence, then was there no evidence of notice to which the demurrer could apply; and yet it is clear that by the demurrer the defendant demanded the judgment of the court upon the evidence. The impossibility of permitting the defendant now to object to the competency of the evidence will be apparent when we consider that, if the objection had been taken in the court below, other proof of the fact might have been offered. The objection can no more be taken in this proceeding than it could have been after the verdict of the jury, and, indeed, by the demurrer the court is substituted for the jury." The argument and contention of defendants' counsel in this case assails the competency of the evidence to prove want of proper notice, presentation of the note to the maker for payment, and its refusal after demand. In addition to the recitals in the notarial certificate of presentation and demand for payment, and its refusal, and a deposit in the post office at Jasper of notices of protest, addressed to the defendants at Jasper, Ala., there is evidence of the fact, as testified to by the notary, that he notified the defendants by mail of the protest, and that giving notice by mail was the custom prevailing there. Under the doctrine quoted above, the soundness of which we do not question, we must affirm the judgment. *Carson v. Bank*, 4 Ala. 148; *Young v. Foster*, 7 Port. 420.

Affirmed.

(121 Ala. 285)

YEAGER et al. v. SELF.

(Supreme Court of Alabama. April 12, 1899.)

GARNISHMENT—BOND TO PLAINTIFF—LIABILITIES.

Under Acts 1890-91, p. 590, which provides that, in garnishment, the defendant, upon giving a bond for the payment of the amount of such judgment as may be rendered against the garnishee, may have the garnishment dismissed, a judgment cannot be entered against the obligors in such a bond without an ascertainment by the court of a moneyed liability, for which the court could have properly rendered judgment against the garnishee if the bond had not been given.

Appeal from circuit court, Bibb county; John Moore, Judge.

Action by C. C. Self against W. H. Yeager and others. A writ of garnishment was issued against the Tennessee Coal, Iron & Railroad Company. Defendants gave bond for discharge of garnishee. From a judgment against the obligors on the bond, defendants appealed. Reversed.

For the purpose of dissolving said garnishment, the defendant, W. H. Yeager, executed a bond as provided by the statute (Acts 1890-

91, p. 590) with N. J. Henderson, J. H. Yeager and C. H. Reach as sureties. The record certified to this court on the present appeal does not show that the garnishee ever made answer to the writ, nor is there a bill of exceptions in the transcript. A judgment was rendered in the case against W. H. Yeager and the sureties on his bond given to dissolve the garnishment, for the amount of the judgment recovered by C. C. Self against W. H. Yeager, but in said judgment there was no ascertainment by the court of any indebtedness on the part of the garnishee to the defendant. From this judgment the said W. H. Yeager and his sureties prosecute the present appeal, and assign the rendition thereof as error.

Betha, Wright & Arnold, for appellants.
W. W. Lavender, for appellee.

HARALSON, J. Under the act of 1890-91, "to dissolve garnishments in cases where the defendant executes bond to plaintiff" (Acts 1890-91, p. 590), it has been several times held by this court, that a judgment cannot be rendered against the obligors in the bond given under the provisions of said act, unless and until the garnishee's liability is ascertained according to the forms provided therefor by existing laws. *Collins v. Baldwin*, 109 Ala. 402, 19 South. 862; *Guliford v. Reeves*, 103 Ala. 301, 15 South. 661; *Skews v. Vancleave*, 24 South. 850.

In this case, it does not appear that the garnishee ever made answer to the writ; but it does appear, that judgment was rendered against the obligors in said bond, before and without ascertainment by the court of a moneyed liability for which the court could properly render judgment against the garnishee if the bond had not been given. This was an erroneous judgment.

Reversed and remanded.

(121 Ala. 475)

BIRMINGHAM RAILWAY & ELECTRIC CO. v. BIRMINGHAM TRACTION CO.

(Supreme Court of Alabama. April 18, 1899.)

INJUNCTION—REMEDY BY APPEAL—JURISDICTION OF LOWER COURT—RESTRAINING SUIT
—APPEAL—REVIEW.

1. A court of equity will not, by injunction, interfere with the proceedings of an inferior court on the ground that such court threatens to exceed its jurisdiction, where an appeal would lie from such proceedings.

2. A court of equity will not issue an injunction to restrain the action of the probate court where it involves the determination of the question of the jurisdiction of the probate court over any proceeding pending therein.

3. A court of equity cannot by injunction restrain a party to a cause in another jurisdiction, at the instance of the opposing party, from having the court proceed to a final adjudication, in the absence of some special equity not cognizable by the court trying the cause.

4. A court of equity will not by injunction restrain the proceedings of an inferior court, wherein it threatens to exceed its jurisdiction by executing a judgment appealed from, when the appellate court can control the action of such inferior court by a writ of prohibition.

5. The supreme court will not review the determination by the probate court of the right of a railroad to have a right of way condemned, on appeal from denial of an injunction, where the probate court had jurisdiction, and an appeal lies from its determination.

Appeal from chancery court, Jefferson county; John C. Carmichael, Chancellor.

Bill by the Birmingham Railway & Electric Company against the Birmingham Traction Company. From a decree in favor of defendant, complainant appealed. Affirmed.

The bill alleges, in short, that the defendant had instituted condemnation proceedings in the probate court of Jefferson county to take certain property claimed by complainant, of which defendant was in possession, and that, after hearing objections, the judge of probate had granted the application, and appointed commissioners as provided by law, and from this order complainant had prayed an appeal to this court, as prescribed in section 1717 of the Code of 1896, and gave a supersedeas bond, which was taken and approved by the judge of probate; that by this appeal the proceedings were transferred to this court; that, notwithstanding this appeal, the commissioners named were proceeding to ascertain the damages, and, unless restrained, the defendant would proceed with the condemnation proceedings, and enter upon and take possession of the property sought to be condemned. An injunction, as prayed for, issued. The defendant answered under oath, embodying a demurrer in its answer. The answer denies all the allegations of fact in the bill, except those relating to the proceedings in the probate court, and especially denies that any supersedeas bond was ever given as alleged. There was a motion to dismiss the bill for want of equity, and this motion was submitted with the motion to dissolve the injunction on the sworn answer and the demurrers. On the hearing, the chancellor dissolved the injunction, and reserved the questions arising on the demurrers and motion to dismiss. From the decree dissolving the injunction the complainant appeals, and assigns the rendition thereof as error.

R. H. Pearson and Walker, Porter & Walker, for appellant. Alex. T. London and John London, for appellee.

TYSON, J. Appellant seeks a review of the decree dissolving an injunction procured by it against the defendant upon a bill filed by it, alleging that the defendant had, prior to the filing of the bill, instituted proceedings in the probate court of Jefferson county to condemn a right of way across its right of way, and that upon a hearing of the petition for condemnation the court granted the application, from which decree it appealed to this court, by giving the necessary appeal and supersedeas bond. It is also alleged in the bill that, notwithstanding the appeal, the defendant "is still proceeding in the condemnation case, and is still attempting to get possession of the

right of way, and to have the same condemned to its use, and is urging the commissioners to assess the damages and to go upon and take possession of complainant's property, * * * and, unless restrained by this court, the said traction company will take possession of, and trespass on, the complainant's said property, and, unless restrained, will cause irreparable damages to complainant and its property." The prayer is that the defendant be enjoined and restrained from further proceeding or taking any further steps in its application for condemnation of the property in the probate court until its appeal from the order of condemnation can be heard and determined by the supreme court, and restrained from entering upon, and taking possession of, the right of way and crossing. The answer admits all the allegations of the bill, except the allegation relating to the giving of a supersedeas bond by the complainant in its appeal from the order of condemnation, and the alleged proposed trespass by it, and the damages alleged that will flow therefrom. It is averred in the answer that the only bond that complainant gave was a bond as security for costs of said appeal. As to the alleged proposed trespass, it is averred in the answer that the respondent has done nothing except to insist that the commissioners appointed by the probate court assess the damages as required by the order of the court appointing them. There are other matters of defense set up in the answer, which it is not necessary to consider. The answer contains many grounds of demurrer to the bill, some of them going to the jurisdiction of the court to grant the writ of injunction upon the allegations contained in it.

The obvious purpose of the bill is to restrain any further proceedings by the probate court in the condemnation case pending the appeal in that cause to this court; and, in support of this, it is urged, when an appeal is taken as provided by section 1717 of the Code, that the appeal operates to suspend all further action in the condemnation proceeding in the probate court during the pendency of the appeal, and oust that court of all jurisdiction over the matter. On the other hand, it is contended by appellee that the mere giving of a bond or security for costs cannot and does not have this effect; that in order to suspend the jurisdiction of the probate court, and all further proceedings by it, pending the appeal, the complainant should have given a supersedeas bond, if an appeal lies from the order of condemnation before the assessment of the damages by the commissioners. This section is silent as to what kind of bond must be given. Indeed, nothing whatever is said directly upon that subject, but it simply provides "that either party is entitled to an appeal to the supreme court from the order of the court granting or refusing the application, within thirty days from the making thereof." As to whether either of these contentions is correct, or whether an appeal lies until after

the assessment of the damages by the commissioners, a report by them, and an order of condemnation in pursuance thereof (sections 1718-1720), we do not here decide. These questions cannot be raised in the manner attempted here.

If the probate court, without jurisdiction, should, in excess of its jurisdiction, require the commissioners to make the assessment, receive their report, and make an order of condemnation in pursuance of the report, the complainant has the right of appeal, and can have such order annulled. If it should do so in the absence of jurisdiction, the order would be void, and the defendant would acquire no rights under it. Furthermore, a court of equity cannot determine the question of jurisdiction for the probate court in any matter pending in that court, or which that court determines is pending in it. Nor can a court of equity by injunction restrain a party to a cause in another jurisdiction, at the instance of the opposing party, from having the court to proceed to a final adjudication, in the absence of some special equity not cognizable by the court trying the cause. 1 Spell. Extr. Relief, §§ 30-41. Mr. High, in his work on injunctions, states the rule to be: "The purpose for which the interference is allowed being to prevent injustice, defect in jurisdiction in the court in which the judgment was rendered will not of itself authorize an injunction, if no equitable reason is shown why the judgment should not be enforced. Even if the judgment is altogether void for want of jurisdiction, equity will not enjoin, but will leave the parties to their remedy at law by certiorari." High, Inj. § 125. It is contended by appellant's counsel that this rule does not apply in this case, for the reason that, should the defendant be permitted to proceed to judgment in the condemnation proceeding after the report of the commissioners, it (the defendant) could, by a deposit of the money in the court, for the complainant, to the amount of the damages assessed, together with the cost of the proceeding, enter upon the land so condemned, and operate the road, notwithstanding an appeal by it from such order of condemnation. Code, § 1721. Conceding this to be true, yet if, as contended, the cause is now exclusively within the jurisdiction of this court by the appeal, and the appeal would afford no protection, this court can prevent, by appropriate proceedings, an inferior court from exceeding its jurisdiction by attempting to execute a judgment appealed from, by a writ of prohibition. Or, if the court attempting to exceed its jurisdiction belongs to the class which the circuit court can control in its usurpation of jurisdiction, that court, by prohibition, may correct the error. High, Extr. Rem. § 780; Ex parte Roundtree, 51 Ala. 42; Ex parte Boothe, 64 Ala. 312; Ex parte Smith, 23 Ala. 94; Ex parte Russell, 29 Ala. 717; Ex parte Smith, 34 Ala. 455. The jurisdiction of a court of equity cannot be invoked

when there are adequate legal remedies. 3 Brick. Dig. p. 330, § 8.

Appellant's counsel has entered into quite an elaborate argument to show that the respondent had no right to have condemned the right of way. We must decline to enter into a consideration of that question. That was a matter for the determination of the probate court, over which it had jurisdiction, and its action in that respect must be revised by an appeal.

We are clearly of the opinion that an injunction was not the proper remedy to right the wrongs complained of in the bill, if they exist. *Morgan v. Morgan*, 50 Ala. 80. There was no error in the decree dissolving the injunction. Decree affirmed.

(121 Ala. 346)

EAGLE LIFE ASS'N v. REDDEN.

(Supreme Court of Alabama. April 19, 1899.)

CORPORATIONS—PROCESS—SERVICE.

Code, § 3274 (2657), providing for service on corporations by delivering a copy of the summons and complaint to the president, agent, etc., includes foreign corporations; other provisions for service on foreign corporations being cumulative.

Appeal from circuit court, Elmore county; N. D. Denson, Judge.

Action by Fannie E. Redden against the Eagle Life Association. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Watts, Troy & Caffey, for appellant. H. R. Golson and T. G. Hilyer, for appellee.

HARALSON, J. There is but one question presented for review, viz.: Was there such service made upon the defendant as to authorize the judgment rendered against it? The case is presented by appeal on the record alone.

The complaint as amended reads as follows: "Fannie E. Redden, Plaintiff, v. Eagle Life Association of Westfield, Massachusetts, Defendant. The plaintiff claims of the defendant, a corporation, one thousand dollars (\$1,000) due on a policy, whereby the defendant, on the 4th day of May, 1898, insured for the term of his natural life, the life of T. J. Redden, who died on the 17th day of June, 1897, of which the defendant had notice. Said policy is the property of the plaintiff."

The Code, § 3274 (2657), provides: "When the suit is against a corporation, the summons may be executed by the delivery of a copy of the summons and complaint to the president or other head thereof, secretary, cashier, station agent, or any other agent thereof." There is nothing in this statute which excludes foreign corporations from its provisions, and by its terms, foreign as well as domestic corporations are included. It is true, other sections of the Code make special provisions for service on corporations do-

ing business in this state, when they are sued, but these several provisions are cumulative, for the greater convenience of those who desire to institute legal proceedings against such corporations. To hold otherwise, would be by judicial construction, to render nugatory said section 3274 (2657) of the Code which we have quoted above.

A judgment by default was entered in this case, and a writ of inquiry was executed. The service as to the return of the sheriff, showed that the summons and complaint were "executed by handing a copy to Robert Cox." The judgment entry recites, "that the defendant being called, came not but made default, and thereupon it appeared to the court by competent and satisfactory evidence that the copy of the summons and complaint in this cause was served on the defendant by the sheriff, by leaving a copy thereof with Robert L. Cox, more than twenty days before this term, and that said Robert L. Cox was at the time of such service, local agent of the defendant corporation at Tallassee in Elmore county, Alabama; it is therefore adjudged that plaintiff recover of defendant, but the damages being uncertain, let a jury come and assess the damages, and thereupon came a jury," etc. This judgment met the requirements of the statute in reference to service. *Independent Pub. Co. v. American Press Ass'n*, 102 Ala. 475, 15 South. 947.

We discover no reversible error in the judgment below, and it is affirmed.

Affirmed.

(121 Ala. 386)

PAYNE v. LONG.

(Supreme Court of Alabama. April 20, 1899.)

PROMISSORY NOTE—MATERIAL ALTERATION—QUESTION FOR COURT—RATIFICATION—PLEA OF NON EST FACTUM—DEPOSITION—EVIDENCE—FAILURE TO OBJECT.

1. The incorporation in a note, after the promise to pay on a specified day the sum named therein, of the words, "subject to a settlement between us," constitutes a material part thereof, which the payee cannot strike out, without the maker's consent, without avoiding the note.

2. A plea of non est factum, averring that a note was not executed by defendant or by his authority, because plaintiff, without defendant's knowledge or consent, with a fraudulent intent, altered it by "detaching therefrom a material memorandum, which said memorandum was as follows," but not setting out the memorandum, is bad.

3. The deposition of a party taken in another suit involving the same controversy, that does not show that he was sworn, or that the party against whom he testified had the power to cross-examine him, or was legally called on to do so, is inadmissible.

4. In an action by an executor, where no objection is made to defendant's testimony on the ground that he is incompetent, under Civ. Code, § 1794 (2765), to testify to transactions between himself and plaintiff's testator, plaintiff is not entitled, as a matter of right, after the evidence is all in, to have it excluded.

5. A payment on a note made after the maker knows that it has been materially altered amounts to a ratification of the alteration, and

estops him from setting it up in avoidance of the note.

6. In an action on a note defended on the ground of a material alteration, an instruction that if defendant, after being fully informed thereof, authorized an entry of credits on the note, which he claimed to be entitled to for past payments, he thereby ratified and confirmed the alteration, is properly refused, where it does not appear that the payments referred to were made at a time when defendant had full knowledge of the alleged alteration.

7. Whether or not an alteration of a note is material is a question for the court; and an instruction that ratification of a material alteration in a note can only be made by such promise or conduct on the part of the maker as will establish that he has waived the alteration, and that if the jury believe that the note has been materially altered since its execution the burden is on plaintiff to establish a ratification of the alteration by defendant, is erroneous.

Appeal from circuit court, Walker county; James J. Banks, Judge.

Action by E. W. Payne, executor, against B. M. Long. From a judgment for defendant, plaintiff appeals. Reversed.

This action was brought by F. M. Payne against the appellee, B. M. Long, and counted upon a promissory note, alleged to have been executed by the defendant to the plaintiff. After the institution of the suit, F. M. Payne died, and the suit was revived in the name of the appellant, E. W. Payne, as executor of the last will and testament of F. M. Payne, deceased.

The defendant filed six pleas. Demurrers were sustained to the third and sixth pleas. The first plea was the general issue. In the second plea the defendant set up payment, and the substance of the fourth and fifth pleas is set forth in the opinion.

To the fourth plea the plaintiff demurred upon the ground that the alteration alleged to have been made in the note sued on was not shown to have been a material alteration.

To the fifth plea the plaintiff demurred upon the ground that it fails to set out the memorandum referred to therein. Demurrers to the fourth and fifth pleas were overruled, and to each of these rulings the plaintiff separately excepted.

The plaintiff filed replications to the fourth and fifth pleas, in which he averred that after the memorandum referred to in said pleas was detached from the note sued on, the defendant, with full knowledge of the memorandum being so detached, ratified said note in its then alleged altered condition and waived any valid and legal objection thereto, by making repeated payments on said note subsequent to the time the said memorandum was detached therefrom. There were demurrers interposed to these replications which were overruled.

The note sued on was introduced in evidence and showed that there was indorsed on it several credits. The plaintiff introduced in evidence a part of the deposition of F. M. Payne, deceased, which was taken in a case pending in the chancery court of Walker county, in which the defendant B. M. Long

was complainant and F. M. Payne, the plaintiff's testator, was defendant, which suit, the bill of exceptions recites, involved, among other matters, the controversy that is now disputed in this case as to the note here sued on. In the part of F. M. Payne's deposition so introduced in evidence, said Payne testified that the note sued on was executed on October 10, 1889, and was written upon a sheet of foolscap paper, close to the top thereof. Prior to the execution of the note, he and the defendant Long had a settlement as to the amount due for the purchase of land, and Long made a calculation of the amount due, upon the sheet of foolscap paper, and upon the ascertainment of the amount due to said Payne, Long wrote upon the top of the sheet of paper on which the calculation was made, the note here sued on; that the calculation so made by Long was the only other writing upon the paper other than the note, and that there were no conditions attached to said note or written upon said piece of paper with said note; that subsequent to the execution of said note, Payne desiring to use the note as collateral security for a loan negotiated with a bank, he cut off from the sheet of paper on which the note was written, that part of it where the calculation was made by the defendant, and that in doing so he made no alteration of the note itself. The said Payne further testified in his deposition that Long, the defendant, had seen said note several times since the calculation was detached therefrom, knowing at the time that said detachment had been made, and that he had four or five times entered credits of his partial payments on said note; that said Long had never made any objection to said note on account of the detachment or the alleged alteration.

J. A. Estes was introduced as a witness for the plaintiff, and he testified that in January, 1895, the plaintiff put the note in suit in his hands as an attorney for collection; that on the 15th day of January, 1895, he presented said note to the defendant for payment, and had a conference with him and the plaintiff's intestate; that during the discussion the defendant Long wanted the plaintiff's intestate to allow him a credit for the deficit in the number of acres, which he claimed Payne had sold him in 1887, but that the plaintiff declined to allow this credit; that subsequently, on January 23, 1895, the plaintiff's intestate and the defendant met in his (the witness') office, and settled the balance due on said note; that he, Estes, made a calculation and statement as to the amount then due upon said note; that of this statement he made an exact duplicate, and that after the plaintiff's intestate had consented to an additional credit which Long claimed should be entered on the note, such credit was entered by Estes and then at the request of both Long and Payne, he calculated the interest and made two additional duplicate statements showing the balance due on said note. Upon this wit-

ness identifying the statement testified to, the plaintiff offered one of said statements in evidence. The defendant objected to the introduction of said statement in evidence, the court sustained the objection, and the plaintiff duly excepted. The defendant offered to introduce in evidence a certain portion of his own deposition in the chancery case of Long against Payne above referred to, which deposition was taken in the lifetime of the plaintiff's testator orally, before the register. In the portion of the deposition so introduced in evidence, the said Long testified that he wrote the note sued on, but that at the bottom of the note and on the left and opposite his signature there was a condition which was in substance as follows: "This note is subject to an adjustment about the number of acres included in the deed from Payne to me;" that it was understood by Payne and himself that the difference between the land deeded and the real number of acres was to be settled on the final settlement of the note, and that it was for this reason that the memorandum or condition was placed in the note, and that the said condition was cut off of the note now sued on. The plaintiff objected to the introduction of this portion of the deposition on the following grounds: (1) The defendant was in open court, and, therefore, the deposition could not be used because the defendant could introduce better evidence. (2) That the deposition was in reference to a transaction with or statement by plaintiff's testator, a deceased person, whose estate was interested in the result of the case. The court overruled the plaintiff's objection, permitted the defendant to introduce the portion of the deposition in evidence, and to this ruling the plaintiff duly excepted. The defendant was then introduced as a witness in his own behalf, and testified that at the time of the execution of the note now sued on, there was a written memorandum on the note, and that when he discovered that this memorandum had been detached from the note, he objected to such alteration, and had never made any promise since to pay the note. The bill of exceptions then states: "The foregoing testimony was introduced without objection to any of the questions which elicited it or to the answer; but after it was all in the plaintiff moved to exclude said testimony of defendant on the ground that it tended to prove a statement or transaction by the defendant with the plaintiff's testator, a deceased person, whose estate was and is interested in the result of this suit." The court overruled this motion, refused to exclude the evidence, and to this ruling the plaintiff duly excepted.

Upon the introduction of all the evidence the plaintiff requested the court to give to the jury the following written charges, and to the refusal to give each of said charges the plaintiff separately excepted: (1) "If the jury believe the evidence they must find for the plaintiff." (2) "I charge you that if you be-

lieve from all the evidence that there was a memorandum attached to the note sued on alleged by defendant, but that after defendant became fully informed and advised as to the fact (if it be a fact) that the memorandum was detached by F. M. Payne, he made payments and had them indorsed on the back of the note or indorsed them there himself, without objection or condition, then you may reasonably infer and find from these facts that defendant has waived his objection to said alteration and has ratified the note in its present condition." (3) "I charge you, gentlemen of the jury, that if you believe from the evidence that after B. M. Long became fully informed of the alleged altered condition of the note, he instructed F. M. Payne or his attorney to enter credits on the note which he claimed he was entitled to for past payments, you may infer from this that he thereby ratified and confirmed the note in its then altered condition." (4) "I charge you, gentlemen of the jury, that if you believe from all the evidence in this case, that there was a note or memorandum attached to the note at the bottom as alleged by the defendant, and that such note or memorandum was detached or cut off by F. M. Payne before any payment was made and indorsed thereon, and that all the payments now indorsed on the note were made or placed on the back of the note after the alleged alteration with full knowledge of the alteration on the note in the present condition, then you may infer from all these facts that B. M. Long ratified said note and is bound by it."

At the request of the defendant, the court gave to the jury the following written charges, to the giving of each of which the plaintiff separately excepted: (1) "Ratification of a material alteration in a note can only be made by such promise or conduct on the part of the maker of the note as will establish that the maker has waived the alteration and thereafter stands as if the alteration had not been made." (2) "I charge you, gentlemen of the jury, that if you believe from the evidence that the note had been materially altered since its execution then I charge you that the burden of proof is on the plaintiff to establish a ratification of the alteration by the defendant." (3) "If the jury believe from the evidence that F. M. Payne intentionally cut off a memorandum which was on the note when it was delivered to said Payne, in substance that this note is subject to a land settlement, then the jury must find for the defendant unless they further believe from the evidence that the defendant with a full knowledge of the detachment of the memorandum ratified the alteration."

There were verdict and judgment for the defendant. The plaintiff appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

J. A. Estes and Appling & McGuire, for appellant. Coleman & Bankhead, for appellee.

HARALSON, J. 1. The defendant pleaded four pleas, numbered 1, 2, 4 and 5, upon which, and upon the replications to the fourth and fifth, the case was tried. The first was the general issue, the second payment, and the fourth and fifth set up an alleged alteration in the note sued on. The plaintiff moved to strike the fourth plea, which motion was overruled, and he demurred to it and the fifth plea, which demurrers were overruled.

The alleged alteration set up in the fourth plea was, that after defendant "signed said note sued on, and before it was delivered, the defendant added thereto on the same piece of paper on which the note was written, a memorandum in writing qualifying said instrument in substance as follows: 'subject to a settlement between us;' * * * that after said note was delivered to plaintiff, the said plaintiff or his authorized agent, without the knowledge or consent of defendant, altered said note by detaching said memorandum." The words, "subject to a settlement between us," were not a part of the note, but were written separate therefrom, on the same piece of paper. The principle is familiar, that when a contract is reduced to writing, all previous agreements and negotiations between the parties in reference to the subject-matter of the contract are merged in the writing, and in the absence of fraud or mistake are considered as abandoned. *Litchfield v. Falconer*, 2 Ala. 280; *Thomason v. Dill*, 30 Ala. 444; *Clark v. Hart*, 49 Ala. 86. If there remain any unsettled matters between the parties to a note at the time of its execution and delivery, not embraced in it, they may well incorporate in the instrument, a provision to that effect, to limit, in its settlement, the operation of the above rule. The incorporation in a note,—after the promise to pay on a specified day the sum named therein,—of the words, "subject to a settlement between us," plainly enough indicates that there is something unsettled between the parties not included in the note, and which may be brought forward on its settlement, and such words constitute a material part of the note which cannot be stricken by the payee without consent of the maker. If the facts averred in the fourth amended plea are true as alleged,—as will more fully appear hereafter,—they constitute a good defense, and the motion to strike the plea, and the demurrer to it, were properly overruled.

2. The fifth is in form a plea of non est factum, averring that the note sued on was not executed by the defendant, or by any one authorized to bind him, because the plaintiff, "without the knowledge or consent of the defendant, with a fraudulent intent altered said note by detaching therefrom a material memorandum, which said memorandum was as follows." Here the plea ends. Then follows defendant's affidavit that it is true, of date 22d August, 1895. After this, appear these words: "This note is subject to an adjustment about the number of acres included in

the deed from Payne to me. Filed in office, Aug. 25th, 1895. C. C. Kelly, Clerk." The plea did not set out the memorandum, and was subject to the demurrer interposed to it.

3. The plaintiff was thus forced to try on this defective plea. As to the plea, in view of another trial,—if the alleged alteration shall be presented in another and proper form,—it may be well to notice the legal question growing out of the alleged alteration. It is well settled in this court, "that any material alteration, by one not a stranger to the paper, whether injurious or not, avoids the contract as to all parties not consenting. It is enough, that if the instrument were genuine, it would operate differently from the original; or as otherwise expressed, avoidance will result, if the alteration is one which causes the paper to speak a language different in legal effect from that which it originally spoke." *Montgomery v. Crossthwait*, 90 Ala. 553, 570, 8 South. 498.

If the alleged memorandum had been incorporated in the note at the time it was executed, it is scarcely open to doubt, that it would have been a material part of it, and could not have been stricken or erased by the holder, the maker not consenting, without avoiding the note. As a result of the adjudications on the subject, which appear to us to be sound, we find the following rules stated in the *Encyclopedia*, touching the removal or addition of memoranda to notes: "A memorandum which is collateral to, or independent of the contract or promise, forms no part of it, whether written on the same paper or not. And the removal of a mere memorandum written on a bill or note, and not constituting any part of the writing, does not amount to a material alteration thereof. A promissory note is not materially altered by writing thereon a memorandum which is purely collateral to and independent of the promise or contract which it contains. . . . Generally speaking, every indorsement or memorandum attached to a writing, with the knowledge of the parties at the time of its execution, is as much a part of such writing as if it had been contained in the body of the instrument. Hence where a note has a memorandum or contract of this kind, which qualifies its terms, written upon or attached to it, the obliteration or severance of such memorandum or contract is a material alteration of the note." 2 Am. & Eng. Enc. Law. (2d Ed.) pp. 228, 227.

4. That part of the deposition of the defendant taken orally before the register in the case of himself against plaintiff's intestate, F. M. Payne, pending in the chancery court of Walker, was clearly inadmissible, on objections raised to it by plaintiff. It was not shown that the witness was examined under oath, nor that the opposite party had the power to cross-examine and was legally called on to do so, which were essential prerequisites to its admissibility. *American U. Tel. Co. v. Daugherty*, 89 Ala. 195, 7 South. 680; 1 Greenl. Ev. § 163.

It is to be observed, that the deposition of plaintiff's testator, F. M. Payne, in said chancery suit, had been introduced by the plaintiff without objection on the part of defendant. Whether it was competent evidence, if it had been objected to, or whether, if illegal and admitted without objection, the defendant had the right to rebut it by the introduction of his own deposition taken in said chancery suit, are questions we do not now decide; but as bearing on the question we may refer to *Boyd v. Smith*, 65 Ala. 299; *Miller v. Cannon*, 84 Ala. 59, 4 South. 204; *Hodges v. Denny*, 86 Ala. 228, 5 South. 492; *Davidson v. Rothchild's Adm'r*, 49 Ala. 104; *St. Clair v. Orr*, 16 Ohio St. 220; *Quick v. Brooks*, 29 Iowa, 484; *Lacock v. Com.*, 99 Pa. St. 207; *Neis v. Farquharson* (Wash.) 37 Pac. 697.

5. The defendant when offered as a witness for himself in this case, was under section 1794 (2765) of the Civil Code incompetent to testify as to any conversation or transaction between himself and plaintiff's intestate, if objection had been made at the time by the plaintiff. The bill of exceptions states, that this evidence which is set out, "was introduced without objection to any of the questions which elicited it, or to the answers, but after it was all in, plaintiff moved to exclude it on the ground that it tended to prove a statement or transaction by defendant with plaintiff's testator." He was not entitled as a matter of right to have it excluded. *Billingsley v. State*, 96 Ala. 126, 11 South. 409; *McCalman v. State*, 96 Ala. 98, 11 South. 408.

6. A ratification of the alteration of an altered instrument by the parties to it will restore it as altered, without new consideration. 1 Am. & Eng. Enc. Law, 521. The statement of the witness, Estes, which the court refused to admit, was shown by the witness to have been made at the request of defendant and plaintiff's testator, that he should make it out and give a copy to each of them, showing the amount due on the note sued on, which statements he made, the one being an exact duplicate of the other, and gave one to each of the parties. This statement contained the credits the plaintiff's intestate allowed. The defendant claimed another credit, in addition to those entered on the note, as shown by said statement, which plaintiff's intestate admitted, and it was then and there entered on the note by the witness at the defendant's request. And at that time,—January 23, 1895,—after defendant knew the alleged memorandum had been separated from the note, he paid thereon the sum of \$50, which was also entered on the note and in said statement at defendant's request, leaving a balance of \$787.53. This paper was merely an incidental and collateral fact, tending to establish the main issue, and was clearly admissible, certainly to show ratification of note after the alleged alteration. 3 Brick. Dig. p. 439, § 486. If the defendant made payments on said note, after he knew of the alleged separation of said memorandum from the note, this would amount to a ratifi-

cation of the act, and estop him from setting it up as availing the note. 2 Am. & Eng. Enc. Law (2d Ed.) 261, and authorities cited.

7. There was, of course, no room for the general charge requested by plaintiff.

His third charge was properly refused. It did not hypothesize that the past payments referred to were made at a time when defendant had full knowledge or information of the alleged alteration in the note.

The remaining charges requested by plaintiff were free from error, and should have been given.

8. The first and second charges given at the request of defendant were faulty in referring to the jury the question of the materiality of the alleged alteration. 2 Am. & Eng. Enc. Law (2d Ed.) 269.

It is unnecessary to consider the third based on the fifth plea held to be bad.

For the errors indicated, the judgment is reversed and the cause remanded.

(121 Ala. 399)

WHITE SEWING-MACH. CO. v. SAXON
et al.

(Supreme Court of Alabama. April 18, 1899.)

BONDS — SIGNATURE ON CONDITION — ACTION AGAINST SURETY — MATERIAL ALTERATION.

1. Where sureties sign a bond on condition that three or four other good men, unnamed, shall sign it before its delivery to the obligee, they are not bound thereby unless the other signatures are procured.

2. Where sureties sign a bond on condition that others shall also sign it before delivery by their principal to the obligee, they are not bound where no other signatures are procured, though the bond provides for their liability, notwithstanding such a condition, and contains other provisions inconsistent therewith.

3. Where sureties sign a bond on condition that others shall also sign it before delivery, knowledge that the principal is proceeding with the business the bond was intended to secure is insufficient to put them on notice that the bond has been delivered in violation of the condition.

4. Where a bond signed by sureties on condition that it shall not be delivered until others have also signed it is delivered in violation of the condition, failure of the sureties to repudiate their obligation on notice thereof estops them from relying on the condition in defense to an action thereon by the obligee, who relied on the supposed security of the bond.

5. An agent of the obligee of a bond, who was not present when the sureties signed their names to it, procured it from the principal obligor, and subscribed his name to it as a witness. *Held* a material and vitiating alteration.

Appeal from circuit court, Walker county; James J. Banks, Judge.

Action by White Sewing-Machine Company against J. W. Saxon and others. From a judgment in favor of defendants John B. Richardson and E. W. Miller, plaintiff appeals. Affirmed.

This action was brought to recover for the breach of a bond which had been given by the defendants to the plaintiff to secure the faithful performance by Saxon of the duties as agent of the plaintiff company. The bond was set out in the complaint, and was conditioned

that the said J. W. Saxon should pay to the White Sewing-Machine Company all moneys or indebtedness obtained or incurred by said Saxon through his agency in the sale of sewing machines for the plaintiff, and that he should faithfully perform all the duties incident to such agency. The stipulation of the bond relating to the liability of each person signing it, without any regard to any understanding that it should be signed by other persons, is copied in the opinion. This bond was executed on August 16, 1893, and the plaintiff averred that the said Saxon was indebted to it in the sum of \$986.86 for goods, wares, and merchandise sold by plaintiff to J. W. Saxon on the strength of said bond, and in pursuance of the conditions thereof, commencing on August 22, 1893, and continuing until April 30, 1894, and that the said Saxon had failed to pay over to the plaintiff the sum thus due, and thereby there was a breach of said bond, rendering the defendants liable. To this complaint the defendants demurred, but, the demurrers being overruled, it is unnecessary to set them out on this appeal.

The defendants pleaded the general issue, and, among others, the following special pleas, each of which was verified by affidavit of the respective defendants: "(7) Comes the defendant J. B. Richardson, and for answer to the complaint says that this defendant delivered the said bond to J. W. Saxon to become an instrument executed by this defendant only on condition that the same should be executed by three or four other good men, and then delivered to plaintiff, but was not to be delivered to plaintiff until the said three or four other good men had executed it,—all of which the said plaintiff knew at the time it acquired possession of said bond; and the said plaintiff, knowing these facts, fraudulently procured the possession of the said bond from the said J. W. Saxon, and fraudulently concealed from these defendants the delivery of the said bond by J. W. Saxon without the signatures of the said three or four good men who were to sign before the said J. W. Saxon had authority to deliver it, until after the said J. W. Saxon had operated under it as alleged in the complaint. (8) Comes the defendant J. B. Richardson, and for further answer to the said complaint says that there was, at the time this defendant signed it, a memorandum attached to said bond upon which the action is founded, in words as follows: 'N. B. Each signature must be witnessed by some person, who shall sign his name as such witness in the blank space to the left of the line on which such signature appears;' and this defendant says that neither his signature to said bond nor that of his co-surety was witnessed by any person who signed his name as a witness, but this defendant says that W. G. Ware, who was the duly-authorized agent of the plaintiffs, after he had obtained possession of the same, without the knowledge or consent of this defendant, placed his (said Ware's) name as a witness to the signatures to said bond, with a

fraudulent intent. (9) Comes the defendant J. B. Richardson, and for further answer to the said complaint says that at the time the said plaintiff, by their agents, obtained the possession of the said bond which is the foundation of this action, there was no subscribing witness thereto, and this defendant says that the said plaintiffs, without the knowledge or consent of this defendant, procured the name of W. G. Ware to be placed thereto as a subscribing witness, with a fraudulent intent." "(11) Comes the defendant E. W. Miller, and for answer to the complaint says that he never executed the bond sued on, either by himself or by any one authorized to bind him. (12) Comes the defendant E. W. Miller, and for answer to the complaint says that this defendant delivered the said bond to J. W. Saxon to become an instrument executed by this defendant only on condition that the same should be executed by three or four other good men, and then delivered to plaintiff, but was not to be delivered to plaintiff until the said three or four other good men had executed it,—all of which the said plaintiff knew at the time it acquired possession of said bond; and the said plaintiff, knowing these facts, fraudulently procured the possession of the said bond from the said J. W. Saxon, and fraudulently concealed from these defendants the delivery of the said bond by J. W. Saxon without the signatures of the said three or four good men who were to sign before the said J. W. Saxon had authority to deliver it, until after the said J. W. Saxon had operated under it as alleged in the complaint. (13) Comes the defendant E. W. Miller, and for further answer to the complaint says that there was, at the time this defendant signed it, a memorandum attached to said bond upon which the action is founded, in words as follows: 'N. B. Each signature must be witnessed by some person, who shall sign his name as such witness in the blank space to the left of the line on which such signature appears;' and this defendant says that neither his signature to said bond nor that of his co-surety was witnessed by any person who signed his name as a witness, but this defendant says that W. G. Ware, who was the duly authorized agent of the plaintiffs, after he had obtained possession of the same, without the knowledge or consent of this defendant placed his (said Ware's) name as a witness to the signatures to said bond, with a fraudulent intent. (14) Comes the defendant E. W. Miller, and for further answer to the said complaint says that at the time the said plaintiffs, by their agents, obtained the possession of the said bond which is the foundation of this action, there was no subscribing witness thereto, and this defendant says that the said plaintiffs, without the knowledge or consent of this defendant, procured the name of W. G. Ware to be placed thereto as a subscribing witness, with a fraudulent intent."

To the seventh and twelfth pleas the plaintiff demurred upon the following grounds:

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"(1) Because it does not allege the names of the 'three or four other good men who were to sign the bond.' (2) It is too indefinite and uncertain in its averments as to the condition upon which said defendant signed said bond. (3) Said plea shows on its face that defendant is estopped to deny the validity of said bond, inasmuch as it shows on its face that he signed and delivered the bond to the principal debtor, J. W. Saxon, and thereby put it in the power of said Saxon to make a valid delivery of said bond." To the eighth, ninth, thirteenth, and fourteenth pleas the plaintiff demurred upon the following grounds: "(1) Because the matters and things therein alleged as an answer to said complaint are immaterial, and, if true, constitute no defense to the action. (2) The fact that said Ware signed his name to said bond as a witness after the same was signed by defendant and delivered to him does not vitiate the bond, nor in any manner affect its validity. (3) The said bond was such an instrument as did not need to be witnessed or attested in order to its validity. (4) The plea fails to show what the fraudulent intent was with which Ware signed his name to said bond." The demurrers to each of these pleas were separately overruled. To the seventh, eighth, ninth, twelfth, thirteenth, and fourteenth pleas the plaintiff filed the following replications: "(1) The plaintiff denies the averments therein contained. (2) Plaintiff says said defendants are estopped to make said defense after they signed said bond, and plaintiff acquired possession thereof. They, having knowledge of the delivery of said bond to plaintiff, permitted plaintiff to sell goods on said bond to said Saxon, without objection, till long after the goods were sold and delivered to Saxon under this bond for the price of which this action is brought. (3) After said bond was delivered to plaintiff in the manner stated in said pleas, said defendants well knew that said J. W. Saxon was operating under said bond, and getting credit from plaintiff by reason thereof, upon the faith and credit of said bond as a valid instrument; and yet said Miller and Richardson permitted said Saxon to continue to buy goods under said bond without ever informing plaintiff of said alleged defense to said bond till long after the accounts and notes were made upon which this action is based, and therefore said Miller and Richardson are estopped to take advantage of the matters of defense set up in said pleas. (4) Said defendants waived their rights to make the defense set up in said pleas, in the condition of the bond sued on, as appears fully from the complaint by the following stipulation, viz.: 'Each one signing this bond is bound by the purport of it without any regard to any understanding that any person should also sign this instrument; and the person to whom this is intrusted has absolute authority to deliver it, and the same is made and shall be considered without reference to any other instrument or agreement whatsoever;

and any agreement or arrangement with any of the signers hereof to discharge or release any of them shall be void, and of no binding effect upon the White Sewing-Machine Company, unless this bond shall be delivered up or discharged in writing by the White Sewing-Machine Company.' (5) Said defendants are estopped to make said defense set up in said pleas, because they signed said bond and delivered it to their co-obligor, J. W. Saxon, and they all knew that said Saxon delivered said bond to plaintiff, and that plaintiff was acting on it as a valid bond, selling goods to said Saxon; and they never objected to plaintiff's selling goods under said bond till long after the goods had all been sold for the price of which this action is brought. (6) Said defendants waived the objection to the invalidity of said bond as alleged in said pleas by permitting plaintiff to act upon said bond after knowing of its delivery to plaintiff in its present form, or having notice of facts sufficient to stimulate inquiry, which, if diligently followed up, would have led them to a knowledge of the delivery of said bond to plaintiff in the present form, without raising any objection thereto."

To the second, third, fourth, fifth, and sixth replications to the seventh, eighth, ninth, twelfth, thirteenth, and fourteenth pleas the defendants demurred upon the following grounds: "(1) The said replication fails to allege that this defendant had notice or knowledge that plaintiff had acquired possession of the bond without the fulfillment of the conditions precedent to its delivery. (2) The said replication fails to allege that the defendant knew the circumstances attending the acquisition of the bond by the plaintiff at the time the goods were obtained by said Saxon from plaintiff. (3) The said replication fails to show that this defendant had any knowledge or notice of the putting of the name of the subscribing witness to said bond at the time the said J. W. Saxon obtained the goods from plaintiff. (4) The said replication fails to allege that the defendant, with a knowledge or notice of the condition of the bond as set out in the complaint, permitted the said Saxon to become indebted to plaintiff." These demurrers were sustained to each of the replications to the several pleas, and to each of these rulings the plaintiff separately excepted.

Upon issue being joined, the evidence introduced sustained the averments of the several pleas. The substance of this evidence is sufficiently stated in the opinion. Upon the hearing of all the evidence, the court, at the request of the defendants Richardson and Miller, gave the general affirmative charges in their behalf, to the giving of each of which charges the plaintiff separately excepted. There were verdict and judgment in favor of the plaintiff against the defendant J. W. Saxon and in favor of the defendants J. B. Richardson and E. W. Miller. The plaintiff appeals, and assigns as error the several rul-

ings of the court to which exceptions were reserved.

Appling & McGuire, for appellant. Coleman & Bankhead, for appellees.

MCLELLAN, O. J. This is an action on a bond purporting to have been executed to the White Sewing-Machine Company by Saxon, Miller, and Richardson to secure the faithful performance by Saxon of his duties as agent of the company. Miller and Richardson defended on the ground that they signed the bond, and left it with the principal obligor, with the understanding and upon the condition that it was not to be delivered to the obligee, and they were not to be bound by it, until and unless "four or five other good men" should sign it. It is admitted that a bond delivered in violation of a condition that certain other named persons should subscribe it is not binding upon the sureties who sign upon the condition; but it is insisted that the same result does not flow when the condition is that other good men, or "four or five other good men," shall execute it. In *Moss v. Riddle & Co.*, 5 Cranch, 351, the plea of a surety to an action on a bond was that he delivered the instrument to a member of the partnership which was the obligee, in escrow, to be his act and deed only on condition that the same should be afterwards signed, sealed, and delivered by "some other friend of Welsh," the principal obligor. To this plea the plaintiffs demurred (1) because a bond cannot be delivered to an obligee as an escrow; (2) because the plea does not state by what other friend of Welsh it was to have been executed; (3) because it did not state by whom the execution of the bond by that other friend was to have been procured, leaving uncertain whether the condition upon which it was to become the deed of Moss was to be performed by him, or by Riddle, or by Welsh; (4) because the plea is repugnant, inconsistent, and informal. There was a second plea, intended to set up that defendant's conditional signature was obtained by fraud. The court, by Chief Justice Marshall, held the first plea bad on the ground that a delivery to one partner is a delivery to all, that the delivery averred in the plea was therefore a delivery to the obligee, and "that a bond cannot be delivered to the obligee as an escrow." The other grounds of demurrer to the first plea are not discussed or referred to, and nothing is decided upon the question whether it was necessary for the plea to aver the name of the other person who was to sign the bond. What else is said in the opinion has reference to the question of fraud arising on the second plea. In the case of *Guild v. Thomas*, 54 Ala. 414, it is said in the opinion: "The defense presented by the pleas, and sustained by the rulings on the demurrers, and the instructions given to the jury, is that the defendant signed the bond as surety only, intrusting it to the principal obligor for delivery, but with

authority to deliver it only on condition that other persons joined as sureties in its execution. Without authority, he delivered it, such persons not having joined in its execution." Upon this statement of what the pleas contained it was held that they presented a good defense to the action, and that the demurrers were properly overruled. It does not appear by the report of the case affirmatively whether the condition was merely that "other persons" should sign the bond, or that certain named other persons should sign it. But the court must have considered this immaterial, as the predicate laid down as a basis of the conclusion declared involves no specification or identification of such other persons. Upon looking to the original record in the case, it is found that one of the two pleas averred a condition that the bond should be signed by Jesse Latham, while the other averred that the condition to delivery was that the bond should be signed by "another surety." The demurrer went to both pleas together, and did not assign as an infirmity in the second that the name of the other surety was not alleged. The condition proved was that laid in the first plea,—that Jesse Latham was to sign the bond as surety. So that this case, while more or less persuasive that the court did not regard it essential to such a condition that the other person to sign the obligation should be named, is not a decision of the point. In all of the many other cases decided by this court on this subject the condition averred was that other named persons should sign the instrument before its delivery to the obligee; and we have not been referred to any case in other jurisdictions bearing upon the question whether a surety putting a bond in escrow may stipulate that it shall not be delivered until other persons, or a given number of other persons, not named or otherwise identified, shall have signed it as sureties. But upon principle there would seem to be little difficulty in the point, or doubt as to its correct solution. The surety is under no obligation to sign the bond at all. His signature is his voluntary act. Nor is he under any obligation to deliver a bond, having signed it. Signing for the accommodation of the principal obligor, he may put such limitations and conditions upon his favor as seem to him proper or to his interest. The whole matter is at large with him, and, having constituted the principal obligor his agent to deliver the bond, he may impose whatever conditions he chooses upon the act of his agent. The condition may be quite onerous; it may be very difficult of performance; it may involve uncertainty as to what is necessary to performance. But, whatever it is, or may involve, its imposition is within his clear and unfettered right. The thing to be done not being at all obligatory on him, he can decline to do it absolutely, and he may do it upon whatever conditions, capricious or otherwise, he may elect to impose. As he may subscribe upon condition that A. B. and C.

D. shall also subscribe, he may make the obligation of his signature depend upon the subscription of a hundred or a thousand other named persons. Such a condition would be more difficult of performance than a condition that four or five other good men should subscribe as sureties, and more unreasonable, if either could be said to be unreasonable. If any condition is deemed too onerous, or unreasonable, or impossible, even, of performance, the holder in escrow is not thereby authorized to deliver to the obligee. He has no authority whatever to deliver until the condition, whatever it may be, has been complied with; and the obligee who knows that he is acting as the agent of the surety in making delivery is put on notice that the condition was imposed, and has not been performed. And he will not be heard to say that the surety should not have imposed such a condition; that it is unreasonable, uncertain, or even impossible; since the surety, having the undoubted right to decline to sign at all, must have an equally undoubted right to determine under what circumstances and to what extent he will bind himself. And we are clear to the conclusion that if these sureties, Miller and Richardson, signed this bond upon the condition that three or four other good men should sign it before it should be delivered to the obligee, they are upon this, without more, not bound, the signatures of the other sureties not having been procured, and the condition not having been fulfilled.

Appellant, however, insists that a different conclusion must be enforced in this case because of the fact that the bond thus delivered in escrow to Saxon, and by him, in violation of the condition, delivered to the obligee, contained the following stipulation: "Each one signing this bond is bound according to the purport of it without any regard to any understanding that any person should also sign this instrument; and the person to whom this is intrusted has absolute authority to deliver it, and no notice of its acceptance by said company shall be required; and the same is made and shall be construed without reference to any other instrument or agreement whatever, and any claim of any arrangement or agreement with any of the signers hereof to discharge or release them, or any of them, shall be void, and of no binding effect upon the White Sewing-Machine Co., unless this bond shall be delivered up or discharged in writing by the said White Sewing-Machine Co.; and it is to continue in full force until so delivered or destroyed." But we do not think this provision in the paper is of any force or operation in respect of the question being considered. It was a part of the bond itself. If the pleas of Richardson and Miller state the facts as to the bond being delivered only in escrow on a condition which was never performed, the bond, nor any part of it, was executed by said defendants. This stipulation itself therefore never became binding on Richardson or Miller. It was not their

stipulation; it was not their contract. They made no contract with the plaintiff. And not only was the obligee charged with notice that, notwithstanding what is thus set down in the paper which these defendants signed, that paper, and no part of it, was binding on them if delivered in violation of the condition, but the pleas allege, and the evidence without conflict proves, that the obligee had actual knowledge that the paper was signed only upon condition that it should never be delivered, or become a binding obligation, until and unless the signatures of three or four other good men should be procured.

The plaintiff further insisted on the trial that defendants Miller and Richardson were estopped to set up the defense that said bond was delivered out of escrow, in violation of said condition, by the facts that they came to or were chargeable with knowledge or notice of the fact that Saxon, the principal obligor, had so delivered said bond, and was carrying on a course of dealing with the plaintiff under the security supposed to be afforded by it, and with this knowledge or notice they stood by, made no objection to the wrongful delivery of the bond, nor asserted its invalidity on account thereof, and allowed the dealings between plaintiff and Saxon to continue, plaintiff relying upon the bond to secure the credits it allowed Saxon in the course of said dealings. The replication to the foregoing effect is, in the first place, sought to be supported by proof that, soon after the bond was delivered in escrow, Saxon began to carry on the business for the obligee in respect of which it was intended the bond should be plaintiff's security for his faithfulness, and continued to carry it on for about eight months, during which the defaults complained of occurred, said defendants Richardson and Miller well knowing all the while that Saxon was engaging in and carrying on that business; and it is argued that these facts were sufficient to put them on notice that the bond had been delivered to the obligee in violation of the condition. We do not think so. The facts may have been notice to these defendants that the bond had been delivered, and that Saxon was acting under it; but, as it was Saxon's duty not to deliver and the obligee's duty not to accept the bond until the condition upon which it had been signed and placed in escrow had been complied with, and as presumptions favorable to duty, rather than those against its performance, are always to be indulged, the defendants had a right, till they knew to the contrary, to presume that the condition had been complied with before the paper was delivered, and that Saxon was proceeding under the bond for which they had stipulated as a condition to any liability on their part,—a bond signed by three or four other good men along with themselves. But there is a tendency of evidence in the case to show that both Richardson and Miller, after having actual knowledge that the bond had been delivered in violation of the condition,

and that Saxon was carrying on the business under it, failed seasonably to repudiate responsibility upon it, and allowed the dealings between plaintiff and Saxon to continue on the faith of the bond. The bond was signed by these defendants on August 18, 1893, and Saxon immediately thereupon entered upon the business to which it related, and continued therein for about eight months. Saxon testifies that four or five months "after he had been engaged in the business under said bond he told" Miller and Richardson that the bond had not been signed by any one else except them. Miller testifies that "four or five months, or may be longer, after Saxon had been selling White sewing machines here in Jasper, he went to him, and asked him about the bond, and Saxon told him for the first time that he had delivered the bond without procuring said requisite number of men." It is true that this witness further testifies that this conversation with Saxon was shortly before this suit was begun, and after the letter written by witness to plaintiff on April 9, 1894, which letter is an admission of liability on the part of Miller. The suit was instituted on May 16, 1897. Richardson testifies that "he did not know but what the condition had been complied with till a short while before suit was brought upon the bond." Here, then, according to the testimony of Saxon, both these defendants knew that the bond had been delivered without the other sureties, and that the business was being carried on under the bond as thus delivered, by the middle of January, 1894. The business was carried on under the bond for two months after that time, and much of the indebtedness of Saxon to the plaintiff accrued during that subsequent period of two months. Miller's testimony in one part tends to corroborate Saxon as to the time he was informed of the unauthorized delivery of the bond, and in another part he says he came to this knowledge after April 9, 1894. If they did have this knowledge in January, 1894, their failure to then repudiate the bond, and continuing, while the business was thereafter being carried on, to allow the plaintiff to rest upon the supposed security of the bond, would be such acquiescence in and ratification of the wrongful delivery of the instrument in violation of the escrow as would estop them to insist on their nonliability in this action, for that the condition upon which they signed the bond had not been complied with. Whether they had such knowledge at that time should have been left to the jury, unless the other defense advanced by them was a good defense, and was proved by uncontroverted evidence. That other defense is that the bond was altered, after they had signed it, in this: that one Ware, who was the agent of the obligee, but who was not present at the time they or either of them signed the instrument, subscribed his name thereto as an attesting witness to their signatures, and that they had no knowledge or notice of this until this suit was brought, or just before. The

facts of such subscription by Ware, and of their ignorance of it, were proved beyond controversy at the trial, as also that he was plaintiff's agent in and about the making of this bond, that it was handed to him by Saxon, that he then carried it to his attorneys, who advised him it was a good bond, that he then said he was entirely satisfied with it, and thereupon subscribed his name to it as a witness, and kept it, and carried it off with him for the obligee; and it remains to be considered whether this act of Ware was a material and vitiating alteration of the instrument. Of course, on the facts just adverted to, it is to be taken as the act of the obligee corporation, or as having been procured to be done by it, and as having been done after the complete execution of the bond. There has been no adjudication of this question by this court. The authorities are conflicting upon it. In the American & English Encyclopedia of Law is this text: "It is a material alteration of an unattested instrument to insert, subsequent to its execution, the signature of an attesting witness. Such attestation furnishes a distinct and different medium of proof of the execution of the instrument, and in some states excepts it from the operation of the statute of limitations." Volume 2, p. 245. And upon the general principle that any alteration is material which changes the effect and operation of the contract on the face of the paper, either by modifying original stipulations or by adding new ones, express or implied, it would seem clear that the addition of an attestation, which imports the agreement of the parties upon and selection by them of a person to be the repository of the proof of execution and of the surrounding circumstances (*Ellerson v. State*, 69 Ala. 1), and under our laws has the effect of requiring the attesting witness to be called to prove execution, and of authorizing execution to be proved, if he be dead or beyond seas, by proving his signature, materially affects the status and rights of parties under the contract. And, as has been often said by this court, it is of no consequence whether the alteration, if allowed to operate, would be beneficial or detrimental to the party sought to be charged on the contract. The important question is not that, but whether the integrity and identity of the contract has been changed. *Anderson v. Bellenger*, 87 Ala. 334, 6 South. 82; *Montgomery v. Crossthwait*, 90 Ala. 563, 569-571, 8 South. 498. The above-quoted text of the Encyclopedia is supported by the courts of last resort of Maine, Massachusetts, and Pennsylvania (*Brckett v. Mountfort*, 11 Me. 115; *Homer v. Wallis*, 11 Mass. 309; *Marshall v. Gougler*, 10 Serg. & R. 164; *Adams v. Frye*, 3 Metc. [Mass.] 103; *Milbery v. Storer*, 75 Me. 60; *Henning v. Werkheiser*, 8 Pa. St. 518; *Foust v. Renno*, Id. 378), while in North Carolina and Wisconsin a different view obtains (*Blackwell v. Lane*, 20 N. C. 113; *Fuller v. Green*, 64 Wis. 159, 24 N. W. 907). We shall adopt the rule that an unauthorized attesta-

tion, made under the circumstances shown in this case, is a material and vitiating alteration. Whether, to have this effect, it would have to be fraudulently made, we need not decide. The authorities so holding also further hold that the attestation is *prima facie* fraudulent, and, so far from the presumption being rebutted in the case at bar, all the evidence bearing on the point goes to strengthen it. But it would seem, under the decisions of this court, that any material alteration made by one not a stranger to the contract would be vitiating, whether made with fraudulent intent or not. We find no error in the rulings of the court as to the sufficiency of the pleas setting up this alteration, or as to the insufficiency of the replication to said pleas. The evidence was free from conflict to the proof of the averments of these pleas, and upon them the court properly gave the affirmative charge for the defendants *Richardson and Miller*. Affirmed.

(121 Ala. 348)

JONES v. DAVIS et al.

(Supreme Court of Alabama. May 16, 1899.)

PURCHASE-MONEY MORTGAGE—PRIORITY.

A mortgage given by the purchaser of lands to a third person is subordinate to a mortgage given by him thereafter to the vendor to secure the price, since the vendor's lien for the price is superior to the first mortgage, and is not, as against it, merged in the mortgage given therefor.

Appeal from chancery court, Morgan county; W. R. Francis, Chancellor.

Bill by Malinda J. Jones against O. P. Davis and others. There was a decree for defendants, and complainant appeals. Affirmed.

Harris & Eyster and S. T. Wert, for appellant. E. W. Godbey, for appellees.

TYSON, J. This appeal is prosecuted by the complainant from a decree dismissing her bill, and adjudging an unrecorded mortgage, which she alleges was executed by J. L. Davis to her in 1883, as subordinate to the lien of the respondent Mary J. Davis, acquired by her by certain transfers, which will be noticed later on. The facts appear, without dispute, to be that in 1883 J. L. Davis purchased the land claimed by complainant to have been conveyed to her by mortgage from J. J. Davis, paying part of the purchase money in cash, and executing his note for the balance; that complainant was present when this purchase was made by her son, J. L. Davis, and knew of the giving by him of his note for the balance due as purchase money; that after the purchase by her son, and he had received a deed from J. J. Davis to the land, she claims that J. L. Davis executed to her the mortgage upon which she bases her right to maintain this suit. Some years after this sale and purchase, J. J. Davis died, and O. P. Davis was appointed administrator of his estate. Finding that J. L. Davis had not paid to his father the balance due as purchase money up-

on the lands, he called upon him, and had him execute the mortgage of February 10, 1889, to better secure the purchase-money note. This mortgage and debt were afterwards transferred by him, for a valuable consideration, to his mother, Mary J. Davis, and widow of J. J. Davis, who a few days thereafter acquired by transfer a note and mortgage executed by J. L. Davis to one Culver, which latter mortgage was a superior lien upon the lands to either complainant's or the one owned by O. P. Davis as administrator. The mortgage acquired by her from O. P. Davis as administrator was foreclosed, and the land purchased by her at the sale. No point is made upon the regularity of this foreclosure sale, or the transfer of the mortgage to her, by appellant's counsel, and we will therefore not inquire into them. The only insistence is that the lien of the mortgage was subordinate to the rights of the complainant.

Premitting a discussion of the question as to whether O. P. Davis knew of the existence of complainant's mortgage when the mortgage to him as administrator was executed, about which there is an irreconcilable conflict in the testimony, but conceding that he did, complainant's lien is subordinate to the equitable rights of Mary J. Davis, who became by transfer the owner of the debt which J. L. Davis owed as a balance on the purchase money of the land. The taking by O. P. Davis, as administrator, of the mortgage, was confessedly to secure the balance due his intestate's estate upon this land purchase; and no other consideration entered into the transaction. He had, as administrator, a vendor's lien upon the land, which was superior to complainant's mortgage lien; and without deciding as to whether an acceptance by him of this note and mortgage was a waiver, *inter partes*, of his vendor's lien, it certainly had no such effect, so as to allow the inferior lien of a stranger to intervene and become superior to his equitable rights to have the lands stand as a security for the debt due by the mortgagor upon the lands to his vendor. In the case of *Thorpe v. Durbon*, 45 Iowa, 192, it was said that: "In exchanging one form of security for another for the same debt, no other lien can intervene and become paramount thereto. Where the vendee of real estate under a verbal agreement of purchase erected thereon a building to which a mechanic's lien attached, and subsequently thereto he received a deed, and executed a mortgage for the purchase money, held, that the lien of the mortgage was paramount to the mechanic's lien." See, also, *Armstrong v. Ross*, 20 N. J. Eq. 109; *Eggeman v. Eggeman*, 37 Mich. 436. The principle here involved was recognized and enforced by this court in the case of *Fouche v. Swain*, 80 Ala. 151, where the facts appear substantially to have been as follows: Mrs. Swain and her husband sold certain lands in 1869 to Prior, the legal title to which was in the husband; he paying a portion of the purchase price in

cash, and executing a deed of trust in favor of Mrs. Swain to her husband, as trustee, upon all the lands embraced in the deed of the Swains to him. This deed of trust was filed for record, but, before its actual recordation, Prior, being indebted to Cothran, Son & Co., executed to them a deed of trust during the same year upon the same lands, which was recorded on the day of its execution. A year or two after the execution of the last-mentioned deed of trust, a bill was filed by the Swains to foreclose the deed of trust held by them. This foreclosure suit was compromised by the Swains and Prior, resulting in Prior's executing a deed to the lands to Mrs. Swain; the owner of the second deed of trust not being a party to the foreclosure proceedings, or participating in the compromise. Upon these facts this court said: "The title of Mrs. Swain being superior to complainant's, we can see nothing in the facts of the case by which this priority has been lost or forfeited. It is shown that in January, 1870, a bill was filed by Mrs. Swain, to foreclose her trust deed, against Prior. This suit, however, was compromised, and, pursuant to the terms of settlement between the litigants, Prior and wife conveyed the mortgaged lands—or, more properly speaking, their interest in them—to Mrs. Swain, by deed bearing date October, 1872. It may be conceded this deed did not affect the rights of complainant, as acquired by the transfer to him of the Cothran trust deed, because Prior could convey no better title than what he owned. No more did it affect the prior mortgage and superior title of Mrs. Swain. It may have satisfied it as between her and Prior, just as the successful prosecution of the foreclosure suit would have done. But, as to any junior incumbrancer, her superior equity would still be preserved in its full force and vitality. There would be but poor show of logic in holding that this strengthening of her title by Mrs. Swain has, after all, but served to weaken it. It is common practice for chancery to keep alive equitable liens and incumbrances, as against strangers or third parties. Equity could often be but badly administered without it."

We have considered the only question suggested, but not argued, in appellant's meager brief. And, indeed, we could have affirmed the decree of the lower court, under the rules of this court, for want of a sufficient brief by appellant's counsel. However, as the question involved was of importance, we have considered it.

We find no error in the decree of which the appellant complains. The decree must be affirmed. Affirmed.

(123 Ala. 421)

JONES v. CAPITAL CITY INS. CO.
(Supreme Court of Alabama. April 19, 1899.)
INSURANCE—CHANGE OF POSSESSION.

1. Defendant in one plea having averred a sale of the interest of insured, and in another a sale, giving the name of the vendee, to each

of which pleas plaintiff demurred separately. the error, if any, in not stating to whom the sale was made in the first plea was not prejudicial to plaintiff.

2. A condition in a policy avoiding it "if any change takes place in the interest, title, or possession of the subject of insurance" is not broken by an offer for sale by the insured, contingent on the consent of the creditors of his assignor, and a bid received, contingent on the satisfaction of the purchaser with the title after examination, when possession does not pass, no part of the price is paid, and no deed is delivered to the purchaser, or to any one for him, before a loss occurs.

Appeal from circuit court, Conecuh county; John R. Tyson, Judge.

Action on an insurance policy by James F. Jones against the Capital City Insurance Company. From a general charge for the defendant, plaintiff appeals. Reversed.

The complaint counted upon a policy of insurance which was issued to one J. P. Etheridge, assignee, by the defendant, and insured a two-story brick building from loss by fire, which said building was destroyed by fire during the existence of the policy.

The defendant filed five pleas. The first was the general issue. To the second and third pleas the plaintiff's demurrers were sustained, and the substance of the fourth and fifth pleas is sufficiently stated in the opinion.

To the fourth and fifth pleas, the plaintiff separately demurred on the following grounds: (1) It does not appear from said pleas that there was any change of interest by the assured, because it was not averred in said plea that there was any conveyance in writing expressing the consideration which was signed by the insured, whereby the said property was sold or transferred. (2) It does not appear from said plea that there was any change of interest of the assured, because it was not averred that said alleged sale or any note or memorandum expressing the consideration was in writing and signed by the party to be charged therewith, or some other party by him thereunto lawfully authorized in writing.

To pleas numbered 4 and 5, the plaintiff filed several replications, in which he set up that the contract for the sale of the property insured, to the person named in said pleas, was void, in that it was not in writing, nor was there any note or memorandum in writing expressing the consideration and subscribed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized in writing, nor was the purchaser put in possession by the seller. To these replications of the plaintiff the defendant demurred upon the ground that it was immaterial whether any deed was delivered to the purchaser, since no deed of conveyance was necessary. The demurrers to the replications were sustained, and the plaintiff duly excepted. The facts of the case are sufficiently stated in the opinion.

Upon the introduction of all the evidence, the court at the request of the defendant gave to the jury the general affirmative charge in

its favor, to the giving of which charge the plaintiff duly excepted.

There were verdict and judgment for the defendant. The plaintiff appeals, and assigns as error the rulings of the court upon the pleadings and the giving of the general affirmative charge requested by the defendant.

J. F. Jones and D. M. Powell, for appellant. Thos. G. & Chas. P. Jones and Edwin F. Jones, for appellee.

HARALSON, J. Suit to recover the value of a two-story brick building insured by the defendant company against loss by fire, the building having been destroyed during the life of the policy.

W. E. Liverman of Conecuh county owned the property in which he carried on a mercantile business in said county. Failing in business, on the 15th of January, 1894, he made a general assignment for the benefit of his creditors, including this storehouse and his goods and merchandise, to J. P. Etheridge as assignee. Said Etheridge, as such assignee, took out this policy of insurance on the 4th day of May, 1894.

It appears that certain creditors of said Liverman, petitioned the register of the chancery court of Conecuh county, on the 20th November, 1894, to require said Etheridge, as such assignee, to give a bond as provided by statute, for the faithful performance of the trust committed to him by said assignment, and on the 12th of December following, after due notice to do so, the said Etheridge failing to give bond, was removed as such assignee, and the plaintiff in this case, J. F. Jones, was appointed assignee of said trust estate in his stead. Said Etheridge was ordered by the decree removing him and appointing Jones as his successor, to turn over "to said J. F. Jones at once all the goods, wares, merchandise, choses in action, books, accounts, notes, mortgages, moneys and all other evidences of debt, and all property that had come into your [his] hands as assignee of W. E. Liverman." The said Etheridge, as appears, in December, 1894, after his removal and this order appointing Jones as his successor, delivered to him the said policy of insurance, but the same was not assigned in writing thereon by him to said Jones, until the 4th November, 1895, when he duly and regularly assigned to said Jones as such successor assignee, all his claim as assignee in said policy, and any loss or damage which had accrued to him under the same. As such assignee from said Etheridge and under the appointment of the register, the said J. F. Jones, the appellant, instituted this suit to recover of the appellee company the loss accruing under said policy.

The property, as was shown, was destroyed by fire on the 6th November, 1894.

The policy contains the provision, that "if any change * * * takes place in the interest, title or possession of the subject of insurance (except change of occupants, without

increase of hazard) whether by legal process or judgment or by the voluntary act of the assured or otherwise, or if this policy be assigned before a loss," the same shall be void.

The defendant in its fourth and fifth pleas, set up a breach of this condition of the policy by averring in the fourth, "that after the issuance of the policy sued on, there was a change of the interest of the assured, he having sold the same, and received the purchase money or a part thereof, without the consent of this defendant, prior to the destruction of the property described in said complaint." The fifth plea is in substance the same as the fourth, but avers that after the delivery of the policy and the happening of the loss, Etheridge, the assured, voluntarily sold the subject of the insurance to one James W. Etheridge for the sum of about \$1,500 and received about \$600 of the purchase money, without the consent of the defendant indorsed on the policy.

One ground of demurrer to the fourth plea was, that it did not aver to whom the alleged sale was made. Conceding that in a case like this, where the assignee of the policy and not the original party taking out the insurance, brings the suit, in whose knowledge the fact of the sale if made would not lie as it would with the party taking it out, if he had sold, it is unnecessary to pass on the question raised, since in the fifth plea, the same in substance as the fourth, the name of the party to whom the sale was made is given. Under the latter plea, the plaintiff had the full benefit of all that he could have claimed, if the name of the vendee had been mentioned in the fourth plea, and if there was error in overruling the demurrer to it on this ground, it was error without injury. The case was really tried on the fifth plea. *Howie v. Edwards*, 97 Ala. 649, 11 South. 748.

Another ground of objection to the pleas, on demurrer was, in substance, that the pleas did not show such a sale as would not be void under the statute of frauds. But in this there was no merit. The pleas averred a change of interest of the assured in the property, in that he sold the same to the party named. This was a substantial averment of a completed sale in all the essential elements or requirements therefor. If the plaintiff without replying specially the statute of frauds against these pleas, had simply taken issue thereon, under our system of pleading, in proving his pleas the defendant would have been required to show a sale not void under the statute of frauds. A sale void under that statute, would not have met the defense of a sale of the assured's interest in the real property insured, as pleaded to avoid the policy. There was really, therefore, no necessity for plaintiff's replications, and the subsequent alterations of parties thereon, and we may allow them to pass from view.

In his work on Insurance, it is said by Mr. Biddle in respect to alienation when forbidden in the policy, that, "To avoid on the

ground of alienation simply, the whole title must be parted with; for an alienation of a part of the property or a diminution in interest of the assured will not avoid; the retention of a legal or equitable title being a sufficient interest. Nor does a sale of a part conflict with a clause against 'sale or transfer.' But when there is a clause against any change in the title or possession of property by sale or voluntary transfer, a sale of an undivided half interest was held to avoid," etc. 1 Bid. Ins. § 203. The same author holds on authorities cited, that if a sale is never carried out, or the property is reconveyed and the bargain thrown up, and the vendor is in possession at the loss, the policy is not avoided; that an executory agreement of sale is not within the policy clause, though part of the purchase money is paid, and that a contract that cannot be enforced is not a sale. Id. §§ 206, 207, 224. See, also, on same subject and to same effect, 1 May, Ins. § 287; 3 Joyce, Ins. §§ 2251, 2252. The author last cited says: "A void sale of the insured property will not avoid the policy, although it contains a clause forbidding alienation or change of title. Such a sale does not operate as a change or transfer of title in any way, and is in no way an alienation of the property." Id. § 2249.

The sale of the interest of the assured in this case as disclosed, relates to the whole and not to a part of the real property alleged to have been sold. J. P. Etheridge, the original party insured, examined by defendant, stated, "I took out the insurance policy sued on in this case, after I became the assignee of W. E. Liverman. I advertised for sealed bids for the sale of the property, the subject of insurance and of this suit, some time in July and August, 1894, but did not receive but one bid. This was from J. W. Etheridge, my brother, and was for \$1,500. The bid was in writing. I held this bid up for the purpose of allowing my brother to investigate the title to the property, and also for the purpose of hearing from the creditors of W. E. Liverman. At the time the fire occurred, I had not heard from all the creditors and my brother had paid me no money on the bid." Here he makes it appear that his acceptance of the bid was contingent on the approval of the creditors of his assignor, Liverman, and his brother's bid was contingent on his satisfaction with the title after examination. He further testified, that his brother had never taken possession of the property named in the policy; that he never attempted to get possession of it or set up any claim to it, and had never paid a dollar in money or other thing of value on the purchase price of it; and further, that after the fire, he, the assured, made a deed to the property to his brother, which was drawn up by W. D. Atkinson, who was acting as his attorney at the time, and was also the agent of the defendant, and this deed was left with Atkinson, and witness simply did what he, Atkinson, told him, but he had never delivered the deed to his brother and had not.

instructed or authorized Atkinson to do so. W. E. Liverman testified that he obtained this deed from Atkinson and it had been ever since then in his possession, and that it had never been delivered to J. W. Etheridge or to any one for him, and he had never been authorized to deliver it to him. It was shown that J. P. Etheridge, the assignee, made proof of loss and destruction of the property and that the same belonged to him as assignee, and was in his possession as such at the time of the fire. Under such a state of facts, it is difficult to see, and cannot be held, that there had been a sale of said property, or a change in the interest of the assured such as would avoid the policy under its terms. The defendant failed to make good its defense, set up in said pleas. There were rulings on the introduction of evidence having reference to the alleged sale and change of interest, but we need not pass on these since they cannot affect the result. On the undisputed evidence the general charge for the plaintiff might have been given instead of for the defendant, as was done.

Reversed and remanded.

(121 Ala. 50)

**BESSEMER LAND & IMPROVEMENT CO.
v. CAMPBELL.**

(Supreme Court of Alabama. April 21, 1899.)

**MASTER AND SERVANT—DEATH BY WRONGFUL ACT
—PLEADING—MINES—FIRES—NEGLIGENCE—EVIDENCE—CONCLUSIONS OF WITNESS—SUPERINTENDENT—AUTHORITY—PRESUMPTIONS—INSTRUCTIONS—HARMLESS ERROR—DAMAGES.**

1. In an action for causing an employé's death, an allegation that a certain person was in defendant's employment, that he had superintendence intrusted to him, that he was negligent while in the exercise of the superintendence, and that he was defendant's superintendent, sufficiently asserts that the superintendence was intrusted to him by defendant.

2. In an action for causing an employé's death by suffocation in a mine, an allegation that the superintendent negligently failed to take due and proper precautions to prevent a fire from causing the suffocation is a sufficient allegation of negligence, as an averment of specific negligence is not required.

3. A fire originated in the middle of a mine, and volumes of smoke rose from the air shaft. A short time thereafter men passed up a slope parallel with the air shaft without much difficulty with smoke, until they reached a point opposite the fire. There were no appliances at hand for extinguishing the fire by water, but they could have been obtained in a few days by telegraphing. One at the bottom of the mine, 400 feet below the fire, could have lived several days while the fire was raging, if it had originated in the air shaft, and had quickly penetrated to the slope, and the air shaft was large enough to carry the smoke and gases as rapidly as they were generated. The mine superintendent smothered the fire by sealing up the air shaft and slope, and an employé who was below the fire was suffocated. *Held* a question for the jury whether the superintendent was guilty of negligence justifying a recovery.

4. Where a fire is raging in the middle of a mine, while an employé is below the fire, it is the mine owner's duty to telegraph to a distant city, and hire a special train, to obtain appliances with which to extinguish the fire, if such is the only means of saving the employé's life,

as the rule of diligence, when life is at stake, requires the doing of everything that gives reasonable promise of its preservation, regardless of difficulties and expense.

5. In an action against an employer for causing his employé's death by suffocation while he was in a mine below a fire that was smothered by sealing the air passages, evidence as to what might have been done towards providing means adequate for his rescue is admissible.

6. A mine owner is liable for the death of an employé caused by the superintendent's failure to do what due diligence required of him, because he was acting under excitement.

7. A mine superintendent will be presumed to have authority to purchase all appliances necessary to extinguish a fire to save the life of an employé, in the absence of evidence to the contrary.

8. The giving of an instruction, at plaintiff's request, as to a count in the complaint, that was in the case when the request was made, is not error, though subsequently, at defendant's request, an affirmative charge was given for him on the count.

9. An instruction to render a verdict against a mine owner for causing the death of an employé, if it was caused by the superintendent's negligently allowing a fire in the mine, will not require a reversal of a judgment for plaintiff, though it is faulty, as being abstract.

10. In an action against a mine owner for causing the death of an employé through the negligence of a person alleged to be defendant's superintendent, it is not error to assume that such relation existed, where there was uncontradicted evidence of such fact.

11. An employer's failure to use due diligence in rescuing an employé while in a mine in which a fire is started is not excused by his acting pursuant to the unanimous opinion of other operatives.

12. In an action for causing the death of an employé in a mine by the employer's stopping or allowing the stopping of a fan over an air course, an instruction to find for the employer, if the fan was stopped without his order, is properly refused.

13. An employé, placed in imminent peril, is not guilty of contributory negligence, precluding a recovery for his employer's negligently causing his death, by mistakenly failing to avail himself of a means of escape, where he acted as a man of ordinary care would have done under the circumstances.

14. In an action for causing the death of an employé, it is error to limit the recovery to the amount he would have contributed to the support of his dependent next of kin, where he had saved a part of his wages after paying the living expenses of himself and those dependent on him.

15. In an action for causing the suffocation of an employé, while 400 feet below a fire in a mine, by smothering the fire by bratticing a slope and air course, there was evidence that the employé could have lived a few days, until the employer could have procured appliances for extinguishing the fire with water. *Held*, that a witness' testimony that he was satisfied that the return air course was on fire, and the testimony of the superintendent that at the time he bratticed up the mine there was nothing he could have done to save the employé, were properly rejected, as being mere conclusions.

16. In an action for causing the death of a coal-mine employé, on an issue as to his earning capacity, defendant is not harmed by evidence of the amount of coal a strong and industrious miner could dig, where there was evidence that the deceased was strong and industrious.

17. In an action for causing the death of a mine employé through the employer's failure to extinguish a fire by water, while the employé was 400 feet below the fire, evidence that several months previously a pipe line to a river

had been laid is admissible to show the feasibility of getting water through that line, if it still existed, or through a line to be relaid, if it had been taken up, in time to extinguish the fire before the employé's death.

Appeal from city court of Birmingham; H. A. Sharpe, Judge.

This action was brought by Jasper N. Campbell, as administrator of the estate of Henry Reevers, deceased, against the Bessemer Land & Improvement Company, to recover damages for the alleged wrongful and negligent death of plaintiff's intestate, who was, at the time of his death, an employé of the defendant in its coal mine at Belle Ellen, Ala. The counts of the complaint upon which the cause was tried are sufficiently stated in the opinion, as are also the demurrers interposed to these counts. These demurrers were each overruled, and the defendant separately excepted thereto. The defendant pleaded the general issue, and, by special pleas, set up as a defense the contributory negligence of the plaintiff's intestate, in that, after being notified of the fire in the mine, the intestate failed to use due diligence to escape from the mine, and was thereby killed. It was on these pleas that the trial was had.

The intestate was a coal miner in the coal mine of appellant at Belle Ellen, Ala., at the time he met his death. The mine of appellant consisted of a slope or main entry, which went into the ground at an angle from its mouth. On each side of this slope were headings or entries, running at right angles to the main slope. In each entry or heading were rooms driven at right angles to the heading, in which the miners dug coal, which was hauled out of the heading in trams by mules, and there put on a cable or chain, and hauled on this cable or chain to the mouth of the slope by steam. Parallel to the main slope was an air course, driven at a distance of about 20 feet from the slope. At the place where this air course emerged to the surface was an air shaft, over which a fan was operated, and made to revolve by steam power. The effect of the operation of the fan was to make a vacuum over the air shaft, and cause the air to rush out of the air shaft to fill this vacuum, and, as the air shaft was connected at the bottom of the mine with the slope, the rush of air out of the air shaft caused a rush of air down the slope from without, to take the place of the air that was removed by the fan. The slope was called the "intake," and the air shaft the "outtake," of the mine. The purpose of the fan was to create a draft into the mine at the mouth of the slope, and thence through all the workings, and out of the mine through the air shaft, and thus ventilate the mine, and convey fresh air throughout it. When the fan is in operation the ventilation is expedited, and when the fan is stopped ventilation is retarded. The tendency of the air through the mine is to take the nearest course. Consequently, if an opening is made between the slope and air course higher up than the bottom of the mine, the

tendency of the air would be to pass through such opening (if large enough to take it all), and out through the air course, without passing through the lower workings. At the time of the fire, intestate was working on the second south entry. The fire originated higher up in the mine, between the first north and first south entries. The fire started about 9 or 10 o'clock in the forenoon, and was first discovered burning in a cross cut or "dog hole" (passage from the slope to the air course), which was between the first south and first north entry. The fire started in a brattice (plank barricade, with dirt packed in between two layers of plank), which was put in the crosscut to keep the air from passing from the slope into the air course. The fire, when first seen, was burning the planks of this brattice. The witness Hudgins, who discovered it, immediately went out of the mine on a trip of tram cars, and notified the superintendent, Johns, who was at work in the engine house on top. Hudgins and Hinton testify that Johns was notified that the fan house was on fire, and that he told McCall to stop the fan, if the fan house was on fire. In this, both Johns and McCall corroborate these witnesses, while the witness Milam says he heard nothing about the fan house being on fire. The witness McCall testified that Johns then went into the mine, not going to the fan house, and that he (McCall) went to the fan house, and shut off the fan for a couple of minutes, and, finding the fan house was not on fire, put it in operation again, and that the fan itself never stopped revolving. Other witnesses testify that the fan was stopped for a long time from the first announcement of the fire. After the witness Johns had received information of the fire, he went down into the mine, to the place where it was burning. He and other men spent 25 or 30 minutes in throwing water on the fire with buckets from a "sump" in the slope near the crosscut, where the fire was. The bursting of a steam pipe, which drove the smoke from the fire up the slope, caused the men to desist from their efforts to put it out this way, and they were soon driven to the mouth of the slope. After unsuccessful efforts, by rescue parties, to reach the part of the slope below the fire, a trip of cars was run down three times and brought to the top again. The last time the trip was on fire. The testimony showed that, at this time, the slope was full of smoke, and that no one could pass the fire on the slope, either going up or coming down. The superintendent, Johns, then consulted with the miners as to what else could be done to rescue the imprisoned men, and the miners unanimously agreed that nothing further could be done to get the men out, and that the proper thing to do to save the bodies of the men, and to keep the mine from burning entirely up, was to seal up the mouth of the slope and air course, and, by withdrawing the supply of air and oxygen from the fire, to smother it out, and this was

done, after the lapse of a period variously stated by the witnesses at from one to three hours. At the time of the fire, the testimony showed that appellant had no hose at its plant, and that there were but two sources for the supply of water to extinguish the fire. One was the water that accumulated in an abandoned mine, near the slope which caught fire, and called the "Electric Haulage Drift." The testimony as to the extent of this supply tended to show that it was barely sufficient, at the time of the fire, to supply the boilers which ran the hoisting engine, pumps, and fan, and that there was none available for extinguishing the fire in the slope. The other source of supply was the Cahaba river, which was a mile and a quarter or a mile and a half from the mouth of the slope. The testimony tended to show that the pipe line from the Cahaba river to the slope was partially removed, and not available, and that there was no supply of pipe nearer than Birmingham. There was also testimony tending to show that it would require three or four days to procure the pipe, and a day or more to lay it after it was procured. There was also testimony tending to show that the man who occupied the adjoining room to the intestate at the time of the fire notified the intestate that the slope was on fire, and that the intestate heard the notification, and started out of the room, and that he had time to get out of the mine before the fire spread.

During the examination of one of the witnesses for the plaintiff, he testified that he was in the mine digging coal at the time the fire broke out; and, further, that the mine was bratticed up 2 or 2½ hours after the fire commenced, and that "at the time the brattice was begun the fire must have been on the slope and air course." The plaintiff moved to exclude the portion of this witness' testimony which is in quotations, because it was the conclusion of the witness. The court sustained the motion, excluded said testimony, and to this ruling the defendant duly excepted.

During the examination of another witness for the plaintiff, who was at work as a miner in the defendant's mine at the time of the fire, and who knew the plaintiff's intestate, he testified that he was a sober and industrious man, and was a professional miner. Thereupon the plaintiff asked the witness the following question: "How much could an average miner, who was in good health and strength and industry, dig of coal in a day at this mine, at that time?" The defendant objected to the question, because it called for immaterial and irrelevant evidence. The court overruled the objection, and the defendant duly excepted. The witness answered: "From five to nine tons a day."

During the examination of different witnesses for the plaintiff, who were shown by their testimony to have been engaged in mining for many years, and to have been experienced miners, the plaintiff asked them as

to the different ways in which fires in mines could be extinguished; and, during the examination of other witnesses by the plaintiff, they were asked as to the feasibility of getting the necessary implements from different places to extinguish the fire in the defendant's mine, and as to whether or not these implements could have been obtained and used in time to have saved the plaintiff's intestate's life. To each of the questions calling for such evidence the defendant separately objected. The court overruled the objections, and the defendant separately excepted to each of such rulings.

During the examination of the plaintiff, he was asked the following question: "State whether or not before the fire there was a pipe line for water running from Belle Ellen mine to the Cahaba river." The defendant objected to this question, because it was not confined to the time of the fire or about that time. The court overruled the objection, and the defendant duly excepted. The witness answered that, about six or eight months before the fire, he saw a pipe line running from the mines in the direction of the Cahaba river.

During the examination of one of the witnesses for the defendant, who was shown to have been an expert miner, he was asked the following question: "At the time you bratticed up the mines, tell the jury whether, in your opinion, it was practicable to put out the fire in any other way." The plaintiff objected to this question, because it called for the conclusion of the witness, and was not a matter for expert testimony. The court sustained the objections, and the defendant duly excepted.

There was offered in evidence the American Mortality Tables, showing the expectancy of plaintiff's intestate to have been 39.5 years.

Upon the introduction of all the evidence, the court, at the request of the plaintiff, gave to the jury the following written charges: (1) "The jury cannot find for the plaintiff under the first count of the complaint." (2) "If the jury believe from the evidence that defendant's superintendent, Johns, in the exercise of his superintendence, negligently caused or allowed a fire to be or remain in the mine, and that the death of Henry Reeves was proximately caused therefrom, then the jury must find a verdict for the plaintiff, unless the jury further believe from the evidence that Henry Reeves was guilty of negligence himself, which proximately brought about his own death." (3) "The burden of proving contributory negligence on the part of Henry Reeves is on defendant, Bessemer Land & Improvement Company." (4) "If the jury believe from the evidence that defendant's superintendent, Johns, negligently failed to take due and proper precautions to prevent the fire from causing suffocation or asphyxiation of Henry Reeves, and that Henry Reeves' death resulted therefrom, as charged in the complaint, the jury must find a verdict for the plaintiff, unless the jury are reasonably satisfied, from

the evidence, that Henry Reeves was himself guilty of negligence, which proximately brought about his own death." (5) "What miners may have said to Johns about sealing up the mines, if anything, is not the test of whether it was negligent or not to seal up the mines." (6) "If the jury believe from the evidence that Johns caused the mines to be sealed up while Henry Reeves was inside, and that it was negligent to do so, under the circumstances, and if the jury further believe from the evidence that Henry Reeves' death was the proximate consequence of the mines being sealed up, then the jury must find for plaintiff, no matter what the miners may have said to Johns about the matter, provided the jury are not reasonably satisfied from the evidence that Henry Reeves proximately contributed to his own death by his own negligence." (7) "If the jury believe from the evidence that defendant's superintendent, Johns, negligently caused or allowed the mouth or openings of the mine to be closed after the fire was discovered, and while Henry Reeves was in said mine, and that the death of Henry Reeves was proximately caused thereby, then the jury must find a verdict for plaintiff, unless the jury are reasonably satisfied from the evidence that Henry Reeves was himself guilty of negligence, which proximately contributed to his own death." (8) "If the jury believe from the evidence that defendant's superintendent, Johns, negligently failed to take due and proper precautions to notify Henry Reeves or to cause Henry Reeves to be notified of the fire, and if the jury further believe that such failure (if there was such) proximately caused the death of Henry Reeves, then the jury must find a verdict for plaintiff, unless the jury are reasonably satisfied from the evidence that Henry Reeves was himself guilty of negligence which proximately contributed to his own death." (9) "If the jury believe from the evidence that defendant's superintendent, Johns, negligently caused or allowed smoke or gas, other than air, to be in or conveyed to that part of said mines where plaintiff's intestate was, and thereby proximately cause the death of said intestate, Henry Reeves, the jury must find a verdict for plaintiff, unless the jury are reasonably satisfied that Henry Reeves was himself guilty of negligence which proximately contributed to his own death." (10) "Whether or not Johns did or did not do what seemed to him or to the men best is not the issue in this case. The issue is whether what was done or left undone would have been done or left undone by an ordinarily prudent person, who was a mine superintendent, under the same circumstances." (11) "The test of whether Johns was negligent or not is not whether he acted honestly, or whether he did all he thought of, but whether he did all a reasonably prudent person, who was a mine superintendent, should have done, under the same circumstances." (12) "If the jury believe from the evidence that Johns was excited, and there-

by caused to do a negligent act, or to refrain from doing something that ought to have been done, and that an ordinarily prudent person, who was a mine superintendent, would not have so acted under the same circumstances, then the fact of excitement, if such be a fact, would not prevent a recovery by plaintiff, if otherwise entitled to a recovery."

The defendant separately excepted to the giving of each of these charges, and also separately excepted to the court's refusal to give each of the following charges requested by it: (1) "If the jury believe the evidence, they must find for the defendant." (2) "If the jury believe from the evidence that the fan over the air course was stopped, by persons not acting under any order from the defendant's superintendent, L. W. Johns, then the jury must find for defendant under the eighth count." (3) "If the jury believe from the evidence that the defendant's superintendent, L. W. Johns, owing to the excitement under which he labored, caused from the circumstances of the fire, failed to discover and adopt some means of preventive effort, which would have availed to save intestate, the jury are not authorized to charge defendant because of such failure." (4) "If the jury believe from the evidence that the intestate knew of the existence of the fire in the mine in time to have escaped therefrom, and failed to do so, then the jury must find for defendant." (5) "Unless the jury believe from the evidence that the defendant's superintendent, L. W. Johns, was authorized by defendant, at the time of the fire, to purchase hose and pipe, then his failure to do so could not be negligence on his part, if the jury believe such failure to have existed." (6) "If the jury believe the evidence, they must find for defendant under the sixth count." (7) "If the jury believe the evidence, they must find for defendant under the seventh count." (8) "If the jury believe the evidence, they must find for defendant under the eighth count." (9) "If the jury believe the evidence, they must find for defendant under the ninth count." (10) "Any failure on the part of defendant's superintendent, Johns, to use preventive effort, which was caused solely by an excited condition of mind, brought about by the fire, would not be negligence on his part, for which the defendant would be liable in this action." (11) "If the jury believe from the evidence that the defendant's superintendent, Johns, at and during the time of the fire, was greatly excited by reason of it, and that, owing to such excitement, he failed to discover and adopt some means of preventive effort, which otherwise he would have discovered and adopted, then such failure on his part would not be negligence, for which the defendant in this action would be liable." (12) "Under the evidence in this case, the failure of the defendant's superintendent, L. W. Johns, to employ special trains to bring hose and pipe from Birmingham to extinguish the fire, would not be negligence on the part of the defendant."

(13) "Under the evidence in this case, the measure of damages is restricted to the amount which the jury may find from the evidence that the intestate would have contributed to the support of those dependent on him during his life, if he had not been killed in defendant's mine." (14) "The measure of diligence which the law exacted of the defendant in extinguishing the fire and rescuing intestate was to make a reasonably diligent use, under the existing circumstances, of the means and appliances belonging to it, and reasonably accessible." (15) "The failure on the part of the defendant to borrow or purchase supplies to be used in extinguishing the fire would not be negligence on the part of the defendant, if the jury believe such failure to have existed." (16) "The failure of defendant's superintendent, L. W. Johns, to get hose and pipe from Birmingham, before bratticing up the burning mine, if the jury believe such failure to have existed, would not be negligence for which the defendant in this action would be liable." (17) "The only negligence on the part of defendant's superintendent, L. W. Johns, of which the plaintiff can complain in this action, would be his failure to make a reasonably diligent use of the means he had at hand when the fire broke out to extinguish the fire and save the intestate, if the jury believe that there was any such failure on his part." (18) "No omission of preventive effort on the part of defendant's superintendent, produced entirely by a state of excitement of mind caused by the circumstances of the fire, on him, would be negligence on the part of defendant for which it would be liable in this action, if the defendant exercised reasonable care in the selection and retention of said superintendent."

There were verdict and judgment for the plaintiff, assessing his damages at \$2,000. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved. Affirmed.

Walker Percy, for appellant. Bowman & Harsh, C. P. Beddow, and Campbell & Thomas, for appellee.

McCLELLAN, C. J. The complaint originally contained ten counts. Demurrers were sustained to some of them, and upon the rest, except four, the affirmative charge was given for the defendant. Those upon which the verdict for plaintiff was rendered are the sixth, seventh, eighth, and ninth. The sixth count is as follows: "Plaintiff [J. N. Campbell, as administrator of the estate of Henry Reeves, deceased] claims of the defendant fifteen thousand dollars as damages, for that heretofore, to wit, on 15th day of September, 1897, defendant was running and operating a coal mine at or near Belle Ellen, in Bibb county, Ala., and on said day plaintiff's intestate was in the service or employment of the defendant in or about said business of the defendant, and while said intestate was in said

mine, in and about said business as aforesaid, a fire broke out or was burning in said mine, and said fire caused smoke or gases other than air to be in said mine in such quantity or density that said intestate was suffocated or asphyxiated, so that, as a proximate consequence thereof, he died; and plaintiff further avers that his said intestate was suffocated or asphyxiated, and his death was caused as aforesaid, as a proximate consequence and by reason of the negligence of a person in the service or employment of the defendant, who had superintendence intrusted to him, while in the exercise of such superintendence, viz. defendant's superintendent or bank boss, to wit, L. W. Johns, negligently failed to take due and proper precautions to prevent said fire from causing said suffocation or asphyxiation and death of plaintiff's intestate."

The only difference between this count and the seventh, eighth, and ninth is in respect of the averments of the negligent acts and omissions of said L. W. Johns, which we have italicized above. The averment in the seventh count is that said Johns "negligently caused or allowed said smoke or gas, other than air, to be in or be conveyed to that part of said mine where plaintiff's intestate was as aforesaid." In the eighth it is that Johns "negligently caused or allowed the ventilator fan of said mine to be shut down or stopped too soon after the said fire was discovered." And in the ninth count it is averred that said Johns "negligently caused the mouth or openings of said mine to be closed after said fire was discovered, and while plaintiff's intestate was in said mine." Defendant demurred to each of these counts on the grounds: (1) "It is not averred in any of said counts that the defendant intrusted said L. W. Johns with such superintendence," and (2) that "the specific negligence which it is alleged said L. W. Johns is guilty of is not sufficiently set out in any of said counts." The demurrer was overruled, and that action of the trial court is presented for our consideration. Each of these counts avers that Johns was in the employment and service of the defendant, that he had superintendence intrusted to him, and that he was negligent while in the exercise of such superintendence, and that he was the defendant's superintendent or bank boss. We do not think it requires discussion to demonstrate that any fair construction of these averments leaves no room to doubt that the superintendence which the defendant's superintendent had was intrusted to him by the defendant. *Iron Co. v. Herndon*, 114 Ala. 191, 214, 215, 21 South. 430. In the averment of the negligence of the superintendent, Johns, each of the counts, even the sixth, is sufficient, under the rule which has been too often declared by this court, and has been too long established to be now departed from. The averment of specific negligence is not required. *Railway Co. v. Davis*, 92 Ala. 307, 9 South. 252; *Laughran v.*

Brewer, 113 Ala. 509, 514, 515, 21 South. 415, and cases there cited.

A fire in a coal mine is not a thing of an hour or a day. It may burn for days and weeks and months. And a fire, it is inferable upon some tendencies of the evidence in this case, may be so located in the mine, with reference to the slope, the air course, the entries, and the chambers as that persons in recesses of the mine beyond it may survive for some indefinite time while the conflagration is raging in a part of the mine. How long life could be sustained when the fire begins halfway down a 600, or 700 foot slope, in the brattice of a crosscut leading into the air course, and immediately burns through the brattice, thus facilitating, to a greater or less extent, the carrying off of the heat, smoke, and gases through the air course, and away from the lower reaches of the mine, where persons are imprisoned, is not shown in this case, and, in the nature of things, could not be with any approach to definiteness. A witness testifies that a man could not have lived in there more than an hour and a half, under any state of facts supported by tendencies of the evidence. This was his opinion as a mine expert, but it was conjectural at best, and weakened by other opinions expressed by this witness, which were in conflict with common knowledge. With unobstructed ingress and egress of air down the slope to the fire, and then up the air course, it would seem that the exhaustion of oxygen in the air below the fire would be slow indeed. And so, too, the filling of the lower spaces with smoke and gases. And, under these circumstances, a man in the mine, 300 or 400 feet below the fire, might live for several days, so far as smoke and gas coming down on him and the sterilization of the atmosphere around are concerned. Of course, he would have less time if the opening at the fire into the air course was too small for the passage of all the hot air and smoke produced by the fire, and, of course, too, his span of life would be further abridged by the spread of the fire towards him. And then, too, if the fire attacked the brattice on the side next the slope, there must have been some time before that was burnt through, and a passage there made for the smoke and gases into the air shaft, and while this state of things continued the smoke would have naturally gone down the slope until it reached the lower end of the air course, thus tending to fill the mines at once. But it is not certain that the fire began on the slope side of the brattice. There is evidence that more headway was made by it in the air shaft than in the slope, and it is a fact of some pregnancy that the men working in the entries below the fire were not warned of its existence by smoke coming down there, but had to be called away by a person sent down into the mine some time after the inception of the fire. It further appears that they experienced no difficulty with the smoke until they reached the point of the

fire as they came up the slope, and it does not appear that the person sent to them had any difficulty with smoke opposite the point of the fire as he went down to the men,—all which affords grounds for an inference to be drawn by the jury that the fire originated in the air shaft, and that smoke got into the slope only after the brattice had been burned through from the shaft, and, of course, that from the moment there was any fire in the slope there was exit from it for the smoke into the air shaft. And it appears to be certain that the air course was belching smoke before there was any indication of it in the lower part of the mine. We refer to these several tendencies of the evidence, in consonance with which the jury might have found the facts, to demonstrate the uncertainty that must necessarily have hedged about the inquiry as to how long the intestate lived in the mine after the fire, or, rather, might have lived had the slope and air course been left open, and as a basis for our conclusion that that inquiry was peculiarly one for the jury. The court could not have been justified in fixing any definite limit to the period the intestate would have survived if the mine had been left open. It could not have assumed that he would have died in a day or two, or three days, or a week, nor could it have assumed, of course, that the jury would find that he could not have lived long enough for the means adequate to his rescue to have been procured and used. The whole matter was for the jury; and, to enable them to say whether Johns was at fault in not procuring the means to extinguish the fire by other process than smothering it out,—and smothering, may be, the intestate's life out along with it,—the court properly admitted the evidence tending to show that such means could have been procured. And it is no objection to this evidence that it went far afield. If Reeves' life could have been saved by telegraphing to New York or to Chicago for hose with which to flood the fire, it was upon the defendant's superintendent to so telegraph, and have the appliances sent by express. And so, if that would have met the occasion, he should have telegraphed to Birmingham, 60 miles away, where such appliances were generally kept, and, if need had been, have had them sent out by a special train. Where human life is at stake, the rule of due care and diligence requires everything that gives reasonable promise of its preservation to be done, regardless of difficulties and expense. The person upon whom the duty of action rests does not discharge it by using only the means immediately at hand. If a man is in a place where he will sooner or later be burned to death, and the person upon whom rests the duty of rescue has not at hand a bucket of water with which to extinguish the fire and save the life, but there is time for him to go and get it, he must go and get it. If it is necessary and there is time for him to go a mile for it, he must go that mile for it. Or if a man is lashed to the top

of a tree, and like to starve to death, the person whose duty it is to save him cannot excuse himself because he has no ladder. He must fetch one, and he must go as far as is necessary to fetch one, within the time the man may survive. In the case we have, it being for the jury to find how long Reeves would have survived had the slope and air shaft not been bratticed up, it was proper to lay before them evidence tending to show what Johns might have done during such time towards providing means adequate to his rescue.

We do not understand that an employer's liability for the negligent act of his superintendent can be measured by the latter's poise of temperament, nor that the character of a given act of the superintendent in respect of negligence can be made to depend upon his excitability or the reverse. It is the duty of a superintendent to do what an ordinarily careful and prudent man would do under the same circumstances, and the employer is liable if he fail to do this, and injury results to an employé. To hold, as we are urged to do by counsel for appellant, that there can be no liability, where the duty has been neglected because of supersensitiveness of the superintendent's nervous system, would be to allow employers generally to escape the burden the statute puts upon them by employing superintendents who are especially excitable and given to losing their heads on important occasions. There is a well-established doctrine, applicable mainly, if not entirely, under pleas of contributory negligence, to the effect that where a party has been suddenly placed in a position of extreme peril, and thereupon does an act which, under the circumstances known to him, he might reasonably think proper, but which those who have knowledge of all the facts, and time to consider them, are able to see was not in fact the best, he will not be held to have been negligent in so acting; but, as indicated in this statement of the proposition, and as has been expressly ruled by this court, his conduct, even in such case, is measured by the standard of the care and prudence an ordinarily careful and prudent man would have exercised under the circumstances. Thus, we have said: "The fact, if it be one, that the intestate was panic-stricken, and his energies paralyzed, by the awful nature of the impending catastrophe, might be proper to be considered by the jury in determining what effort amounted to due diligence, or what omission of effort would be negligence, under all the circumstances; but no such consideration can relieve from the duty of diligence on the one hand, or condone negligence on the other." *Holland v. Railroad Co.*, 91 Ala. 444, 454, 8 South. 527. We are not aware that this doctrine has ever been applied to a defendant's superintendent, and there is no predicate for its application in any case, in the absence of personal peril to the party seeking to have his conduct measured by ref-

erence to it. But, however all that may be, the defendant here was not entitled to a more favorable rule than that laid down by the trial court, holding Johns to the same care and diligence that would have been exercised by a man of ordinary care and prudence under the same circumstances. The law cannot take any account of those personal idiosyncrasies of a superintendent which tend to perturb him on occasion beyond ordinary men.

There is a presumption that the superintendent of the mining operations of a corporation has deputed to him all the powers and authority necessary to a proper discharge of the duties imposed upon him. It is his manifest duty to extinguish a fire in the company's mine in a proper manner, and *prima facie* he has the correlative authority to provide means to that end. This presumption concurs, with all the evidence in this case, to the conclusion that Johns had authority to purchase and procure the necessary appliances to extinguish this fire, and the court below was not at fault in assuming the existence of such authority.

Most of the rulings of the city court to which exceptions were reserved are referable to, and supported by, the foregoing views. Those that are not we will discuss separately.

The usual order observed in submitting requests for instructions to the trial judge is for the plaintiff's requests to be first submitted, and granted or refused, and then those of the defendant. We presume that order was observed on the trial of this case. Therefore, when charge 2 was given for plaintiff in respect of Johns' supposed fault as to the inception of the fire, the affirmative charge for the defendant, as to the fourth count, had not been given, and that count was still in the case. On this state of the record, the most that can be said of that charge (2) is that it was abstract, and this infirmity will not require a reversal of the judgment.

The fact that Johns was defendant's superintendent was proved over and over again on the trial, and by his own evidence, and in no way denied or at all disputed. The fact that the court, in some of the instructions, assumed the existence of this relation cannot be ground for reversal.

It was in evidence that Johns consulted the operatives as to the expediency of bratticing up the mines, and that they expressed the opinion that that was the best thing to be done. Very clearly, this did not make it the best thing to be done, nor relieve Johns from the duty of taking some other course, if, in the exercise of due care and diligence, another course should have been pursued. He could not in this way shift the responsibility which was upon him.

The complaint charges that Johns negligently caused or allowed the fan to be stopped too soon. If it was not stopped at his order, but he allowed it to be stopped, the

avermment of the count is proved. Charge 2 refused to defendant was therefore too narrow.

Charge 4 refused to defendant would have exacted too high a degree of diligence from Reever. He was not absolutely bound to escape if there was time for him to have escaped, but only to do all that a man of ordinary care and diligence would have done, under the circumstances, to escape. It is fallacious to say that because his life depended on it he was bound to exercise the highest possible degree of diligence and care, and to make no mistakes in the methods he adopted to save his life. The rule is one of ordinary and reasonable care at all times, regardless of what the threatened consequences are; and it may be, on a principle referred to in another part of this opinion, that the awful character of the impending danger, the imminency of loss of life, itself shaded the general rule, or, rather, was to be taken into account by the jury, favorably to the plaintiff, in determining what a man of ordinary care and prudence would have then and there done.

There was evidence in the case tending to show that Reever saved a part of his wages after paying the living expenses of himself and those dependent upon him. It would therefore have been error for the court to limit the recovery to the amount he would have contributed to the support of his dependent next of kin.

The testimony of the witness John White, that "at the time the bratticing was begun the fire must have been on the slope and air course," was obviously a mere conclusion of the witness, and was properly excluded; as was also the statement of the witness McCall, "I am satisfied the return air course was on fire;" and the proposed testimony of the witness Johns, that, "at the time he bratticed up the mine, there was nothing he could have done to save the men," and "that it was not practicable to put out the fire except by bratticing up the mines with the appliances we had." These statements of Johns covered, indeed, the very issues which the jury were trying.

It was in evidence that Reever was a strong, healthy, sober, and industrious young man, a regular worker, and an experienced miner. In determining his earning capacity, the defendant could not have been prejudiced by the evidence that an average miner, "in good health and strength and industry, could dig from five to nine tons of coal a day at those mines, at that time." If there is any inaptness in the comparison, it is unfavorable to the plaintiff.

The fact that, before the fire, there had been a pipe line extending from the mine to Cahaba river, a distance of a mile and a half, tended to show the feasibility of getting water through that line, if it still existed, or through a line to be relaid there, if it had been taken up, in time to extinguish the fire

in that way, while the intestate still survived, and evidence was properly received of the fact.

The testimony of Duncan as to the inspection he had made, etc., was competent, under counts then in the case.

The judgment must be affirmed. Affirmed.

(21 Ala. 329)

FIELDS v. KARTER.

(Supreme Court of Alabama. April 18, 1890.)

CHATTEL MORTGAGES—VALIDITY—TITLE OF MORTGAGOR—SUFFICIENCY OF DESCRIPTION—RIGHTS OF MORTGAGEE—ACTION AGAINST PURCHASER—COMPLAINT—AMENDMENT—ADMISSIBILITY OF EVIDENCE—INSTRUCTIONS—HARMLESS ERROR.

1. A purchaser of land, who, through a mistake in the description in his deed, has only an equitable interest, which he can enforce in a suit to reform the instrument, has a sufficient title to the land to support a chattel mortgage on the crops.

2. In an action by a mortgagee against the purchaser of mortgaged crops, the purchaser's title to the land on which they were grown was disputed, but no question was raised as to the mortgagor's title to any particular part of the tract. *Held*, that evidence showing on what part of the tract the crop was raised was immaterial.

3. In an action by a mortgagee against the purchaser of mortgaged crops, it appeared that the mortgagor, through a mistake in the conveyance to him, had only an equitable interest in the land, but that it was sufficient to support the mortgage. *Held*, that an instruction that plaintiff could not recover unless, at the time the mortgage was executed, the mortgagor had a present interest in the land as distinguished from a mere expectation that he would acquire such interest, and unless the land conveyed to the mortgagor was the same as that described in the mortgage, was erroneous.

4. Under a complaint alleging that defendant bought and received property covered by plaintiff's chattel mortgage, plaintiff cannot recover if defendant merely received the property as agent for others who were the purchasers.

5. In an action by a mortgagee to recover the value of a mortgaged crop purchased by defendant, there was a conflict of evidence as to whether the crop was raised on the land described in plaintiff's chattel mortgage. *Held*, that the court properly refused to charge that the mortgage was a lien on the crops described in the mortgage.

6. Where a material fact is established by the uncontroverted evidence, it is error for the court to refuse to charge as to the existence of such fact.

7. A purchaser of mortgaged property is not a bailee of the mortgagor, and in an action against him by the mortgagee to recover the value of the property he is not restricted to such defenses only as could have been made had the action been brought against the mortgagor.

8. In an action by a mortgagee to recover the value of a mortgaged crop "purchased and received" by defendant, in which it appeared that defendant did not purchase for himself, but as agent for others, the court erred in refusing to allow plaintiff to amend his complaint to show that defendant received the mortgaged property.

Appeal from circuit court, Cullman county; H. C. Speake, Judge.

Action by A. E. Fields against J. H. Karter. There was judgment for defendant, from which plaintiff appeals. Reversed.

After all the evidence was introduced, and before the court gave the general charge to the jury, the plaintiff moved the court to allow him to amend the complaint on file, as follows: "Plaintiff claims of the defendant the sum of one thousand dollars as damages from the defendant, and for cause of action shows: Plaintiff was at the time hereinafter complained of, and is now, the owner and holder of a mortgage executed to him by one J. M. Persall and wife, J. R. Persall, on or about the 18th day of August, 1890, and duly recorded on the 30th day of August, 1890, in the office of the probate judge in Cullman county, Alabama, in volume 12, page 121, of the Mortgage Records, which was executed to secure a bona fide indebtedness of \$800 then and there contracted with plaintiff, and which remains unpaid in part to this day. And said mortgage, besides conveying legal title to other property, conveyed to plaintiff the equitable title in and to all the crops of cotton raised or caused to be raised by the said J. M. Persall during the year 1892. Said J. M. Persall raised cotton during the year 1892, which cotton was subject to plaintiff's said mortgage and equitable lien, and the defendant, with knowledge or notice of plaintiff's lien thereon, did buy or receive within one year before the commencement of this action seven bales of said cotton, of the value of one thousand dollars, which said cotton the defendant sold and removed or caused to be removed beyond plaintiff's reach, or by taking in his name from Cullman to Birmingham deprived the plaintiff of the opportunity of enforcing his said lien upon said cotton, or caused the same to be so mixed with other cotton as to be indistinguishable therefrom; by reason of which acts of the defendant plaintiff was prevented from enforcing his said lien thereon under his mortgage. And by the aforesaid wrongful acts of the defendant, which were done without plaintiff's consent, the lien of plaintiff in said cotton has been destroyed, to his great damage as aforesaid; and hence this suit." The court overruled this motion, refused to allow the amendment of said complaint, and to this ruling the plaintiff duly excepted.

The plaintiff requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "Under the evidence in this case I charge you, gentlemen of the jury, that if you believe from the evidence that Karter, the defendant, paid W. H. Jones for his services in buying cotton in the fall of 1892, and said Jones purchased cotton belonging to Persall grown upon lands known as the 'Archy Place,' in Cullman county, Alabama, and the same was shipped in the name of defendant Karter, then Karter is liable in this action to plaintiff for the cotton so purchased." (2) "If the jury believe from the evidence that defendant, Karter, received cotton grown upon the farm cultivated by Persall during the year 1892, and shipped the same

in his name, this was such a conversion and destruction of plaintiff's lien thereon as would entitle the plaintiff to recover in this action, and your verdict will be in favor of the plaintiff for the reasonable value of the cotton, with lawful interest thereon from the date of such conversion." (3) "If the jury believe from the evidence that Persall hauled the cotton in controversy off the place, and let the defendant, Karter, ship said cotton to Smith & Coughlan, in the city of Birmingham, and at the time he received the same paid Persall for said cotton, or caused him to be paid therefor, although the jury may believe that Jones, who purchased said cotton, was acting as the agent of Smith & Coughlan, and thereby the rights of plaintiff in said cotton under his mortgage were destroyed, and plaintiff prevented from enforcing said rights, this is such an interference with the rights of the plaintiff by defendant as will entitle the plaintiff to recover in this action." (4) "The court charges the jury that said mortgage, if unpaid, was a lien upon the crops grown upon the lands described therein in the year 1892, and that Karter had notice of said lien." (5) "The court charges the jury that the said mortgage in evidence was a lien upon the crops grown upon the lands described in said mortgage in the year 1892, and that said defendant, Karter, had notice of said lien; and that, if they believe from the evidence that said Karter did any act during the fall of 1892 which deprived said Fields of the opportunity of enforcing said lien, then said Karter is liable in this action, and their verdict must be for the plaintiff." (6) "The court charges the jury, at the request of the plaintiff, in writing, that if they believe the evidence they must find in favor of the plaintiff, and assess his damages at the amount that the evidence shows the cotton was reasonably worth." (7) "The court charges the jury that if they believe the evidence they must find in favor of the plaintiff in this cause." (8) "Under the evidence in this case, I charge you, gentlemen of the jury, that the execution of the deed and mortgage were part of one and the same transaction." (9) "The court charges the jury that it makes no difference how the defendant was acting,—for himself, or for Smith & Coughlan, or some other person,—if he, either by himself, or his clerks, or persons working for him, took possession of said cotton in evidence, and removed or shipped it from Cullman to Birmingham away from Cullman, and the jury believe he did this from all the evidence, and believe from the evidence that Fields had a lien upon it, then said Karter is liable in this action, and the verdict of the jury must be for the plaintiff." (10) "In this case, under the evidence, the defendant, Karter, is not entitled to make any other defense than could have been made by the mortgagor, Persall. Karter, the defendant, was and is a mere bailee acquiring possession from the mortgagor, and not a purchaser of the cotton for value without notice."

At the request of the defendant the court gave to the jury the following written charges, to the giving of each of which the plaintiff separately excepted: (1) "The court charges the jury that the burden of proof is on the plaintiff to prove to the reasonable satisfaction of the jury that the cotton in controversy was grown by J. M. Persall, or was a part of his crop raised by him during the year 1892 on land in which the said Persall has a present interest at the time of the execution of the mortgage as distinguished from a mere belief, hope, or expectation that he would acquire such interest in the future; and unless these facts are established by the evidence in this case to the reasonable satisfaction of the jury, then your verdict should be for the defendant." (2) "Unless the jury are reasonably satisfied from the evidence in this case that J. M. Persall, at the time of the execution of the mortgage to Fields, introduced in evidence, had a present interest in the Archy place, as distinguished from a mere belief, hope, or expectancy that he would in future acquire such interest, then your verdict should be for the defendant." (3) "Unless the jury are reasonably satisfied from the evidence in this case that the Archy place is the same land as that described in the mortgage introduced in evidence, then the verdict of the jury should be for the defendant." (4) "The court charges the jury that if they believe from the evidence that at the time of the execution of the mortgage that Persall had not a present interest in the land on which the cotton was raised, but only had a mere belief, hope, or expectation that he would in future acquire an interest in said lands, the plaintiff cannot recover in this action, and your verdict should be for the defendant." (5) "Unless the jury are reasonably satisfied from the evidence in this case that the cotton sued for was grown on the lands described in the mortgage in evidence, then your verdict must be for the defendant." (6) "Unless the jury are reasonably satisfied from the evidence that the defendant had notice that the cotton in controversy was part of the crop of said J. M. Persall grown during the year 1892, or that facts sufficient were brought to his knowledge to put him on inquiry, which, if properly and diligently pursued by him, would have brought to his knowledge that said cotton was the cotton of said Persall grown by him on the Archy place, and on which plaintiff had a mortgage, then the plaintiff cannot recover, and your verdict must be for the defendant." (7) "The jury may look to the fact, if it be a fact, together with all the evidence in the case, that the witness Jones went to Birmingham, Alabama, and settled the transaction in buying cotton during the fall of 1892 with Smith & Coughlan, in determining whether or not he was the agent of Smith & Coughlan or the agent of Karter."

There were verdict and judgment for the defendant. The plaintiff appeals, and assigns

as error the several rulings of the trial court to which exceptions were reserved.

Will F. Brown, E. C. Hall, and George H. Parker, for appellant. Cafer & Brown and S. T. Wert, for appellee.

MCLELLAN, C. J. This is an action of trespass on the case, prosecuted by Fields against Karter. The complaint upon which the trial was had is as follows: "Plaintiff sues to recover of the defendant the sum of one thousand dollars, and for cause of action alleges the following: Plaintiff was at the time hereinafter complained of, and is now, the owner and holder of a mortgage executed to him by one J. M. Persall and wife, J. R. Persall, on or about the 18th day of August, 1890, and duly recorded," etc., "which was executed to secure a bona fide indebtedness of \$800 then and there contracted with plaintiff, and which remains unpaid in part to this day. And said mortgage, besides conveying legal title to other property, conveyed to plaintiff the equitable title in and to all the crop of cotton raised or caused to be raised by the said J. M. Persall during the year 1892. Said Persall raised cotton during the year 1892, which cotton was subject to plaintiff's said mortgage and equitable lien; and the defendant, with knowledge or notice of plaintiff's lien thereon, did buy and receive, within one year before the commencement of this action, seven bales of said cotton, of the value of three hundred dollars, which said cotton he sold and removed, or caused to be removed, beyond plaintiff's reach, or caused the same to be so mixed with other cotton as to be indistinguishable therefrom, by reason of which said acts of defendant plaintiff is prevented from enforcing his said lien thereon under his mortgage; and by the aforesaid wrongful acts of the defendant, which were done without plaintiff's consent, the lien of plaintiff in said cotton has been destroyed, to his great damage; hence this suit." Plaintiff introduced in evidence a mortgage executed to him on August 18, 1890, by Persall and wife, covering certain 159.79 acres of land in Cullman county, and crops of cotton to be grown thereon in certain years, including 1892, and proved that Persall raised from seven to nine bales of cotton on this land in 1892; that he hauled as many as six bales of cotton from this land during the fall and early winter of that year; that these six bales were paid for by the defendant, either for himself or as agent for a Birmingham cotton firm, and that they were shipped to said firm by the defendant. The points of main controversy in the case were two only: First, whether plaintiff acquired any lien on the cotton by virtue of the mortgage; and, second, whether Karter bought and received the cotton, and removed it out of plaintiff's reach, as averred in the complaint. And as to the first inquiry it is insisted that Persall had no such interest in

the land when the mortgage was executed in 1890 as would enable him to vest in the mortgagee an equitable title to crops to be raised in 1892. The evidence as to Persall's interest was as follows: The land constituted a farm known as the "Archy Place." Fields bought it from Archy, and while the latter was still in possession of it, holding it for Fields, he (Fields) sold the place to Persall, and directed Archy to put the latter in possession, which was done. Fields executed to Persall a deed which was intended to convey this Archy place to him, but by mutual mistake, or the mistake of the scrivener, of which neither party was aware at the time, one 80 acres of the place was misdescribed. The sale being on credit, as soon as this deed was delivered to Persall, he executed and delivered the mortgage to Fields to secure the payment of the purchase money, both instruments being written and signed at the same time and delivered, first the deed, and then the mortgage back, in immediate succession. The mortgage correctly describes the land. Upon the consummation of this transaction, Persall had a right to the immediate possession of the land, which was immediately vested in him. The mortgage which perfected this right also in terms vested the equitable title to the subsequently raised cotton in Fields, and it is therefore to be taken that Persall had the right to immediate possession at the moment this equity to the cotton passed. He then also had the further right to a correction of Fields' conveyance of the land to him, the absolute right to have Fields execute to him a conveyance to that part of the Archy place which had by mutual mistake been omitted from or incorrectly described in the deed which Fields had executed. It is to be assumed that Fields would have recognized this right, and at once have voluntarily executed a proper conveyance; but, if he refused, Persall had a plain remedy in chancery to effectuate his right to have a proper and correct deed to the land he had purchased. Reaffirming the doctrine of *Paden v. Bellenger*, 87 Ala. 575, 6 South. 351, it is yet clear to us that this case does not fall within that principle, but that Persall's rights existing at the moment the mortgage was executed to a perfect deed to the Archy place, and to the immediate possession thereof, constituted a distinct and substantial equitable interest in the land, quite sufficient to support the mortgage of crops to be grown thereon in subsequent years. One of our cases goes much further than this, and probably too far. *Hurst v. Bell*, 72 Ala. 336. The evidence showing this sufficient interest in Persall was free from conflict or adverse inferences. The court might have charged the jury affirmatively upon it on the hypothesis of their belief of the evidence. And there being no controversy in the case as to Persall's interest in the whole of the Archy place, the inquiry as to whether the cotton

in question was grown upon one or another part of that place was immaterial, and testimony should not have been received upon it. Upon the same considerations the first, second, and third charges given for defendant must be held to have been abstract, confusing, and misleading, and therefore improperly given, though, as they asserted a correct proposition of law, the judgment would not necessarily be reversed on account of them.

The complaint alleging that Karter "did buy and receive" the cotton upon which plaintiff had an equitable lien, it was essential to recovery that the jury should be reasonably satisfied that he both bought and received the cotton. The evidence was clear that he received cotton from Persall which the testimony tended to show was grown on the Archy place,—the land described in the mortgage; but there was a conflict in, or conflicting inferences afforded by, the evidence as to whether he bought the cotton,—one phase of the evidence going to show that one Jones, as the agent of, and being paid for his services by, Smith & Coughlan, purchased the cotton, and that Karter, as their agent or cashier, paid for it with their funds, and shipped it to them. Then, too, it was not directly proved that the cotton which Persall sold was raised on the Archy place; but that was matter of inference. On this state of case the court very properly refused to give the several affirmative charges requested by plaintiff, and also charges 1, 2, 3, 4, 5, and 9.

Charge 8 should have been given for plaintiff. The execution of the deed and mortgage, respectively, were parts of one and the same transaction on the uncontroverted evidence. Karter, on no aspect of the evidence, was Persall's bailee. This consideration suffices to condemn plaintiff's tenth charge.

If the refusal of the court to allow the proposed amendment of the complaint was error, it cannot be said not to have prejudiced the plaintiff. The purpose of the amendment was to meet that phase of the evidence which tended to show that, though Karter did not buy Persall's cotton, he yet received and shipped it with notice of plaintiff's lien, and thereby deprived plaintiff of the benefit of his lien,—a state of facts which was not counted on, as we have seen, in the original complaint. There was evidence before the jury tending to support this amended count at the time it was offered, and it is immaterial whether it was adduced by plaintiff or by defendant. The proposed count presented a good cause of action. The refusal to allow it to be filed is not, therefore, brought within the principles declared in *Beavers v. Hardle*, 59 Ala. 570, but was, we think, in violation of the statute as it has been liberally construed by this court. *Insurance Co. v. De Jarnett*, 111 Ala. 248, 19 South. 995, and authorities there cited.

We deem the foregoing a sufficient expression of our views upon this case for the purposes of another trial, without considering,

and discussing in detail rulings of the trial court on the admissibility of testimony, etc. Reversed and remanded.

(121 Ala. 303)

FRAZIER et al. v. McWHIRTER et al.
(Supreme Court of Alabama. April 20, 1890.)

ELECTIONS—PROBATE JUDGE—JURISDICTION—SURETIES—COSTS—EXECUTION.

1. Under Code 1886, § 423, authorizing the probate judge in election contests to examine the ballots, and, after hearing the evidence, to give judgment, and section 2837, authorizing him to adjudge the costs against the unsuccessful party, he has no authority to tax the costs against the sureties for costs of the unsuccessful party.

2. Where a judgment against sureties for costs in an election contest is void, the court will quash the execution thereon and vacate the judgment.

Appeal from circuit court, Marion county; Thomas R. Roulhac, Judge.

Action by M. M. Frazier and others against John M. McWhirter and others. There was a judgment for defendants, and plaintiffs appeal. Reversed.

This action counted upon a bond given by the defendants as sureties for the court costs in the contest of the election of tax collector of Marion county. It was averred in the complaint that the contestant was cast in the contest, and that judgment was accordingly rendered against him and the sureties on his said bond for the costs of suit, and that said costs had never been paid by the defendants, or either of them. The defendants pleaded the general issue, and a special plea in which they set up that the plaintiff ought not to recover in this case, because judgment had been rendered on said bond by the probate court of Marion county; that said court had jurisdiction of the subject-matter, and had a right to render said judgment against these defendants; and that, therefore, said bond is merged in the said judgment. The judgment referred to in said special plea was made an exhibit to the bill, and its recitals showed that, after hearing the contest, judgment was rendered in favor of the contestee and against John M. McWhirter, Woodruff Miles, and T. W. McWhirter on the bond involved in the present suit, for \$250, and also a judgment for \$250 against J. M. McWhirter, Andrew J. McWhirter, H. W. Palmer, J. W. Palmer, and T. W. Wigginton on another bond, which was given, to secure the costs in said contest, after the execution of the bond here sued on. To the special plea filed by the defendants the plaintiff demurred upon the following grounds: (1) That said plea is insufficient, because it shows on its face that the alleged judgment is void, in that it was based on two bonds executed by different persons, and judgment was thereon rendered against different and distinct parties; (2) the probate court had no jurisdiction, power, or authority to render said judgment. This demurrer was overruled. To the special plea the plaintiff

filed a replication, in which he alleged that, after the rendition of the judgment as alleged and set out in the special plea of the defendants, the said probate court, on motion of said defendants, quashed, set aside, and annulled said judgment and the execution issued thereunder, and that, therefore, the defendants were estopped to allege the validity of said judgment. The plaintiff, for further replication to said plea, alleged that the judgment which was executed as a part of said plea was void, and, further, that the probate judge who rendered the said judgment for costs against the sureties on said bond was without power or authority to render said judgment, and that, therefore, the bond here sued on was not merged in said alleged judgment. On motion of the defendants this special replication was stricken from the file. On the trial of the cause the following facts were disclosed: At the August election, 1892, M. M. Frazier and John M. McWhirter were candidates for the office of tax collector of Marion county. On the returns, M. M. Frazier was declared elected, and the said McWhirter instituted a contest of the said election before Hon. W. H. Matthews, then probate judge of Marion county. Upon the institution of this contest, the contestant, John M. McWhirter, under the provisions of section 398 et seq. of Code of 1886, made and delivered the following bond for the contest of said election:

"John M. McWhirter vs. M. M. Frazier.
* * * Bond. We hereby acknowledge ourselves contestant John M. McWhirter's security for the court costs of the contest in the within case, to the extent of two hundred and fifty dollars. This August 19th, 1892. [Signed] John M. McWhirter, Woodruff Miles, T. A. McWhirter.

"Approved this Aug. 19th, 1892. Walter H. Matthews, Judge of Probate."

This is the bond here sued upon.

It was further shown that, during the proceedings of the contest before the probate judge, it was discovered that the costs incurred up to that time exceeded \$250, for the security of which the bond here sued on was given, and that, therefore, an additional bond of \$250 was required of, and executed by, the defendant, with different sureties, and containing a waiver of exemptions, and that it was upon this bond judgment was rendered at the same time it was rendered upon the bond here sued on.

Upon the introduction of all the evidence, the court, at the request of the defendants, gave the general affirmative charge in their favor, and refused to give the general affirmative charge requested by the plaintiff. To each of these rulings the plaintiff separately excepted. There were verdict and judgment for the defendants. The plaintiff appeals, and assigns as error the giving of the affirmative charge requested by the defendants, and the refusal to give the charge requested by the plaintiffs.

Daniel Collier, for appellants.

TYSON, J. The right of the plaintiff to maintain this suit is unquestionable. Code 1886, §§ 398, 417; *Dean v. Witherington*, 116 Ala. 575, 22 South. 869; *Wilson v. Duncan*, 114 Ala. 659, 21 South. 993; *Hilliard v. Brown*, 103 Ala. 318, 15 South. 605. The demurrer should have been sustained to the special plea of the defendants setting up the decree of the probate court in which the costs of the contest were adjudged against the defendants as sureties upon the instrument executed by them, and approved by the judge of probate, given as security for the costs of the contest, as provided by section 417 of Code of 1886, and ordering execution to be issued against them for the costs, since it was a nullity and void. So much of the decree or judgment as went beyond confirming or annulling the election altogether was in excess of the jurisdiction conferred upon him by section 423 of Code of 1886, providing, where the contest is instituted before a probate judge, that "such judge of probate has authority to make an examination of the ballots given in such election, so far as the same may be necessary to arrive at a correct judgment, and must be governed, in the trial and determination of such contest, by the rules of law and evidence governing the determination of questions of law and fact in the courts of law in this state, so far as applicable; and after hearing the allegations and evidence, must give judgment, either confirming or annulling such election altogether, or declaring some other person than the one whose election is contested duly elected. In all contests of elections for the office of justice of the peace or constable or for any office which is filled by the vote of a single county, except for members of the general assembly, the person whose election is contested is entitled to a trial by jury, the issue to be made up under the direction of the court and a jury summoned as in cases in the probate court." It will be noticed that no provision is made for a judgment for costs against the unsuccessful party,—much less, against the sureties upon the bond for the security for costs; and none exists authorizing such a judgment by the judge of probate against the sureties in the cases of contesting elections to offices filled by the vote of a single county, except members of the general assembly. However, as to the unsuccessful party, the court could have adjudged the costs against him, in favor of the successful party, under section 2837 of the Code of 1886. But this section (2837) does not provide for the adjudication of the costs against the sureties on the undertaking of the unsuccessful party for the costs. We do not doubt that if the unsuccessful party, the contestant who gave the security for the costs, had paid any part of it to the person entitled to receive it, or had obtained a release or acquittance from such person, such payment or acquittance would be a good defense, pro tanto, to the present suit. *Hilliard v. Brown*, supra. The

plea was subject to demurrer, and constituted no defense to the action.

The decree or judgment of the probate judge adjudging the costs against the sureties upon the bond of the contestant in the contest case, and ordering execution against them, being void, on account of want of jurisdiction to render it, the probate judge on a subsequent day correctly granted the application to quash the execution, and properly entered a decree or judgment vacating the former judgment in this respect. 3 Brick. Dig. p. 584, § 124. The replication setting up the latter proceeding vacating the judgment or decree relied upon by the defendants in their special plea was sufficient.

There was error in giving the charge requested by the defendants, and the general affirmative charge requested by the plaintiffs should have been given. The judgment must be reversed, and the cause remanded. Reversed and remanded.

(121 Ala. 316)

LIVINGSTON v. CUDD.

(Supreme Court of Alabama. April 21, 1899.)

MORTGAGES—SATISFACTION OF RECORD—PENALTY.

Under Code 1896, § 1066, requiring a mortgagee on payment and request of the mortgagor to satisfy the record, or forfeit \$200 to him, the mortgagee is liable to a penalty, though the mortgagor may have parted with the property.

Appeal from circuit court, Morgan county; H. C. Speake, Judge.

Action by J. H. Livingston against J. J. Cudd. There was a judgment for defendant, and plaintiff appeals. Reversed.

A demurrer was sustained to the complaint as originally filed, and thereupon the plaintiff amended his complaint so as to read as follows: "(1) Plaintiff claims of defendant the sum of two hundred dollars, for the failure to enter or have entered satisfaction of a mortgage upon the margin of the record thereof, for three months from the time he was requested in writing so to do, by the plaintiff; he, the defendant, having received at the time, he was requested in writing to enter said satisfaction, payment and full satisfaction of the amount secured by said mortgage; which said mortgage was executed by plaintiff in the year 1894, namely in January of said year, and was payable to defendant. Said mortgage was recorded in the office of the judge of probate of Morgan county, Alabama, on the 12th day of February, 1894. Said notice to defendant to mark said mortgage satisfied as above averred was made in writing and received by defendant before the commencement of this suit." To this complaint the defendant demurred upon the ground that it fails to aver that at the time notice was given to satisfy the mortgage the plaintiff was the owner of any property covered by said mortgage. The court sustained this demurrer, and the plain-

tiff declining to plead further, judgment was rendered for the defendant. The plaintiff appeals, and assigns as error the ruling of the court in sustaining the demurrer to the amended complaint.

O. Kyle, for appellant. E. W. Godbey, for appellee.

HARALSON, J. Before the amendment of the statute in respect to satisfying mortgages on the record, to its present form, the original section of the Code was, "Any mortgagee who has received satisfaction of the amount secured by such mortgage, must, if the same has been recorded, at the request of the mortgagor, enter satisfaction," etc. Code 1886, § 2222. As amended it provides that, "If a mortgage which is of record has been fully paid or satisfied, the mortgagee or the transferee or assignee of the mortgage, who has received payment or satisfaction, must, on the request in writing of the mortgagor, or of a judgment or other creditor of the mortgagor having a lien or claim on the property mortgaged, or of a purchaser from the mortgagor, enter the fact of payment or satisfaction on the margin of the record of the mortgage," etc. Code 1896, § 1066. In default of a compliance within two months thereafter with such request, he forfeits to the party making the request, \$200. Under the terms of the section as amended and extended, the right of the mortgagor to demand entry of satisfaction on payment of the mortgage debt, has not been, in any event, taken away or abridged.

In *Gay v. Rogers*, 109 Ala. 624, 20 South. 37, in speaking of this statute, it was said, that when a mortgagee avails himself of the advantages of the registration act, and publishes to the world that he has a lien on the property of the mortgagor, the latter, to this extent is injured in his credit, and ability to utilize his means. This he assumed in giving the mortgage security. "When the lien or mortgage has been wholly or partially satisfied by payment, fairness and justice to him demand that his credit be restored. The mortgagee having published to the world the existence of his lien or claim, when it has been removed, he owes, independent of the statute, a moral duty to his debtor to give the same publicity to the fact, that the property of the debtor is no longer incumbered. The statute makes it a legal duty to perform a moral duty, and imposes a penalty if he fails to discharge this duty. *Scott v. Field*, 75 Ala. 422."

In Iowa, there is a statute prescribing that, "whenever the amount due on any mortgage is paid off, the mortgagee, or those legally acting for him, must acknowledge satisfaction thereof in the margin of the record of the mortgage. If he fails to do so within six months after being requested, he shall forfeit to the mortgagor the sum of \$25." Judge Dillon in construing this statute said: "The record of the mortgage is constructive notice to the world of the existence of the debt and

incumbrance. When this is paid, the statute has provided for a satisfaction of the record, so that the world may also know the fact of payment. Unsatisfied mortgages of record tend to affect the pecuniary standing and credit of the mortgagor in business circles. In view of these considerations, the reasonableness of the statute requiring the mortgagee to acknowledge payment of the debt in as public a manner as the mortgagor had acknowledged its existence, is apparent." *Deeter v. Crossley*, 26 Iowa, 180.

We have referred to the foregoing decisions as confirmatory of the opinion we entertain, that, under this statute, a mortgagor though he may have parted with his interest in the mortgaged property, still has a substantial interest in having an entry of satisfaction made upon its record, and that, after default to enter such satisfaction by the party charged with the duty of making the same, for the time specified, on proper demand of the mortgagor to do so, the mortgagor has a right of action against him to recover the penalty prescribed. The court erred in sustaining the demurrer to the amended complaint. Reversed and remanded.

(121 Ala. 168)

**BIRMINGHAM WATERWORKS CO. et al.
v. HUME.**

(Supreme Court of Alabama. April 20, 1899.)

RIGHT OF HUSBAND TO WIFE'S CHATELS—SHARES OF STOCK—POWER OF APPROPRIATION—EXERCISE—EVIDENCE—COMMON LAW—PRESUMPTIONS.

1. As between husband and wife, their rights in the wife's chattels are governed by the law of the place of their domicile when the property is received.

2. The common law is presumed to prevail in states judicially known to be of common-law origin, in the absence of evidence to the contrary.

3. Shares of stock in a business corporation belonging to a wife are choses in action, subject to the husband's common-law power of appropriation.

4. Such power may be exercised by an assignment of the shares for value.

5. A pledge by a husband of his wife's shares of stock for a debt of his own is an exercise of his common-law power of appropriation, where he intends thereby to appropriate the stock as his own.

6. A bill alleging that a wife indorsed a certificate of shares of stock to enable her husband to reduce it to possession or to pledge it, and that he afterwards pledged it, sufficiently shows his intention to appropriate the stock as his own, in the absence of a demurrer.

7. A husband may exercise his common-law power of appropriation of his wife's shares of stock without any concurrence or transfer on her part.

Appeal from chancery court, Jefferson county; Thomas Cobbs, Chancellor.

This is a bill filed by the appellee, W. D. Hume, against the Birmingham Waterworks Company, Paul H. Earle, its president, J. F. Graham, its secretary, and B. C. Johnson, seeking to have a transfer on the books of the corporate defendant for all shares of stock

claimed by the appellee. The case made by the bill is that on the 27th of February, 1895, the Birmingham Waterworks Company issued a certificate to Mrs. B. C. Johnson for 11 shares of stock; that Mrs. Johnson was then a married woman, the wife of J. T. Johnson, and that she resided with her husband in Tennessee, and continued to reside there until after the 6th of April, 1895; that on the 6th of April, 1895, Mrs. Johnson, at Knoxville, Tenn., signed the blank indorsement printed on the back of the certificate in the presence of F. L. Bradley and her husband, and the indorsement was left blank; that, having signed the indorsement, she delivered the certificate to her husband, and that the indorsement was made for the purpose of enabling him to reduce it to possession, to sell, transfer, or pledge it; that her husband delivered the certificate to Robbins & Gammon as security for a loan; and that he afterwards paid off this loan, and they reassigned the certificate to him on the 7th of June, 1897. The bill further shows: That on the 16th of January, 1898, J. T. Johnson, "for a valuable consideration," assigned the certificate to the appellee. That on the 22d of January appellee presented the certificate, and demanded the issue of a new certificate for 11 shares to him, and that the defendant corporation refused to make the transfer. It is alleged that he is entitled to the aid of a court of equity to have the transfer made. That Mrs. Johnson claims to be the owner of the stock, and has forbidden the corporation from making the transfer. It is then alleged that since the 6th of April, 1895, the waterworks company has declared dividends, and it is averred that J. T. Johnson, from and after the 6th of April, 1895, became and was the real owner and holder of the stock, and entitled to the dividends, and that on the 10th of January, 1898, "for a valuable consideration," he sold and transferred to complainants all of the dividends then accrued on the 11 shares of stock since the 6th of April, 1895, and by his attorney he had demanded their payment, which had been refused. The prayer of the bill is that the waterworks company be compelled to transfer the shares of stock, and issue a new certificate, and to account for and pay over the dividends. To this bill the defendants demurred upon the following grounds: "(1) It appears in and by the said bill of complaint that the said Beatrice C. Johnson was, at the time alleged in said bill, a married woman, and, as such, the owner of the stock described in the said bill of complaint, and it appears from said bill of complaint that the attempted transfer by said Beatrice C. Johnson was insufficient in law to transfer and assign said stock, in this: that it does not appear that the husband of the said Beatrice C. Johnson signified his assent and concurrence of the said transfer as required by law. (2) It appears in and by the allegations of said bill of complaint that the said Beatrice C. Johnson, in and by the said attempted transfer, undertook

to pledge her property as security for the debt of her said husband, contrary to the statutes in such cases made and provided. (3) It is not shown in and by said bill of complaint that complainant ever paid value for the said shares of stock." On the submission of the cause upon the demurrer, the chancellor held that they were not well taken, and decreed that they be overruled. From this decree the respondents appeal, and assign the rendition thereof as error. Affirmed.

Alex. T. London, for appellants. James E. Webb, for appellee.

SHARPE, J. As between the husband and the wife, their rights in personal property coming to the wife attach under, and are governed by, the law of the place where they are domiciled at the time the property is received. *McAnally v. O'Neal*, 56 Ala. 299; *Gluck v. Cox*, 75 Ala. 310; 8 Am. & Eng. Enc. Law, 575. The rule is established here that, when the contrary is not shown, it will be presumed that the common law prevails in states which are judicially known to be of common origin with this state. *Inge v. Murphy*, 10 Ala. 885; *Connor v. Trawick's Adm'r*, 37 Ala. 289; *Bradley v. Harden*, 73 Ala. 70; 1 Brick. Dig. p. 349, § 9. The case of *Kennebrew v. Machine Co.*, 106 Ala. 377; 17 South. 545, cited as being opposed to this rule, was ruled with express reference to the peculiar legal system of Louisiana, and is not in conflict with the rule stated. Tennessee having an origin common with that of the older states, and nothing appearing in the bill to destroy the presumption of the reign there of common law, we must apply it in determining this case.

By the common law, the husband was entitled during coverture to receive, and to reduce to his possession and ownership, all choses in action belonging to the wife at the time of marriage, or which may accrue to her while the coverture continues. As to what acts of the husband will amount to such reduction to his possession, no rule has been declared which will apply with precision to the varied transactions of that nature. That the husband may during the coverture, in the assertion of his marital rights and for a valuable consideration, assign the choses in action of the wife which are capable of being immediately reduced to possession, so as to vest at least the beneficial ownership in the purchaser, the authorities are generally agreed. 2 Kent, Comm. 137-139, and notes; *Clancy, Husb. & Wife*, 150; *Schuyler v. Hoyle*, 5 Johns. Ch. 196; *Needles v. Needles*, 7 Ohio St. 432; *Caplinger v. Sullivan*, 37 Am. Dec. 575, and cases collected in note; *Siter's Appeal*, 4 Rawle, 467; *McConnell v. Wenrich*, 16 Pa. St. 365; *Webb's Appeal*, 21 Pa. St. 248; *Rice v. McReynolds*, 8 Lea, 38; *George v. Goldsby*, 23 Ala. 326. Shares in the capital stock of a business corporation cannot be reduced to possession by collection, as in the case of moneyed contracts; but, representing, as they do, intangible interests in the property of the cor-

poration, they are classed as choses in action, and, when belonging to the wife, are subject to the husband's common-law power of appropriation, and this power he may exercise by assigning the shares for value. *Cummings v. Cummings*, 143 Mass. 343, 9 N. E. 730; *Rice v. McReynolds*, *supra*. The last-named case is confirmatory of the presumption that, as to such right of the husband, the common-law rule was prevailing in Tennessee when these transactions were had.

Whether the pledge of Mrs. Johnson's stock in 1895 amounted to a reduction to the possession of her husband may become a question of fact, depending largely upon whether his intention was to thereby finally appropriate the stock as his own. The bill avers substantially that such was his purpose, and its sufficiency in that respect is not challenged by demurrer. No concurrence or act of transfer on the part of Mrs. Johnson was needed to perfect her husband's common-law right and power of appropriation. The transaction being in Tennessee, the statutes of Alabama relating to the disposition of the wife's property are without application to this case. The decree of the chancery court will be affirmed at appellants' cost.

(121 Ala. 565)

ALABAMA STATE LAND CO. v. SHUTTLESWORTH.

(Supreme Court of Alabama. April 21, 1899.)

EJECTMENT—TITLE TO LAND.

1. The effect of the failure to pay taxes on land, by one in possession, on the bona fides of her claim of ownership, is a matter of argument to the jury, and should not be made the subject of an instruction.

2. The good faith of the claim of title of one who has been in possession of lands for 27 years cannot be made the subject of an instruction to the jury in an action of ejectment against her tenant.

Appeal from law and equity court, Tuscaloosa county; J. J. Mayfield, Judge.

Ejectment by the Alabama State Land Company against J. R. Shuttlesworth. From a verdict and judgment for defendant, plaintiff appeals. Affirmed.

The defendant pleaded the general issue, and the statute of limitations of 10 years. The suit was to recover 80 acres of land, specifically described in the complaint; and it was shown by the bill of exceptions that the land involved in this suit was a part of the lands which were granted to the state of Alabama by an act of congress of June 3, 1856, and that the plaintiff derived title thereto from the state. The defendant, as a witness in his own behalf, testified that he was in possession of the lands sued for as a tenant for his mother, Mary Shuttlesworth, and that Mary Shuttlesworth had been in possession of said lands for 27 years before the institution of this suit; having lived in a house which was built on said property, and cultivated a part of said lands. The defendant, as a witness, further testified that his

mother purchased said lands from one Cutts over 27 years ago, and immediately went into possession of said lands after such purchase. Upon the cross-examination of the defendant as a witness, he was asked to state what means his mother had of paying to James Cutts \$300 for said tract of land, which was the consideration recited in said deed. The defendant objected to this question because it called for illegal and irrelevant evidence. The court sustained the objection, and the plaintiff duly excepted. Similar questions were asked other witnesses, to which the defendant's objections were sustained. Upon the introduction of all the evidence, the plaintiff requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (5) "The fact that the plaintiff did not show payment of taxes does not interfere with the right to recover the land sued for; but the failure of defendant to pay taxes on the lands is some evidence that the defendant, and those under whom he holds, have not claimed to own the land." (6) "A possession, to ripen into title, must be with intent, and in good faith, to claim title; and, if no such bona fide intent existed in defendant and those under whom he holds, the jury must find for the plaintiff for the land sued for." There were verdict and judgment for the defendant. The plaintiff appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Smith & Smith, for appellant.

McCLELLAN, C. J. We are unable to see that the facts sought to be elicited on cross-examination of the defendant's witnesses, that Mrs. Shuttlesworth did not have sufficient means to pay, and did not at the time pay, the consideration for the land recited in the deed introduced to show color of title, tended to show a want of good faith on her part in claiming title to the land during the 27 years of her possession under that color of title. It may be that her failure to pay any taxes on the land was evidence of a want of such good faith in her claim of ownership, but this was matter for argument to the jury, which the court was not bound to embody in an instruction to them. Charge 5 was therefore properly refused.

Charge 6 requested by plaintiff is as follows: "A possession, to ripen into title, must be with intent, and in good faith, to claim title; and, if no such bona fide intent existed in defendant and those under whom he holds, the jury must find for the plaintiff for the land sued for." This charge should, and doubtless would, have been given, if Mrs. Shuttlesworth, instead of her son J. R., had been the defendant. But he claimed no title at all in the land, but only that he held under his mother, who did, he asserts, have title by more than 10 years' adverse possession. To say the least, the charge was palpably misleading in its tendencies. Affirmed.

(121 Ala. 397)

CORPORATE AUTHORITIES OF SCOTTSBORO v. JOHNSON.

(Supreme Court of Alabama. May 10, 1899.)

ESCAPED PRISONER—RECORD—CONTRADICTION BY PAROL EVIDENCE.

1. Where one found guilty of an offense is fined, and on default of payment sentenced to labor on the street, but allowed to go at large on his promise to pay the fine, he cannot be re-arrested as an escaped prisoner.

2. Where one found guilty of an offense is fined, and in default of payment sentenced to two days' labor on the street, but allowed to go at large on his promise to pay the fine, his arrest at the expiration of two days is unauthorized, since his imprisonment began with the day of his sentence.

3. Defendant was convicted and fined by a town mayor's court. On default of payment, he was sentenced to labor two days on the streets, but allowed to go at large on his promise to pay the fine. Five days after, he resisted a rearrest by the marshal for the same offense. *Held* that, on a prosecution for the resistance, it was not a contradiction of the record by parol evidence to show the act of the mayor in releasing him.

Appeal from circuit court, Jackson county; William L. Stephens, Special Judge.

Action by the corporate authorities of Scottsboro against Stokes Johnson. From a judgment in favor of defendant, the authorities appeal. *Affirmed*.

J. E. Brown, for appellants. R. M. Clifton and Tally & Proctor, for appellee.

DOWDELL, J. The appellee was prosecuted and convicted in mayor's court of the town of Scottsboro for the violation of one of the ordinances of the municipality; the charge being, "for disorderly conduct in resisting arrest by the marshal." From this conviction the appellee appealed to the circuit court of Jackson county, in which court he was tried and acquitted. From the judgment of the circuit court the corporate authorities of Scottsboro appeal to this court.

On the trial in the circuit court the evidence, without conflict, showed that the appellee, Stokes Johnson, had been previously tried in the mayor's court for disorderly conduct, and fined in the sum of one dollar; and, in default of payment of said fine, the mayor entered up a sentence to hard labor upon the streets of said town for two days, but at the same time permitted the defendant to go at large, and return to his ordinary business and duties, upon a promise, then made to the mayor, that he (defendant) would pay said fine of one dollar. After the lapse of five days, the defendant not having paid the fine of one dollar, the mayor directed the marshal to arrest the defendant and put him to labor. It was in the making of this arrest by the marshal that the defendant offered resistance, and for which he is now prosecuted for "disorderly conduct in resisting arrest by the marshal." It is a clear proposition that the defendant was not an escape, for he was at large by the order of the court that tried him.

So the law as to the rearrest of an escaped convict has no application in this case.

As a general rule, the day on which a prisoner is sentenced will be reckoned as a part of his imprisonment. *Ex parte Meyers*, 44 Mo. 279; *Whart. Cr. Pl.* (8th Ed.) § 925. At the time of this arrest of the defendant by the marshal under the mayor's direction, the time of the sentence had expired, and any further restraint of the defendant in his liberty after the expiration of the term of his sentence would have been illegal. In case of an escape, where the defendant by his own misconduct prevents the execution of the sentence, the principle above stated would not apply. It follows that there was no authority of law for the arrest, and the defendant had a right to resist.

There was no error in the admission of the evidence as to the action of the mayor in letting the defendant go at liberty upon his promise to pay the fine. This was in no sense contradicting the record by parol evidence.

This view of the case renders it unnecessary to notice the other assignments of error, and, besides, they are not insisted on by counsel in argument. We find no error in the record, and the judgment of the circuit court is affirmed. *Affirmed*.

(121 Ala. 296)

LANE v. MAY & THOMAS HARDWARE CO. et al.

(Supreme Court of Alabama. May 16, 1899.)

EVIDENCE—BOOKS OF ACCOUNT.

An account book is not admissible to show payment, unless the items are shown to have been entered at or about the times the payments were made, and the person making the entries knew them to be correct when made.

Appeal from chancery court, Madison county; William H. Simpson, Chancellor.

Bill by the May & Thomas Hardware Company and others against Charles P. Lane for a specific performance. From a decree for complainants, defendant appeals. *Affirmed*.

The bill in this case was filed by the appellees, as assignees of one H. Pool, against the appellant, Charles P. Lane, to compel the specific performance of a contract, entered into between him and Pool in June, 1893, whereby, in consideration of Pool erecting him a dwelling house in the city of Huntsville, he (Lane) agreed to pay Pool \$1,245 in money, and to convey to him three lots in the city of Huntsville, valued at \$650. The lots were never conveyed, and it was to obtain a conveyance of these lots that the bill was filed. A copy of the contract between Lane and Pool was made an exhibit to the bill. The complainants claim all the rights in and to said lots that Pool had under said contract, and base their claim upon two instruments, which were made exhibits to the bill, viz. one instrument in writing, bearing date May 25, 1895, in which Pool authorized Lane to convey said lots to the complainants free of all

claim Pool had therein, and the other a deed from Pool and his wife, bearing date June 14, 1895, whereby Pool and his wife conveyed to the complainants all right, title, and interest he and his wife had to said lots. It was averred in the bill, and the evidence introduced on behalf of the complainants proved, that Pool completed the house as stipulated for in the contract, and that the defendant, Lane, accepted the house as so completed, and moved into it; that said Lane had paid the money agreed to be paid, but refused both the request by Pool and of the complainants to convey the said lots as stipulated for in the contract. It was averred and proven that the contract stipulating for the conveyance of said lots was duly assigned by Pool to the complainants. The defendant, in his answer, set up the defense that Pool did not comply with his contract, and that he (Lane) was compelled to pay out, in order to complete said house, a large sum in addition to the \$1,245 agreed to be paid Pool in his contract. The evidence on behalf of the defendant tended to prove the allegations of his answer. In his deposition, after having testified that he had paid to Pool amounts in excess of \$1,245 stipulated for in the contract, he was asked the following question: "Please state how much you had to pay out for other labor, after you stopped paying Pool, in order to finish the said house according to the contract." He answered: "To the best of my opinion, I paid out \$389.25 in cash." He was then asked the following question: "Did you not keep a book in which you made a list of all amounts paid out, and the parties to whom paid, which composed the said sum of \$389.25?" Upon his answering that he did, he was then directed in the interrogatories "to make the pages of said book, containing the said list, an exhibit to your deposition." In compliance with this request, he made the pages of his memorandum book an exhibit to his deposition. The complainants separately and severally objected and excepted to the questions calling for the testimony as above stated, and also excepted to each of the answers thereto, and asked that the pages attached to the deposition of the witness Lane as an exhibit, in compliance with the request as stated above, be excluded from the evidence, on the grounds that the entries made by the defendant in his memorandum book are not admissible as evidence, and are not the best evidence of payments or the time of payments. The other facts of the case are sufficiently stated in the opinion. On the final submission of the cause, on the pleadings and proof, the complainants' objections and exceptions to the evidence were sustained, and the chancellor decreed that the complainants were entitled to the relief prayed for, and ordered accordingly. From this decree the respondent appeals, and assigns the rendition thereof as error.

R. W. Walker and William Richardson, for appellant. Humes, Sheffey & Speake, for appellees.

MCLELLAN, C. J. It does not appear that the items on the pages of respondent's memorandum book which were offered in evidence were entered at or about the time the payments were made, nor sufficiently that the witness knew the entries to be correct when they were made. The pages of the book thus offered were therefore properly excluded by the chancellor. *Kling v. Tunstall*, 109 Ala. 609, 19 South. 907; *Railroad Co. v. Cassibry*, 109 Ala. 697, 19 South. 900, and authorities there cited. It was only by reference to these memoranda that it was attempted to prove the items of alleged payment in excess of that part of the contract price which was to be paid in money. The witness expressly relied upon them as his source of "information," upon which his testimony was given; and we therefore conclude that it was not made to satisfactorily appear in the case that the respondent has ever paid more than the \$1,245 stipulated for in the contract. Upon the whole evidence we have no difficulty in reaching the conclusion that Pool built and completed the house within the time and in the manner required by the contract. No time for completion was specified in the contract. The implication, therefore, is that the house was to be finished within a reasonable time. It was finished within four months from the date of the contract. This was clearly not more than a reasonable time. Besides it is not pretended that there was any unwarranted delay. It is insisted, however, that Pool did not complete the structure, but made default therein, and that it was carried on to completion by the respondent himself. The evidence does not support this contention. We gather from it that on September 23, 1893, the contractor, Pool, gave the respondent a written statement showing the amount the latter had paid on the contract, the balance due or which would be due from him, and the amount the contractor owed for labor and material on outstanding bills. From this statement it appeared that the aggregate of amounts paid and owed by respondent, together with outstanding bills which the contractor owed, and which to the extent of any unpaid balance of the contract price might be charged on the property, was greatly in excess of the money respondent agreed to pay. Upon this state of affairs thus coming to the attention of the respondent, he declined to make further payments directly to the contractor, and from thence on to the completion of the house, which was within a few days thereafter, he applied the balance of his money indebtedness under the contract to the payment of labor and material expended and used in its completion. These payments, though not made directly to the contractor, were essentially payments to him under the contract, and he continued to supervise and carry on the work under the contract to its completion to the satisfaction of the respondent. It is clear, we think, that the adoption of this mode of payment by respondent

ent was not due to any dissatisfaction with, or default on the part of, the contractor, but was due to a very natural desire on the part of the respondent to be assured that the money should go in satisfaction of claims which might, if not paid, become charges on the property. This change in the mode of payment was obviously not an abrogation of the contract. The contract was never abrogated, but, as the chancellor found, and as we find, was fully carried out by Pool; and its complete and satisfactory execution was accepted and acknowledged by the respondent. The contract to build the house being thus fully executed by Pool, and that part of the price which was to be paid in money having been paid, or nearly so, there remained to be done only the conveyance to Pool of the lot of land which the contract bound the respondent to convey to him upon the completion of the house. The contract for this conveyance having been duly assigned by Pool to the complainants, they are entitled to have it specifically enforced in accordance with the prayer of their bill. The demurrer to the bill is not insisted on by counsel, and we advert to it only to say that it was properly overruled. *Davis v. Williams* (Ala.) 25 South. 704. Affirmed.

(121 Ala. 460)

SOUTHERN RY. CO. v. SHIELDS.

(Supreme Court of Alabama. April 20, 1890.)

MASTER AND SERVANT—PLEADING—FELLOW SERVANTS—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.

1. A complaint which alleges that plaintiff, while in the employment of defendant, and assisting in driving piles on the line of its railroad, was injured by being thrown in front of a car, and run over, and that said injury was caused by reason of the negligence of one R., who was also in the employment of defendant, and who had intrusted to him by it the superintendence over the men and machinery used in driving the piles, in this: that R. negligently ordered plaintiff to scotch the wheels of said car, without taking the precaution to see that said car was not in motion, and by reason thereof plaintiff was thrown down and injured as aforesaid,—shows such superintendence over the work by an employé, and negligence producing the injury while in its exercise, as is contemplated by Code 1886, § 2590, subd. 2, which provides that, when a personal injury is received by a servant in the business of the master, the master shall be liable therefor when the injury is caused by reason of the negligence of any person in the employment of the master, who has any superintendence intrusted to him, while in the exercise of such superintendence.

2. A complaint which alleges that plaintiff, while in the employment of defendant, and assisting in driving piles on the line of its railroad, was injured, and that said injury was caused by the negligence of one R., who was in the employment of defendant, and who was intrusted by defendant with superintendence over the men and machinery used in driving said piles, and who was at the time in the exercise of such superintendence, in this: that said R., knowing that the person in charge of a car was liable at any time to start the car forward, negligently ordered plaintiff to scotch the wheel of said car, by placing his crowbar in front of the wheel, and that when he under-

took so to do the car started and struck the bar, and knocked plaintiff down and inflicted the injury aforesaid,—shows such superintendence by an employé and negligence while in its exercise as is contemplated by Code 1886, § 2590, subd. 2, which provides that, when a personal injury is received by a servant in the business of the master, the master shall be liable therefor when the injury is caused by reason of the negligence of any person in the employment of the master, who has any superintendence intrusted to him, while in the exercise of such superintendence.

3. In an action for personal injuries alleged to have been caused by the negligence of a superintendent in ordering plaintiff to stop a car by placing a crowbar under its front wheels, it appeared that plaintiff was working under the direction of R.; that the car could have been moved by prying it along the track with a crowbar; that such method would start the car gradually; that it could be stopped without great danger, by placing a crowbar under its front wheels; that such method of moving the car was the usual way; that at the time of injury R., the superintendent, gave orders for a rope to be attached to a log ahead of the car, and then wound around a drum on the car, operated by a steam engine; that the latter method gave the car a greater impetus than the former, and made it more dangerous to stop the car in the manner ordered by R.; and that the motion of the car was so violent that plaintiff, in attempting to stop the car, by placing a crowbar in front of the wheels, as ordered by R., was thrown before the car, and injured. Held, that there was sufficient evidence to submit the question of negligence to the jury.

4. It cannot be said, as a matter of law, that one who is injured while attempting to stop a car in a manner directed by his superintendent is guilty of contributory negligence, where he had only been in the service one month, and had never seen an attempt made to stop a car in that way, and the method did not, to his mind, involve any obvious risks which a prudent man would not incur, and he had a right to rely on the greater knowledge of the superintendent and the assumption that he would not expose him to unnecessary danger.

Appeal from city court of Birmingham; H. A. Sharpe, Judge.

This action was brought by W. C. Savage against the Southern Railway Company to recover damages for personal injuries alleged to have been sustained by the plaintiff while in the employ of the defendant by reason of the negligence of the defendant's servants. After the case was appealed to this court, the complainant, Savage, died, and the cause was revived in the name of John W. Shields, as administrator of the estate of W. C. Savage, deceased.

As stated in the opinion, the cause was tried upon the fourth and sixth counts of the complaint. These counts were as follows: (4) "Plaintiff claims of the defendant, a private corporation, twenty-five thousand dollars as damages, in this: that on or about the 19th day of January, 1896, the defendant was operating a railroad across the state of Alabama and through Fayette county in said state, and was engaged in driving piles on defendant's line of railway in said Fayette county, at or under a trestle on its railroad; that said piles were driven by means of a pile driver which was situated on a flat car, which car was moved along over said railroad like other cars on said railroad, and said pile

driver was operated by means of a steam engine and drum, which were also on said flat car, and the said car was moved from place to place on said road wherever it was necessary to drive piles; that before driving a pile it was necessary to hoist the same from off the ground where it was lying, and place the same in an upright position in the place where it was to be driven; that said pile was hoisted by means of a rope attached to one end of said pile, which said rope was drawn over a pulley fastened to the top of certain upright pieces of timber, commonly called 'leads,' with the other end of said rope attached to a drum on said flat car, which drum was operated by means of a steam engine on said car, the said pile being hoisted by putting said drum in motion, and winding said rope around said drum; that before commencing to hoist the pile from off the ground, as aforesaid, it was necessary to prop or 'scotch' said car by placing a crowbar or pinchbar on the rail of said road in front of and against one or more of the wheels of said car, to prevent the same from being moved from position by pulling on or tightening said rope in attempting to hoist said pile; that on or about the date aforesaid the plaintiff was in the service or employment of the defendant, and was engaged in assisting in driving piles on the line of the defendant's railroad on a trestle in the county of Fayette aforesaid, and while in the discharge of his duties under his employment, and while attempting to place a crowbar or pinchbar on the rail of defendant's said road, in front of and against one of the wheels of said flat car, upon which was situated said pile driver and said engine, and while preparing to hoist a pile from off the ground to place the same in a perpendicular position in the place where it was to be driven, plaintiff was thrown down upon the track of said railroad on said trestle by the sudden movement of a wheel of said car against the pinchbar or crowbar which plaintiff held in his hands, and was run over or partially run over by said car, or one of the wheels thereof, and was thrown under said pinchbar, and in consequence thereof his right leg was crushed and mangled, so that it was necessary to amputate the same below the knee and above the ankle, and was otherwise injured and hurt, by reason whereof plaintiff suffered great mental and physical pain, and has been permanently disabled, and was thereby confined to his bed for a long space of time, and expended large sums of money in attempting to effect a cure of his injuries aforesaid, and expended large sums of money for medicines and medical treatment in and about attempting to effect a cure as aforesaid; and that he has lost a great deal of time, and has been rendered 'less able to earn a livelihood.' The plaintiff avers that said accident and his said injuries were caused by the negligence of one R. H. Rhyne, who was also in the employment and service of the defend-

ant, and who had intrusted to him by the defendant the superintendence over the men and machinery employed in and about the driving of said piles, while in the exercise of said superintendence, in this: that said Rhyne negligently ordered the plaintiff to scotch said car with his crowbar and pinchbar, without taking the precaution to see that said car was not in motion, and by reason thereof plaintiff was thrown down and injured as aforesaid; wherefore he sues." (6) "The plaintiff adopts and makes a part of this, the sixth count of his complaint, all of the fourth count down to and including the words 'less able to earn a livelihood,' where said words first occur in said fourth count, and the plaintiff avers that said accident and his said injuries were caused by the negligence of one R. H. Rhyne, who was also in the employment and service of the defendant, and who was intrusted by the defendant with superintendence over the men and implements and machinery employed in connection with the driving of said piles, and who was at the time in the exercise of such superintendence, in this: that said Rhyne, knowing that the person in charge of the engine on said car was liable at any time to put said engine in motion and commence winding said rope around said drum, thereby commencing to hoist said pile, the tendency of which was to move said car forward, negligently ordered the plaintiff to scotch the wheel of said car, by placing his crowbar or pinchbar in front of and against said wheel; and plaintiff avers that, when he undertook to so scotch said wheel, said car suddenly started in motion in the direction of the plaintiff, and struck said crowbar or pinchbar, knocking plaintiff down, and inflicting the injuries aforesaid; wherefore he sues."

The defendant demurred to these counts, the grounds of which are sufficiently stated in the opinion. This demurrer was overruled, and the defendant duly excepted. The defendant pleaded the general issue, and, by special plea, contributory negligence on the part of the plaintiff. The substance of the evidence is sufficiently stated in the opinion. The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "If the jury believe all the evidence in this case, they must find for the defendant." (5) "If the jury believe all the evidence in this case, they must find a verdict for the defendant, under the fourth count of the complaint as amended." (7) "If the jury believe all the evidence in this case, they must find a verdict for the defendant, under the sixth count of the complaint." There were verdict and judgment for the plaintiff, assessing his damages at \$2,375. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved. Affirmed.

Smith & Weatherly, for appellant. John T. Shugart and Lane & White, for appellee.

MCLELLAN, C. J. This action was instituted by William C. Savage against the Southern Railway Company. There was judgment for plaintiff below, and the defendant appealed. Savage subsequently died, and the cause has been revived here in the name of Shields, the administrator of his estate. The complaint contained 33 counts. A number of these were held bad on demurrer, and the affirmative charge for defendant was given on all the rest, except the fourth and sixth. Each of the counts thus left in the case was intended to present a case under the second subdivision of section 2590 of the Code of 1886, as for an injury caused by the negligence of an employé of the defendant, who had superintendence intrusted to him, while in the exercise of such superintendence. There was a demurrer to each of these counts as amended, which was overruled. The only objection made by the demurrer which is insisted on here is that the counts do not show superintendence, and negligence producing the injury while in its exercise. The counts are not open to this objection. They do show that one Rhyne had superintendence intrusted to him in respect of a part of the crew and certain operations of a pile driver, that plaintiff, Savage, belonged to that part of the crew, and that the injury was received by him while engaged in an operation of the pile driver of which Rhyne had charge and superintendence, and in respect of which it is alleged that Rhyne gave plaintiff a negligent order, in the execution of which he received the injuries complained of. The demurrers were properly overruled.

The evidence shows that plaintiff was injured while endeavoring, in obedience to an order given him by Rhyne, to stop or scotch the car carrying the pile driver by inserting the beveled end of a crowbar on the rail in front of a wheel of the car. The attendant circumstances were these: The car, with the pile driving outfit upon it, was on a trestle which was about 15 feet high. The track was downgrade from the car to the end of the trestle, about 75 feet, and beyond. Piles were to be driven into the ground at particular places beneath the trestle. The car had stopped four or five feet short of the particular place where the first pile was to be driven. The piles to be used were lying on the ground in front of the car. It was necessary to hoist the piles and place them in a position in the leads of the pile driver to be driven into the ground. On the car, as a part of the pile driving apparatus, was a steam engine, which operated a drum. The piles were to be hoisted by attaching lines or cables to them, passing the lines through a pulley at the top of the leads and onto this drum, to which they were attached, so that they would be drawn in by its revolutions. The car had, as we have indicated, to be moved forward four or five feet to be in the position required to drive the pile. There were at the time no appliances on the car

itself either to move it or to stop it when once in motion. There were two possible ways of getting it forward on this occasion to the desired point and stopping it there. One was to prize or pinch the rear wheels forward with a crowbar, and to stop it at the proper place by placing the beveled end of a crowbar on the rail in front of a forward wheel. This was the usual and customary and the safest way. By it the car could be moved so slowly and gently that the man with a crowbar in front could ordinarily stop it with accuracy, ease, and safety. The other possible way, under the circumstances existing on the occasion under inquiry, was to let the force and tension in the cables incident to drawing a pile towards the car and hoisting it draw the car forward till it reached the proper place, and then stopping it by the use of the crowbar, as indicated above. This was an unusual and dangerous way to move and stop the car, according to a tendency of the evidence, especially when the movement, as in this instance, was downgrade; and it would seem, indeed, to require no evidence to show that it was more difficult and perilous to scotch and stop a car by chocking its front wheel with a crowbar held in the hand, when the car was being pulled forward by the cables attached to a heavy log lying some distance in front of it, than to so scotch and stop one being gradually pinched along with a crowbar under a rear wheel. In the latter case, the car having been set in easy and slow motion by the pinching crowbar, it would only be necessary to overcome its own momentum, while in the former not only its own motion would have to be overcome, but also the force and tension of the cables attached to the pile. And, moreover, very naturally the motion would begin more abruptly in the former case than in the latter and be more rapid, and this even though the drum were stopped as soon as motion had been imparted to the car. On the occasion in question the latter method was adopted. The evidence tends to show that, having had the cables attached to the pile in front and to the drum in rear of the leads, and intending while drawing the pile towards the car, and eventually hoisting it, by the same force to draw the car forward, and have the motion thus imparted to it arrested at the point it was necessary to have it stand. Rhyne ordered the engine and drum to be set in motion and the pile to be drawn to the car and then up into the position it had to be placed for driving, and, the engine having been started, he then ordered the plaintiff to catch the car with his crowbar, and scotch and stop it. Plaintiff attempted to obey this order, but, as a tendency of the evidence shows, the motion of the car was so violent that when he put the end of his crowbar on the track in front of and against the wheel it slipped for a time, and then there was a sort of jerking increase of the movement, the wheel caught the crowbar, wrenched it out of his hands in

such way that he was knocked down by it with one of his legs across the rail under the crowbar, and that the wheel mounted the bar as it lay across his leg, and ran up it until it was directly above his leg, crushing and mashing it, so that amputation was necessary. On these tendencies of the evidence, if the jury found, as it was open to them to do, in line with them, it is fairly inferable that the plaintiff's injuries proximately resulted from the attempt to move the car in this way in connection with Rhyne's order for him to stop it while being moved in this way; and the danger to a person attempting to stop a car with a crowbar which was being thus moved the jury might further have found to have been so apparent to the experienced mind of Rhyne, and was so calculated from his point of view to result in injury, that he was guilty of negligence in ordering the plaintiff to catch or scotch and stop the car, under all the circumstances. Hence our conclusion that the refusal of the trial court to give the affirmative charge for defendant cannot be assailed on the ground that there was no evidence that Rhyne was negligent in giving the order.

Nor do we think that, as matter of law, plaintiff was guilty of contributory negligence in attempting to obey the order. He had been in the service only a month. He had never seen an attempt made to stop a car, under the circumstances existing when this attempt was made. The attempt did not, to his inexperience, involve obvious danger,—risks which a prudent man would not incur; and he had a right to rely to some extent upon Rhyne's greater knowledge and experience and upon the assumption that Rhyne would not expose him to unnecessary peril; or, at least, it was for the jury to so find, if they believed the facts which the tendencies of the evidence favorable to plaintiff went to establish. And the trial court properly left both questions—as to Rhyne's negligence and Savage's contributory negligence—to the jury. Affirmed.

(121 Ala. 587)

ALABAMA MIN. R. CO. v. JONES.

(Supreme Court of Alabama. May 16, 1899.)

ACTION FOR CAUSING DEATH—RAILROAD EMPLOYEES—
—NEGLECT—EVIDENCE—DAMAGES.

1. In an action for causing the death of an employé by being thrown from a hand car when it collided with a similar car in front of it, it cannot be said, as a matter of law, that the foreman on the front car was negligent or not negligent in signaling both cars to stop at the same time, while they were going at the same rate of speed, when they were 15 feet apart.

2. An administrator may recover nominal damages in an action for his intestate's death, where he fails to furnish data to enable the jury to determine what he is entitled to recover.

3. In an action for causing death, where recovery is sought of the amount which deceased would have expended on dependents had his expectancy of life not been disappointed, evidence that there were persons dependent on him for

support, and the amount he contributed thereto, is sufficient, without proving their age.

4. A witness' statements to third persons relative to matters concerning which he had testified are admissible to impeach him, where on his cross-examination he denied making the statements.

Appeal from circuit court, Shelby county; George E. Brewer, Judge.

This was an action brought by the appellee, Mary A. Jones, as administratrix of the estate of John Jones, deceased, against the appellant, to recover damages for the alleged negligent killing of the plaintiff's intestate, who was at the time a section hand in the employ of the defendant, and he was killed by falling from the hand car on May 26, 1891, at the Coosa river bridge on the defendant's railroad. The pleadings of the case and the facts are sufficiently stated in the opinion. On the cross-examination of Scott, the foreman of the section who was alleged to have superintendence of the plaintiff's intestate and the cars at the time of the accident, he was asked whether or not, a short time after the accident, he stated to William Doak and Smith Peoples, at Shelby, that he did not know how John Jones came to fall off the car, and that the cars knocked together so hard he came very near falling off, and did not know how Jones fell off. The witness Scott testified that he did not make such statement to either of the persons referred to. The plaintiff recalled the witnesses William Doak and Smith Peoples, and asked each of them if the witness Scott, the section foreman, did not state to them at Shelby, a short time after the accident, that he did not know how Jones was knocked off, and that he (Scott) was sitting on the box, and it came near knocking him off, and he did not know how Jones came to fall off. Each of these witnesses answered that said Scott did make such statement. The defendant objected to this testimony of each of the witnesses Doak and Peoples, and moved to exclude it from the jury, upon the ground that it was hearsay, and not admissible in evidence. The court overruled the objection, and the defendant duly excepted. Under the opinion on the present appeal, it is unnecessary to set out all the charges requested by the plaintiff and the defendant. Among the charges given by the court at the request of the plaintiff, to the giving of each of which the defendant separately excepted, were the following: (4) "If the jury believe from the evidence that Scott, the section boss of the defendant, ordered the section hands to run the two hand cars across the bridge, and that said section hands, in compliance of said order, started across the bridge with said hand car, one following 15 or 20 feet behind the other, and that while on the trestle, after crossing the bridge, said Scott was on the front car, and made a sign for the hands on said car to stop or check up, without first ordering the rear car to check up, or giving those on said rear car sufficient notice of his intention to check up the front car, and that

immediately, as soon as those on the rear car discovered the checking of the front car, one of the hands on the rear car suddenly put on the brake of said rear car, and this was the best thing to do, under the circumstances, to avoid a collision between the two cars, and that plaintiff's intestate, John Jones, was on said rear car at the time, and that he was at his post in discharge of his duty, beside one of the handles of the lever, with his hands upon the same, working it in order to propel the car, and that said putting on of brake snatched the handles out of his hands, and that before he was able to recover it the rear car ran into the front car, and thereby threw the said John Jones to the ground, and killed him, and that the said John Jones did nothing which contributed proximately to his death, then they should find for the plaintiff." (8) "If the jury believe from the evidence that Scott, the section boss of the defendant, ordered the section hands to run the two hand cars across the bridge, and immediately behind the other, and that said section hands, in compliance with said order, started across the bridge with said cars, one following about 15 or 20 feet behind the other, and that while on the trestle, after crossing the bridge, and while said cars were going at a fast rate of speed, one about 10 to 20 feet behind the other, said Scott was on the front car, and made one and the same signal for both cars to check up, and that immediately those on the rear car did everything in their power to check their car in time to avoid a collision, but that the rear car did, notwithstanding, collide with the front car, and that thereby the said John Jones was thrown to the ground below, and killed, and that he was guilty of no negligence which contributed proximately to his death, then the jury should find for the plaintiff." Which charge the court gave, and to the giving of which the defendant then and there duly excepted. Among the charges which the court refused to give at the request of the defendant, and to the refusal to give each of which the defendant separately excepted, were the following: (5) "If the jury believe from the evidence that the two hand cars were run across the bridge over Coosa river at a rate of speed that was safe, and that Scott, the section foreman in charge of said cars, gave the signal for both to slow up at the same time, that then they must find for the defendant." (28) "The court charges the jury that, where the evidence shows the entire income of John Jones was expended on himself and family, then the amount expended upon himself must be deducted from the amount he earned, and if the plaintiff fails to show how much was expended upon himself, so as to enable the jury to ascertain with reasonable accuracy what was spent on the family, that they must find for the defendant." (29) "The court charges the jury that, before the plaintiff can recover in this cause, the plaintiff is required to furnish data to enable the jury to ascertain with reasonable ac-

curacy the amount plaintiff is entitled to receive." There were verdict and judgment for the plaintiff, assessing his damages at \$1,000. Defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved. Reversed.

Thos. G. Jones, for appellant. Browne & Leeper and Longshore & Beavers, for appellee.

MCOLLELLAN, C. J. This case has been heretofore in this court, and is reported in 107 Ala. 400, 18 South. 30. The negligence counted on in each of the four counts of the complaint was that of Scott, the foreman of the section crew of which plaintiff's intestate, John Jones, was a member. The first and third counts charge that he had superintendence intrusted to him in respect of said crew and their duties and of two hand cars used in their work, and that while in the exercise of such superintendence he ordered the hand cars to be run over and across a bridge spanning Coosa river at a high rate of speed, the one following the other at a distance of from 15 to 20 feet, and that while this order was being executed, and the cars were thus being run across the bridge, the said Scott, being on the front car, negligently and carelessly stopped (first count) the car on which he was riding, without notifying those on the rear car, and that by reason thereof the hindermost car ran into the front car, whereby Jones was knocked off; and (third count) that said Scott negligently and carelessly suddenly checked the speed of said front car, without notifying those on the rear car, and that in consequence the rear car collided with the front car, whereby Jones was knocked off, and killed. The second and fourth counts aver that Scott was in charge and control of the front car in crossing over the bridge, and that (second count) he negligently stopped it, and (fourth count) negligently checked its speed, without notice to those on the rear car, whereby the hindermost ran into and collided with the foremost car, knocking Jones off, and killing him. The general issue and several pleas of contributory negligence were pleaded. The fourth plea is as follows: "Defendant says that plaintiff's intestate contributed proximately to his own injury and death in this: that plaintiff's intestate was a section hand, and that it was a part of his duty to propel the lever car upon which he was riding by means of a handle or lever, and that it was his duty to grasp said lever with one or both hands while said car was moving, and defendant avers that at the time of said injury and death the said John Jones, intestate, was riding on the rear end of a hand car which was moving, and in front of which and near to it was another moving hand car, going in the same direction, yet, notwithstanding this, said Jones failed to grasp or hold to said handle or lever of said car, but stood at the rear

end thereof, and was negligently and carelessly looking up and down the river, over which said cars were passing, or was looking backward at said time, without holding onto any part of said car, or to the handle thereof, which was an unsafe and dangerous way of crossing said trestle and river on a moving hand car, and but for such negligent conduct of plaintiff's intestate said injury and death would not have happened. Wherefore, defendant says that plaintiff's intestate contributed directly and proximately to his own injury and death." To this plea plaintiff replied "that her intestate was holding to said handle, and continued to so hold until he was knocked loose by the sudden putting on of the brake of the car upon which he was riding, which said putting on of said brake suddenly had become necessary by reason of the sudden stopping of the car in front, and that immediately after his hands were so knocked loose by the putting on of said brake, and before he had time to recover his hold on said handle, the car he was on ran into the car in front, by reason of which he was thrown out of said car to the ground below, and killed; and she denies that said intestate was guilty of any such contributory negligence as would bar the defendant's liability for his death." There was evidence tending to prove the averments of each count of the complaint, and also evidence tending to disprove them. Similarly the averments of the special pleas found lodgment in the tendencies of the evidence, and there was other testimony going to disprove them. And there was evidence both ways on the allegations of the replication copied above. In short, the evidence was in conflict upon every issue presented on the trial; and the court very properly refused to give the affirmative charges requested by the defendant on the whole case, and upon the respective counts of the complaint. Many special instructions were given for plaintiff, to which exceptions were reserved, and refused to defendant, and exceptions likewise reserved to said refusals. The rulings of the court on these charges were in the main correct. In some particulars they were erroneous, and to these only will we refer specially.

The two hand cars were precisely the same in construction, weight, motive power, brakes, and all other appliances. They were manned each in the same way, and by the same number of men. They were going across the bridge at the same rate of speed, and at least 15 or 20 feet apart. Presumably they could be each stopped within the same distance. Presumably, also, the speed of each could be controlled within the same time, and graduated in the same degree within any given time. Presumably, therefore, a signal given at the same moment of time, indeed the same signal, to each of the crews to check the speed of each, could be obeyed at and in the same time by each crew, and the speed of each would thereby be reduced to the

same extent, so that the relative distance between them would be maintained, and there would be no running of the rear car onto the front car,—no collision. There was evidence that Scott gave the signal to check the speed to each car at the same time by the same motion of his hands. Upon this evidence charge 8, given for plaintiff, hypothesizes negligence on the part of Scott, as matter of law. This was clearly erroneous. It can surely not be said, as matter of law, that Scott acted negligently in giving the signal to check the speed to both crews at the same time, in view of the facts referred to above. In all human probability, looking at the situation from Scott's standpoint at the time he gave the signal, the cars would have equally lessened their speed until they stopped, and all the while have maintained the same distance apart which separated them at the moment the signal was given; and that they did not maintain this distance goes to show that the signal was not given to each of the crews at the same time, rather than to show that the signal, if so given, was negligently given. At the most, the plaintiff was only entitled to have the question as to whether such contemporaneous signals were negligence submitted to the jury, and we make this concession more on account of the former opinion in this case than otherwise. The effect of this instruction was to take the question away from the jury, and to declare, as matter of law, that the giving of the signal to both crews at the same time was negligence. The court erred in giving this charge. Charge 5, refused to defendant, declared, as matter of law, that the giving of the signal to slow up to both crews at the same time was not negligence. Influenced largely by the former decision, we hold that this charge was well refused. And charge 4, given for the plaintiff, is faulty in that it assumes, as matter of law, that Scott should have first directed the crew of the rear car to slacken its speed before giving a like signal to the crew of the front car. The evidence did not, in our opinion, furnish sufficient data for a verdict to be rendered in any substantial amount. Notwithstanding this, however, plaintiff might have been entitled to nominal damages. Hence charges 28 and 29 were properly refused.

It is unnecessary, where recovery is sought of the amount which deceased would have expended on dependents had his expectancy of life not been disappointed, to prove more than that he had persons who would have been distributees had he left an estate dependent on him for support, and the amount he contributed to their support; and there is no legitimate occasion to show the ages of his minor children. The testimony of Doak and Peoples as to the statement made by Scott was properly received, as tending to impeach the latter as a witness; predicate therefor having been laid by questions to Scott. The rulings of the court reserved for our consideration to which we have not re-

ferred have been considered by us, and found to be free from error. Reversed and remanded.

(121 Ala. 587)

NORTHEN v. HANNERS.

(Supreme Court of Alabama. May 10, 1899.)

EXEMPTIONS—EXECUTION FOR COSTS.

Under Const. art. 10, § 1, and Code 1898, §§ 2033-2037, exempting certain personal property from execution for contract debts, an unsuccessful plaintiff in an action for tort cannot claim exemptions as against an execution for costs.

Appeal from circuit court, Clay county; George E. Brewer, Judge.

Proceedings on a claim for exemptions by James T. Hanners against C. S. Northen. From a judgment allowing the claim for exemptions, contestant appeals. Reversed.

The proceedings in this case were had on the contest of a claim of exemptions, which arose in the following manner: James T. Hanners, the appellee, brought an action of tort against the appellant, C. S. Northen, to recover damages for a deceit in the sale of property. In this action the plaintiff was cast in the suit, and judgment was rendered in favor of the defendant against him for the costs of the suit. Upon this judgment execution was issued for the costs, and was levied upon personal property of Hanners. Thereupon Hanners filed his affidavit of claim of exemptions. C. S. Northen, the defendant in the original suit, filed his contest,—contesting, not the sufficiency of the claim, but the right of the plaintiff in the action of tort to claim exemptions against a judgment rendered against him in said action for the costs of the suit. Upon issue made up between the parties, the facts as set forth above were proven, and thereupon the court gave to the jury the following written charge: "If the jury believe the evidence in this case, the verdict must be in favor of the defendant in execution, James T. Hanners." To the giving of this charge the plaintiff in the contest duly excepted. There was verdict and judgment in favor of the claimant of the exemptions. The contestant appeals, and assigns as error the giving of the general affirmative charge in favor of the defendant in execution, and the rendition of judgment for the defendant.

Whitson, Graham & Haynes and M. N. Manning, for appellant. Stogdale & Stogdale and Knox, Bowie & Dixon, for appellee.

TYSON, J. In all civil actions the successful party is entitled to full costs, for which judgment must be rendered against the unsuccessful party, unless in cases otherwise directed by law. Code, § 1325. It is of no consequence whether the plaintiff or defendant is the successful party. If the defendant is the successful party, he recovers his costs of the plaintiff, for which judgment must be rendered by the court, and he is entitled to

have execution upon this judgment issue against the plaintiff,—as much so as the plaintiff would be entitled to a judgment and execution for costs and damages had he been successful. Costs are not recoverable by virtue of any contract, expressed or implied, between the parties litigant; nor is the judgment which the court is authorized to render (indeed, we may say, which the statute peremptorily declares shall be rendered) based upon any supposed contractual relations existing between the parties to the record. Nor was the statute commanding this judgment to be rendered, by its enactment or operation, intended to be enforced upon any such theory. At common law, costs were not recoverable, and were not adjudged in the judgment in the case. *Hood v. Stewart*, 10 Ala. 600; *City Council v. Foster*, 54 Ala. 63. In certain class of cases the plaintiff was permitted to have the defendant "amerced for his willful delay of justice in not immediately obeying the king's writ by rendering the plaintiff his due, or to have him taken up (captatur) till he pays a fine to the king for the public misdemeanor which is coupled with the private injury, in all cases of force, of falsehood in denying his own deed, or improperly claiming property in replevin, or to have him adjudged guilty of contempt for disobeying the command of the king's writ." It was not until the enactment of the statute of Gloucester that costs, *eo nomine*, were recoverable by the plaintiff in real actions, and under that statute the practice of the courts was to award costs of the "writ purchased" in addition to the damages recovered against the defendant. By statutes the plaintiff's right to recover all costs was extended to all cases in which he was successful. But no costs were allowed the defendant in any action when he was successful until the statute of 23 Hen. VIII., which was amended from time to time until he was equitably given the same right as the plaintiff to recover the same costs as the plaintiff would have had if he had recovered. In all cases the costs were taxed by the proper officer of the court. 2 Cooley, Bl. bk. 8, p. 899. Courts have now no inherent power to award costs, which can be only granted in any cause or proceeding by virtue of express statutory authority. 5 Enc. Pl. & Prac. p. 110, note 2. Under the system of costs and fees as provided by our statutes, costs are not granted by the courts of this state as damages to the successful party, but rather in the nature of a penalty imposed upon the unsuccessful party. By express statute, the law of costs must be held to be penal. Code, § 1353; *City Council v. Foster*, supra; *Dent v. State*, 42 Ala. 514. The amount of the costs recoverable is limited to the fees of the officers of the court and witnesses required to attend upon the court, which are fixed by law, and whose compensation, as fees, must be paid by the parties at whose instance they are rendered. As to the officers rendering the services, and the witnesses who attend in obedience to a sub-

poena, while their fees are taxed so as to make up what is known as the "bill of costs" in the case, and limit the amount of the recovery of the successful party, the cost is not recovered by the judgment in their names; nor have they such an interest in it as entitles any one of them to an execution upon the judgment, except, in the case where the plaintiff is the successful party, and the execution against the defendant is returned, "No property found," execution may issue in the name of the clerk against the plaintiff for all costs created by him. Code, §§ 1361, 1389. So far as the officers of court and the witnesses are concerned, the fees due to them are mere debts, based upon an implied promise to pay by the party at whose instance or request they perform the service. *Dane v. Loomis*, 51 Ala. 487; *Hill v. White*, 1 Ala. 576; *Railroad Co. v. Bradley*, 84 Ala. 468, 4 South. 611, and authorities there cited. As between them and the parties litigant, they would be compelled to resort to independent suits for services rendered for the collection of their fees, were it not that by the process of execution the costs must be collected by the sheriff; and he is, of course, justified in retaining out of any money collected by him upon the execution the fees due in the cause, since, if paid over by him to the party in whose favor the execution runs, such party could be compelled by suit to pay it back to him for the officers and witnesses entitled to it. The judgment in favor of the successful party for costs, however, has no element of debt in it. *Lathrop v. Singer*, 39 Barb. 396. If it had, certainly the statute commanding the courts to render judgment in favor of the state of Alabama for costs against a defendant convicted of a misdemeanor, and, if not presently paid or confessed, to imprison him or compel him to perform labor, would be violative of that provision of the constitution "that no person shall be imprisoned for debt." That these statutes are not offensive to the constitution cannot now be regarded as debatable. *Morgan v. State*, 47 Ala. 34; *Caldwell v. State*, 55 Ala. 133; *McDowell v. State*, 61 Ala. 176; *Bailey v. State*, 87 Ala. 44, 6 South. 293. As to the nature and character of the judgment for the costs, costs being a mere incident to the suit, the judgment partakes of the nature and character of the suit. If the cause of action declared upon by the plaintiff is in tort, the judgment, as to damages and costs recovered by him, must follow the complaint, and, of necessity, be in tort. *Stuckey v. McKibbin*, 92 Ala. 622, 8 South. 379; *Williams v. Bowden*, 69 Ala. 433; *McLaren v. Anderson*, 81 Ala. 106, 8 South. 188. And the complaint may be looked to for the purpose of determining the nature of the judgment. Indeed, "it has never been the practice to recite in the entry of judgments, or for it to appear in any way thereby, whether the action and recovery are ex contractu or ex delicto." *McDaniel v. Johnston*, 110 Ala. 531, 19 South. 36. If the plaintiff fails in his suit in tort, upon what

principle can it be said that the judgment recovered by the defendant against him for costs does not follow the complaint, and is in tort? It may be true, as urged by appellee's counsel, that the plaintiff does not become a tortfeasor by the institution of his suit. But it does not follow from this, as argued by him, that the judgment is as upon a contract. The wrong committed by him, for which he became liable for costs to the defendant in the judgment, consisted in the institution of a suit that he could not successfully maintain, and for which the statute imposed upon him the costs, to partake of the nature of his complaint. The exemption of personal property allowed under the constitution and statutes of this state is only as against debts contracted. Const. art. 10, § 1; Code 1896, §§ 2083-2087. In the case in hand, the suit of the appellee (plaintiff) was in tort and he, failing to prosecute it successfully to judgment, was not entitled to claim his exemptions against the execution issued against him for the costs recovered by the defendant (appellant). 1 *Freem. Ex'ns.* (2d Ed.) 3217; *Russell v. Cleary*, 105 Ind. 502, 5 N. E. 414; *Schouton v. Kilmer*, 8 How. Prac. 527. The judgment of the circuit court must be reversed, and the cause remanded.

(131 Ala. 616)

WOODSTOCK IRON CO. v. STRICKLAND et al.

(Supreme Court of Alabama. May 16, 1899.)

PUBLIC LANDS—HOMESTEAD LAWS—TRANSFERS.

Act Cong. June 15, 1880, § 2, enabling transferees of "persons who have heretofore, under any of the homestead laws, entered lands," to entitle themselves to the land by paying the government price therefor, does not apply to persons claiming under attempted transfers made after the passage of the act.

Appeal from chancery court, Calhoun county; J. A. Dowdell, Chancellor.

Bill by the Woodstock Iron Company against Andrew J. Strickland and others. From a decree dismissing the bill, complainant appeals. Affirmed.

John B. Knox, for appellant. J. J. Willett and S. D. G. Brothers, for appellees.

McCLELLAN, C. J. This bill is filed by the Woodstock Iron Company against Strickland and others. It avers that on April 20, 1880, Strickland entered a certain parcel of public land under the homestead laws of the United States; "that on February 9, 1881, Strickland sold and conveyed to complainant, for a valuable consideration, by an instrument in writing, bona fide, the said parcel of land, for, to wit, twenty dollars," which was paid to Strickland and that complainant thereupon entered into possession of said land, and has since continued in possession, etc.; that, at the time of said purchase, complainant made application, in the name of said Strickland, to the United States land office at Montgomery, to have said homestead entry commuted un-

der the act of congress of June 15, 1880, to a cash entry, which application was allowed, and the complainant paid the government the cash price, to wit, \$100, and that afterwards, on August 13, 1882, the patent issued therefor in the name of said Strickland, all which was done by and with Strickland's knowledge and consent. It is further alleged that, in 1888, Strickland attempted to sell and convey said land to the respondent Beal on a recited valuable consideration; that Beal had notice of complainant's claim when he purchased from Strickland, complainant being in the adverse possession of the land at the time; and that the said Beal is now prosecuting two suits in ejectment against complainant for the land, one in his own name and the other in the name of said Strickland. The prayer is for injunction restraining the actions at law, and that, upon final hearing, a decree be passed perpetuating the injunction, declaring a resulting trust in said lands in favor of complainant, and divesting the title thereto out of the said Strickland and Beal, and investing it in the complainant, etc. At the hearing on the merits, the chancellor denied the relief prayed, and dismissed the bill, not for the want of proof to support the averments of the bill, but for want of equity in those averments, and from that decree the present appeal is prosecuted.

The chancellor proceeded on the theory that to declare and enforce the alleged trust resulting from the payment to the government for the land by the complainant, and its conveyance by the government to Strickland, would be violative of the public policy of the United States in respect of government lands; and confessedly this is true, unless the case is brought within section 2 of the act of congress of June 15, 1880, which is as follows: "That persons who have heretofore, under any of the homestead laws, entered lands properly subject to such entry, or persons to whom the right of those having so entered for homesteads, may have been attempted to be transferred by bona fide instrument in writing, may entitle themselves to said lands by paying the government price therefor, and in no case less than one dollar and twenty-five cents per acre, and the amount heretofore paid the government upon said lands shall be taken as part payment of said price." It is clear, of course, upon this statute, that only entries made before its passage are within its provisions. The entry here involved was made a few months before the enactment of the statute,—in April, 1880. It is, we think, equally clear, upon the words of the enactment, that the transfer by the entryman to a third person must also have occurred before the adoption of the statute, to entitle such assignee to the land, upon the payment of the prescribed price. The right is given only to entrymen, or to persons to whom their interests may have been attempted to be transferred,—not to persons to whom such right may be transferred in the future, but to those

who in the past have received such transfers. The words used are just as restrictive to transfers already attempted to be consummated as are the words, "who have heretofore entered lands," etc., employed with reference to the right conferred upon the entryman himself; and, if anything beyond the letter of the act were needed to enforce this interpretation, it is found in the other provisions of the statute, all of which deal with the past or with existing conditions, not with the future or with conditions that might thereafter arise. As said by the supreme court of Florida: "The purpose of the act of congress was for the relief of persons who had previously entered for homesteads, and also the relief of persons to whom the right of those who have so entered lands for homesteads had been previously attempted to be transferred by bona fide instrument in writing. The policy of the act was to permit these two classes of persons to purchase for cash, or make a cash entry of the lands upon the terms stated in the act, and thus save them from loss consequent upon failure to comply with the ordinary statutory requirements as to residence or occupation and improvement in the case of homestead entries. Neither of these classes includes, nor does the policy of the act embrace, a person to whom the person making the entry may have made a transfer, or a bona fide attempt to transfer, subsequent to the act." *Dewhurst v. Wright*, 29 Fla. 223, 10 South. 682. This case was followed, and the foregoing language was quoted and adopted, in the later case of *McCrillis v. Copp* (Fla.), 12 South. 643, where many authorities, including *Anderson v. Carkins*, 135 U. S. 483, 10 Sup. Ct. 905, are cited.

There is no decision of this court directly upon the point; but in *Mulloy v. Cook*, 101 Ala. 178, 10 South. 349, and 17 South. 899, it is held that a transaction of this sort, to be enforceable, must be brought within the act quoted above, and *Dewhurst v. Wright*, supra, is there cited approvingly. The conclusion we reached in that case, that the trust could not be declared and enforced, was rested on the ground that the attempted transfer was not in writing. The fact that we did not put it on the further ground that the transfer had been attempted to be made since the act of 1880, as we might have done, is not to be taken as tending to show that we then were of opinion that such a transfer was within the statute; for it was not necessary to consider that question, and it was not considered. Considering it now, we are, as indicated above, clear to the conclusion that persons to whom the right of the entryman has been attempted to be transferred since the enactment of the statute—June 15, 1880—are not within its provisions, and that such attempted transfers are against public policy, and should not be enforced by the courts. The attempted transfer relied on in this case was subsequent to the statute. The decree of the chancery court must therefore be affirmed.

(121 Ala. 278)

SHELDON v. BIRMINGHAM BUILDING & LOAN ASS'N.

(Supreme Court of Alabama. April 19, 1899.)

BUILDING AND LOAN ASSOCIATIONS—SUFFICIENCY OF DECLARATION—APPLICATION OF PAYMENTS—PREMIUMS—RELIEF—PARTIES.

1. A declaration filed by persons desiring to form a building and loan association as follows: "The undersigned, being desirous of forming a building and loan association, make the following declaration: The general object for which said association is formed is the saving of funds from monthly payments of the members, to be advanced to those desiring to invest it, to the end that the profits arising from the business thus transacted shall, with the monthly payments, largely reduce the number of months required to make each share worth its par value,"—sufficiently expresses the intention of the declarants; and the scheme of intended operation, so far as it is disclosed, is consistent with and adapted to the exercise of the powers expressly conferred by the statute relating to such associations, including the building of houses and the lending of money to its members, and such powers need not be defined in the declaration.

2. A purchaser of stock in a building and loan association is not entitled to have the amount paid for stock applied to the extinguishment of a loan made to her at the time she purchased the stock.

3. Code 1886, § 1556, provides that a building and loan association, when it has funds on hand, may lend the same to the highest bidder therefor, on such terms as may be prescribed by the by-laws. The by-laws prescribed that none but members should be allowed to bid for a loan, and that the amount of premium bid should be deducted from the amount of the loan. The complainant, being a stockholder, bid an amount for a loan, which was deducted therefrom, and gave a note and mortgage for the gross amount of the loan, bearing interest at the rate of 8 per cent. per annum, which, thus calculated, was more than the legal rate. *Held*, that the transaction, being expressly authorized by the legislature, whether the premium be treated as interest or otherwise, was legal.

4. Where the by-laws of a building and loan association prescribe that the amount of the premium bid for a loan shall be deducted from the loan, and that the borrower shall pay interest on the gross amount of the loan at the rate of 8 per cent. per annum, a loan so made is not usurious.

5. The averment that complainant was never a stockholder, and that a sale of a loan to her was not made at auction, is neutralized by averments that certain payments made by her were required of her under the by-laws, which are set out, and show that loans can only be made to the highest bidder, who must be a shareholder, and that she secured the loan with an alleged issuance to her of 82 shares of stock, and cannot be deemed an averment of noncompliance with a statute requiring the loan to be made to the highest bidder, who must be a stockholder.

6. In the absence of equities, the courts will not relieve a party from the hardships of an improvident contract.

7. An action relating to the separate property of a married woman should be brought in her own name, under Code, § 2527.

Appeal from chancery court, Jefferson county; Thomas Cobbs, Chancellor.

Bill by Esther Sheldon, in the name of her next friend, against the Birmingham Building & Loan Association. From a decree in favor of defendant, complainant appeals. Affirmed.

The bill alleges that the defendant was incorporated by filing a declaration of incorporation in the probate office of Jefferson county, Ala., on the 3d day of April, 1879. A copy of the declaration is made an exhibit to the bill, and so much of it as is pertinent to this case is copied in the opinion. It is further alleged that on the 8th of March, 1889, complainant made application to the defendant to borrow \$3,280, and that she was required to pay a premium of 38½ per cent. on this loan, and that she received in cash, after the premium was deducted, the sum of \$2,017.20 (the balance being taken as premium), and that she has been making payments of interest at the rate of 8 per cent. per annum on \$3,280; and a copy of the note and mortgage given to secure this loan is attached as an exhibit to the bill. The bill further alleges that on or about the 6th day of March, 1891, she made an additional application to defendant to borrow an additional sum of \$1,800, and that she was required to pay a premium of 36 per cent. on this loan, and that on this loan she received in cash \$1,203.20, and that the balance went to pay the premium, and that she has paid interest on the said sum of \$1,800 at the rate of 8 per cent. per annum; and a copy of the note and mortgage given to defendant to secure this loan is made an exhibit to the bill. As to the first loan, she alleges that she was required to pay each month dues to the amount of \$16.40, and interest to the amount of \$21.86, and that she has kept up these payments each month, beginning with March, 1889, and ending with July, 1896. As to the second loan, she alleges that she was required to pay each month the sum of \$9.40 as dues and \$12.53 as interest, and that she has made these payments, beginning with the month of March, 1891, up to and including July, 1894. As to each of the loans, respectively, referred to in the bill, the complainant avers "that she never was a shareholder in said alleged association, and that said association has never issued her any stock or paper writing, of any character or description, going to show that she was or is a stockholder in said association, but, on the contrary, your oratrix is only a borrower of money, and as such she has been compelled to pay unlawful and usurious interest, besides large sums of money in the way of a membership fee, fines, penalties, premiums, and dues, and that during the continuance of this loan your oratrix has more than paid to said association an amount largely in excess of the amount actually obtained, yet, notwithstanding all these payments, the said association still claims and demands of your oratrix a sum largely in excess of the original amount actually obtained." It was also averred in the bill "that at the time of the application for said loans there was not a competitive bidding or sale at auction to highest bidder for the alleged loans between herself and the rest of borrowing members, but, on the contrary, the premium was fixed by the officers of said asso-

claration prior to the making of oratrix's application, and she was instructed to bid the premiums above referred to in order to obtain said loans." The notes and mortgages which were executed by the complainant, and which are made exhibits to the bill, each recited that the complainant obtained the loan in strict accordance with the by-laws of the association. The complaint further averred that the respondent association was never incorporated for the object and purpose of prosecuting and carrying on the business of a legitimate building and loan association, as intended by the statute of Alabama providing for the incorporation of such association, but that the defendant's business and the object of its incorporation was to loan as set forth in its declaration of incorporation, and for no other purpose; that the defendant association has no power to demand premiums or unlawful interest, or demand fines, or impose forfeitures of membership fees against the complainant on account of the loans herein complained of, and that all such demands and items are ultra vires, and that all the authority or power the defendant association had in making and entering into the contracts herein complained of was to collect the money actually loaned the complainant, with legal interest thereon. It was then averred in the bill "that the matters of the alleged loans complained of in this bill are of such complicated and intricate character that it is necessary to have an account stated between the respondent association and your oratrix, in order that your honor may render an intelligible decree, so as to do equity to all parties concerned; and your oratrix submits herself to your honor's court, to stand and abide by such orders and decrees as may be made in the premises. And oratrix stands ready, willing, and able to pay, and hereby tenders, whatever amount may be decreed against her upon both loans, separately or conjunctively, with lawful interest thereon, after giving your oratrix credit on said loans for the several amounts paid by oratrix to respondent association, whether they were paid as a membership fee, premiums, fines, dues, or interest; and oratrix is fully able to respond promptly to any decree that this honorable court may render against her on account of said loans herein complained of." The prayer of the bill was that an account be stated between the complainant and the association, charging her with all moneys actually received, with lawful interest thereon, and giving her credit for all payments made to said association as membership fees, premiums, dues, interest, and fines on account of said loan, and that, if there is a balance ascertained to be due the association, the complainant be allowed to pay off the same, and that after such payment all contracts between the complainant and the defendant, including the notes and mortgages executed by the complainant to the defendant, be canceled and annulled. There was also a prayer for general relief. Such by-laws as are pertinent to the

issues involved in the suit were made exhibits to the bill. Section 3 of the by-laws provides that the capital stock of the association shall be \$1,000,000, and that the par value of each share shall be \$40, to be issued in one or more series. Section 12 provides that for each share of stock each member shall pay an initial fee of 10 cents at the time of subscribing for the stock, and 20 cents per month in current funds until the series with which he is connected shall have accumulated real assets sufficient to divide to each share the sum of \$40. Section 22 provides that each member, for every share of stock in his name, shall be entitled to purchase a loan or advances of \$40. Section 23 provides that the amount paid into the treasury each month shall be sold to the highest bidder or bidders, and any member taking an advance or loan shall allow the premium offered by him, to be deducted as provided by section 36; section 36 providing that "any borrower may pay, besides the interest on his loan, such sums as he may see proper from time to time," which payments shall be entered as credits on his notes. Section 25 provides that, for each loan or advance of \$40 per share to a member, at least one share of stock shall be assigned to the association as collateral security. Section 26 provides that "any member taking an advance or loan shall pay to the association, in addition to his or her monthly dues for shares, monthly interest on the gross amount of the advances or loan at the rate of eight per cent. per annum." Section 29 provides that none but members shall be allowed to bid for a loan or advances. Section 45 provides that any stockholder neglecting or refusing to pay his or her monthly dues or interest as the same become due shall pay the additional sum of two cents monthly on each dollar remaining unpaid. The other sections of the by-laws attached as exhibits to the bill refer to the matter of security, and to the matter of repayment and partial repayment of the loan.

The defendant moved to dismiss the bill for the want of equity, and also demurred to the bill upon many grounds, the substance of which was as follows: (1) The averments of the bill show that Esther Sheldon was a married woman, and that the property involved in the suit was her separate property, and that, therefore, the said suit should have been brought by her individually, and not by her next friend. (2) That the complainant is estopped to deny that she was a shareholder in the defendant association, and that the premiums she paid for the loans procured by her were not determined by competitive bidding. (3) That the bill and its exhibits show that the loans were made to the complainant in the manner authorized by law, and in accordance with the by-laws of the defendant association. (4) That it is not shown by the averments of the bill that the defendant has collected, or has attempted to collect, usurious interest. (5) The averments show that the rules and by-laws of defendant provided for uniform sales

of monthly installments of money paid to it, and the mortgages attached as exhibits to the bill recite that the complainant received advances or loans in strict accordance with the rules and by-laws of the defendant association; and there is no averment to show that complainant has repaid advances or loans in accordance with the rules and by-laws of defendant association, or that defendant has collected or attempted to collect any money whatever from complainant, other than the money required to be paid on advances or loans made to complainant under the rules and by-laws of defendant association. (6) "There is no averment to show that an accounting is necessary in order to show or arrive at the amount that it would take to repay the advances or loans owing by complainant. The averments further show that complainant has in her possession a book showing the payments made by her to the association were entered on said book by the association, and the book is not made a part of this bill as an exhibit, and the averments show that this book will show the state of the account existing between complainant and defendant." (7) "There are no averments to show that complainant has not exercised all rights that a stockholder in defendant association had the right to exercise under the rules and by-laws of said association, nor is there any averment to show that defendant association has denied to complainant any rights or privileges of any kind or character whatever that a stockholder in said association had a right to exercise under the rules and by-laws of said association." On the submission of the cause upon the motion to dismiss and the demurrers, the court rendered a decree sustaining both the motion and the demurrer. From this decree the complainant appeals, and assigns the rendition thereof as error.

Denson & Tanner, for appellant. Smyer & Smyer, for appellee.

SHARPE, J. The general statutes contained in the Code of 1876 when the defendant corporation was organized, and existing in the Code of 1886 when this transaction arose, set forth and define the powers of building and loan associations. In such respect they differ from those statutes relating to some other incorporations, which leave the purpose and plan of the body incorporated to be declared by a writing filed. As a grant and also as a limitation of power, they have effect as if embodied in a special charter, leaving unexpressed only the implied authority to do the acts in furtherance of the objects and purposes so expressed. They are not left to be increased or altered by the declaration required to be filed as an initial step in the organization. The office of the declaration was well defined in *Kamper v. Insurance Co.*, 73 Ala. 325, where it was said by this court: "It is an acceptance by the corporators, under the name designated for the objects expressed, of the corporate powers and capacity the

law confers, and a statement of the principal constituents of the corporation, the amount of the capital stock, the names of the corporators, and the quantity each has in the capital stock. There is no authority for introducing more into it, and, if more be introduced, it is mere surplusage, not adding to or detracting from the force of the declaration." Adopting this principle as clearly correct, we fail to recognize the importance imputed by appellant's brief to the recital of purpose in the declaration filed to incorporate this association, or of the omission therefrom of any statement of purpose to build, or aid in building, houses for its members. As exhibited in the bill, the declaration, so far as is material to be considered, is as follows: "The undersigned, being desirous of forming a building and loan association, make the following declaration: (1) The name of the association shall be the Birmingham Building & Loan Association. The general object for which said association is formed is the saving of funds from monthly payments of the members, to be advanced to those desiring to invest it, to the end that the profits arising from the business thus transacted shall, with the monthly payments, largely reduce the number of months required to make each share worth its par value of \$40." The intention of the declarants to form a building and loan association is clearly expressed, and the scheme of intended operation, so far as it is disclosed, is consistent with and adapted to the exercise of the powers expressly conferred by the statute upon such associations, including the building of houses, the lending of money to its members for building, and for other purposes. We doubt not the sufficiency of the declaration for the incorporation of the defendant as a building and loan association, having all the powers expressed or implied by the statute as attaching to such associations formed thereunder.

The question of usury, as inhering in building and loan contracts, has been prolific of judicial writing upon the origin and character of such associations, and especially as to the relation of a loan to the stock upon which it is based. Courts in different jurisdictions, in cases arising under differing statutes and contracts, have produced decisions apparently in conflict; some holding that charges upon the shares are but disguised charges for the loan, which may infect the contract with usury, and that payments thereon are properly payments upon the loan. Other decisions favor the application of such payments upon the stock as the thing charged for, unless by the terms of the agreement they go in extinguishment of the loan. The latter view has been adopted by this court as applicable to the system created by our Code. In *Southern Building & Loan Ass'n v. Anniston Loan & Trust Co.*, 101 Ala. 582, 15 South. 123, the question was directly raised upon a bill filed to redeem from a forfeiture of stock and from a mortgage taken by a building and loan asso-

relation formed under the general statute, and seeking to have credited upon the loan secured by the mortgage payments made by the mortgagor upon his stock in the association. The right to have such payments so applied was denied upon the single ground of the separate existence of the stock, and the obligation to make payments thereon, as distinct from the undertaking to pay the debt accruing on account of the loan. The ground upon which relief was denied in that case is strengthened in this by the fact that there has been no forfeiture of complainant's stock. It cannot be held that she is entitled by this proceeding to have the payments made by her upon her stock credited upon her loan, as sought by the bill. Among the powers conferred by the statute referred to (Code 1888, § 1556), is, "when funds are on hand, to lend the same to any shareholder of the corporation on such security and on such terms and conditions as may be prescribed by the by-laws." As an equal mode of awarding the loan, the statute authorized its sale to the highest bidder, and provided that at all such sales "all shareholders shall have equal opportunities to bid under such regulations as may be prescribed by the by-laws." A by-law of the defendant, exhibited in the bill, provides that "the amount paid into the treasury each month shall be sold to the highest bidder or bidders, and any member taking an advance or loan shall allow the premium offered by him or her to be deducted as set forth in section 36, and shall secure the association for such advance or loan by bond or mortgage on stock of the association." The by-laws also provide that "none but members shall be allowed to bid for a loan or advance." Under such system, premiums result from competing bids of shareholders inter se for the privilege of receiving the loan; and in one respect, at least, they stand upon a different footing from interest, in that they are controlled by the competing members, and not by the lending association. If the premium be treated as interest, the general interest rate of 8 per cent. may be exceeded in the interest charge; but the power given by the statute to the association and its members to so contract among themselves is not a special privilege, in a sense obnoxious to the constitutional provisions looking to the conservation of equal rights. The peculiar plan of business they adopt, and the mutual participation in the profits arising from it, mark building and loan associations as a class so distinct from ordinary lenders as to warrant the distinct legislative grant of the power to so regulate charges for an advance or loan. Besides, the statute is general in its application, in that it excludes no one from the right to enter into the relation of either a borrowing or nonborrowing stockholder, or from the right to organize under its provisions the class of the corporations having such power to lend, and thereby to participate in the benefits conferred by the statute.

The question as to the constitutional right of the legislature to confer upon building and loan associations the right to contract for more than the general rate of interest on its loans is not *res integra* in this state. Such right was recognized and declared in the case of *Association v. Robinson*, 69 Ala. 413, where it was said: "The general assembly ordained the statute against usury, and its power to designate the transaction which shall be deemed offensive to or which shall be excepted from the influence of the statute is not questioned. When it lends express sanction to a particular transaction from the operation of the statute, that transaction is withdrawn and excepted." That case was approved, and the same principle reiterated, in *Association v. Lake*, Id. 456. Those cases have long stood as authority and doubtless reliance upon the law as so declared has resulted in investments in and transactions by such associations to the extent that the doctrine of *stare decisis* must forcibly apply. The principle is well sustained by authority. See *Trust Co. v. Whithed* (N. D.) 49 N. W. 318; *State v. Hammer*, 42 N. J. Law, 435; 4 Am. & Eng. Enc. Law, 1008, 1074. The decision in *Association v. Lake*, *supra*, was made with reference to the general statute which controls this case, and is therefore direct authority for the conclusion which we reach, that the premium mentioned in complainant's contract, whether treated as interest or otherwise, might lawfully be taken by the defendant.

Complainant is charged with interest upon the gross amount of the loan, including the part used or deducted in payment of the premium. Decisions elsewhere are numerous, and discussions are diverse, as to whether a charge for interest on the amount of the premium infects the contract with usury. So far as they are based on constitutional or statutory laws differing from ours, or upon by-laws or contracts unlike those here involved, they are of slight value in the consideration of this case. "On such terms and conditions as may be prescribed by the by-laws" is the broad privilege extended by the statute in respect to making loans. The by-law passed in pursuance of that power is made part of complainant's contract, and is as follows: "Any member taking an advance or loan shall pay to the association, in addition to his or her monthly dues for shares, monthly interest on the gross amount of the advances or loan at the rate of 8 per cent. per annum." What has been said of the power under the general statute to take the premium applies as well to interest upon the amount borrowed to pay the premium. Complainant owed, as the premium she agreed to pay, a debt which was separate from that she owed for the loan. The effect of the deduction from the amount borrowed was the same as if the whole had been paid her in hand, and out of it the separate debt had been presently paid. *Bowen v. Association* (N. J. Err. & App.) 28 Atl. 67. The terms as to interest and the mode of its

payment were according to the agreement, and the agreement was one which the parties had a right to make.

The averments that the complainant was never a shareholder in the association, and that there was no sale of the loan at auction or competitive bidding upon her application for the loan, are neutralized by inconsistent averments to the effect that the premiums and monthly payments were required of her under the by-laws, which, being set out, show their requirement to be that loans be made to the highest bidder and to shareholders only; and it is further averred that complainant secured the loan partly "with an alleged issuance of eighty-two shares of stock in said association." Taken together, these cannot be construed as an averment of a non-compliance with the statute or by-laws in respect either of fixing the premium or lending to a nonstockholder.

No forfeiture has been claimed by the association, and no foreclosure is sought, so far as appears in the bill. The defendant continuing in the performance of the contract, there is no right of redemption from the mortgage until the maturity of the debt secured by it, except under the terms of the contract. *Weir v. Association* (N. J. Ch.) 38 Atl. 643; *Saunders v. Frost*, 5 Pick. 267; *Moore v. Cord*, 14 Wis. 213; 20 Am. & Eng. Enc. Law, 619.

Failing to show by the facts averred any usurious or illegal exactions of the complainant entitling her to relief, the bill is without equity. The courts do not relieve from the mere hardship of contracts, but must accord to the parties their legal rights acquired under them.

The suit relates to the separate property of the complainant, and was therefore improperly brought in the name of a next friend. Code, § 2527; *Wolfe v. Underwood*, 91 Ala. 523, 8 South. 774. The decree of the chancery court will be affirmed at appellant's cost.

(121 Ala. 300)

ALABAMA G. S. R. CO. v. QUEEN CITY ELECTRIC LIGHT CO.

(Supreme Court of Alabama. April 20, 1899.)

SUPERSEDEAS—EXECUTION.

1. An execution issued for an amount largely in excess of the liability of the obligors on a claim bond should be superseded.

2. Under Code, § 4144, providing that, when property for which a claim bond has been executed is not delivered to the sheriff after judgment has been obtained against it, execution shall issue for the amount of the judgment, if that be less than the assessed value of the property, or for the assessed value, if that is not greater than the amount of the judgment, an execution for the assessed value of the property when it is delivered is erroneous, and should be superseded.

3. A supersedeas petition need not particularly describe pig iron covered by the execution which it is sought to supersede, since it is impossible to describe it so that it might be selected from a quantity of the same kind.

Appeal from city court of Gadsden; John H. Disque, Judge.

Petition for writ of supersedeas by the Alabama Great Southern Railroad Company, and R. B. Kyle and F. Y. Anderson, as sureties on a claim bond, against the Queen City Electric Light Company. From a judgment sustaining a demurrer to the petition, plaintiff railroad company appeals. Reversed.

The facts disclosed in the petition were as follows: The Queen City Electric Light Company, the appellee, brought an action against the Etowah Furnace Company, and sued out a writ of attachment, which was levied upon 471 tons of pig iron as the property of the defendant in attachment. The Alabama Great Southern Railroad Company interposed a claim to this pig iron, and on August 17, 1893, the Alabama Great Southern Railroad Company entered into a claim bond, with R. B. Kyle and F. Y. Anderson as sureties, and instituted a claim suit to try the right of property in and to the 471 tons of pig iron on which the Queen City Electric Light Company had sued out its attachment. The 471 tons of pig iron claimed were left in the possession of R. B. Kyle, a surety on the claim bond. Kyle held as bailee of the Alabama Great Southern Railroad Company. Subsequently an action of detinue was brought against Kyle to recover 202 tons of this pig iron. This action was brought by E. L. Knox & Co. In this action, E. L. Knox & Co. recovered judgment against Kyle for the 202 tons of pig iron, and it was accordingly, in obedience to the judgment, surrendered to E. L. Knox & Co. In the claim suit, the Queen City Electric Light Company recovered judgment condemning 58 tons of pig iron to the satisfaction of its judgment against the Etowah Furnace Company, defendant in attachment. Within 30 days after the rendition of this judgment, appellant turned over to the sheriff of Etowah county the 269 tons of pig iron remaining in its possession. These 269 tons, together with the 202 tons hitherto delivered in obedience to the judgment of the court to E. L. Knox & Co., constituted, it will be observed, the entire 471 tons of pig iron delivered to appellant under the claim bond. Notwithstanding this delivery to the sheriff, he proceeded to declare the claim bond forfeited, and execution was issued against the Alabama Great Southern Railroad Company and the sureties on its claim bond for the assessed value of the iron. Upon these facts, the petition prayed that the execution issued upon the claim bond against the railroad company and its sureties be superseded, quashed, and annulled. To this petition the Queen City Electric Light Company demurred upon several grounds, which may be summarized as follows: (1) Said petition does not show that the pig iron recovered by E. L. Knox & Co. of Kyle and that surrendered to the sheriff were any part of that levied on under the attachment in favor of the Queen City Electric Light Company against the Etowah Furnace Com-

pany. (2) Said petition does not show that the pig iron levied on under said writ of attachment was embraced in that recovered by E. L. Knox & Co. or that surrendered by Kyle to the sheriff. (3) Said petition does not show that the 58 tons of pig iron referred to is any part of the 471 tons recovered by Knox or turned over to the sheriff. (4) Said petition does not show that the 58 tons of pig iron condemned by said judgment attached to said petition referred to were delivered to the sheriff of Etowah county within 30 days from the date of said judgment. (5) Said petition does not show that the costs directed by said judgment to be paid within 30 days from the rendition of said judgment were paid within said 30 days. This demurrer was sustained, and to this ruling the petitioner duly excepted. From the judgment sustaining the demurrer the present appeal is prosecuted, and the rendition of such judgment is assigned as error.

Amos E. Goodhue, for appellant. Burnett & Cull, for appellee.

SHARPE, J. By the judgment rendered in the claim suit, only 58 tons of the iron for which the claim bond was given was found liable to the appellee's attachment. The claim bond had no relation to other attachments that may have been levied on the property, and the obligation of the bond was to have forthcoming the property found liable to the appellee's attachment alone. No description is given in the judgment of the iron so found liable, and it was impossible for the appellant, as it is impossible for the court, to identify the particular iron mentioned in the judgment, as distinguishable from other iron mentioned in the bond.

The obligation, so far as it relates to the delivery of property, was sufficiently performed in the delivery to the sheriff, within 30 days from the judgment, of iron to the amount of 58 tons, out of the iron mentioned in the bond. The delivery in excess of that amount was probably on account of other attachments levied upon the same property, but such excess is not here involved. If the claimant or its sureties made proper delivery to the sheriff of the property condemned and covered by their bond, then the condition of the bond, so far as it required the forthcoming of property, was satisfied, and that fact is sufficiently shown by the petition. The delivery of property, however, did not prevent the forfeiture of the bond, without performance also of its further stipulation for the payment of costs.

The statute provides that if the property be not delivered, and the costs of the trial paid, within 30 days, the officer must indorse the bond "Forfeited," and "execution must issue thereon against the obligors in the bond for the amount of the plaintiff's judgment if that be less than the assessed value of the property or for the assessed value if that is not greater than the amount of the judgment and

also for the damages if any were assessed and the costs of the trial of the right of property. And in the event the claimant delivers the property and fails to pay damages and costs within thirty days, execution must issue for such damages and costs only." Code, § 4144. No damages having been assessed in this case, the costs should have been paid by the claimant or its sureties, and, if they were not paid, the bond was subject to forfeiture, and execution might properly have issued against the obligors for costs alone. The petition does not aver with particularity the payment of costs, but it does aver, in general terms, that petitioners "have complied with the obligations resting upon them as obligors in said bond." If it be held that such averment was too general, as relating to payment of costs, still the petition was not subject to the demurrer. The execution here issued was for an amount largely in excess of petitioners' liability, and ought, therefore, to be superseded. The judgment which the appellee obtained against the furnace company in the attachment suit was for \$125.16. The damages being assessed in the claim suit, the execution should not have exceeded that sum, besides interest and costs, even if there had been no delivery of property. It appears to have been issued for \$464, the assessed value of the 58 tons of iron; which, as we have seen by the statute, is to be done only when the property is not delivered, and when the assessed value is not greater than the amount of the judgment. The judgment sustaining the demurrer must be reversed, and the cause will be remanded.

(121 Ala. 598)

CALDWELL v. CALDWELL.

(Supreme Court of Alabama. May 11, 1899.)

DESCENT AND DISTRIBUTION—ARBITRATION AND AWARD.

1. Where a distributee is indebted to the estate in an amount in excess of his distributive share, a decree that he shall not participate in the distribution will not be reversed because the amount of such indebtedness, as stated in the decree, is somewhat too large.

2. The use, in a decree settling the estate of a decedent, of the term "advancements," in speaking of the debts due the estate by a distributee, is not reversible error.

3. The award of an arbitrator to whom matters in controversy have been submitted in writing is legal and binding on the parties, no fraud or unfairness being shown, although one of the parties withdrew from the sittings of the arbitrator after two days, and refused to further attend and participate.

Appeal from probate court, Jackson county; William B. Bridges, Judge.

Proceedings in settlement of the estate of Hamlin Caldwell, deceased. From a decree excluding E. H. Caldwell from distribution, he appeals. Affirmed.

The following facts were disclosed: Hamlin Caldwell departed this life, intestate, in Jackson county, in the year 1895, leaving, surviving him, as his heirs and only heirs at

law, three sons, D. K., G. B., and E. H. Caldwell, and one daughter, Almena Caldwell, all of whom were of full age, and resided in said county. Said Caldwell owned an estate consisting principally of lands situated in said county. Subsequent to his death, in the year 1895, D. K. Caldwell was appointed by the probate court of said county the administrator of the estate of Hamlin Caldwell, deceased. He gave bond, and qualified as such, and entered upon the discharge of his duties. Prior to his father's death, E. H. Caldwell and John Snodgrass, Jr., were partners in the mercantile business. Caldwell bought Snodgrass' interest for an agreed price of \$6,000. Forthwith Caldwell sold a half interest in the business to G. B. Caldwell for an agreed price of \$5,500. A small piece of land, worth \$500, sold to E. H. Caldwell by Snodgrass, was not included in the sale to G. B. Caldwell. John Snodgrass, Jr., was indebted to the estate of John Snodgrass, Sr. In part payment of the \$6,000 due John Snodgrass, Jr., E. H. Caldwell agreed to adjust the liability of John Snodgrass' estate, and accordingly E. H., G. B., and D. K. Caldwell executed their joint notes to the heirs of John Snodgrass, deceased, for several sums, amounting in the aggregate to the indebtedness due from Snodgrass, Jr. D. K. Caldwell was indebted to E. H. Caldwell, successor to the firm of Snodgrass & Caldwell, and it was agreed among the three brothers that the amounts which D. K. and G. B. Caldwell might pay on said notes to the Snodgrass heirs should be applied as a credit on their respective indebtedness to E. H. Caldwell. In the course of time, said notes not being paid, Hamlin Caldwell sold his "home place," and paid said notes. The firm of Caldwell Bros. suspended business. E. H. Caldwell, prior to the sale of the home place, conducted a mercantile business at Bellefonte, in said county, and also a farming business on the home place, in the name of his father, H. Caldwell. This business became involved in debt, and was closed out. Hamlin Caldwell paid the indebtedness. That business in the evidence is spoken of as the "Bellefonte business," and the amount of debts paid by Hamlin Caldwell is referred to as the "Butler debt." Butler furnished the money, and took a mortgage on the lands. The mortgage was afterwards foreclosed, but by an arrangement Sallie Brown paid the debt or redemption money, and holds the claim upon the land. After Hamlin Caldwell's death, the three boys undertook to settle or adjust the indebtedness of each one to the estate, and finally referred the matter, by agreement entered into in writing, to the arbitration of W. H. Norwood, an attorney at Scottsboro. In the course of said arbitration it was sought to charge G. B. Caldwell with the rent of a farm of which he had control for 12 years or more. Said G. B. Caldwell admitted the rents were worth \$1,500 per annum, and some years the rents sold for as much as \$2,500. He claimed be-

fore the arbitrator that he had paid the rents each year but one. That year he gave his note for the rent to his father. On said note there was one credit for an amount paid by E. H. Caldwell. The amount paid was collected by him from a tenant on said farm. Said G. B. Caldwell produced no receipts or other evidences of the payment of said rents, except his own statement. The arbitrator announced his intention not to charge said G. B. Caldwell with any sum for the years which he said he paid the rent. After that, E. H. Caldwell took no further part in the proceedings before the arbitrator, and did not attend his sittings. Among other things, the arbitrator charged said E. H. Caldwell with the amount paid to the Snodgrass estate on said notes by Hamlin Caldwell out of the funds realized from the sale of the home place, and with the amount paid by Hamlin Caldwell on the debts against the Bellefonte business. Said arbitrator made his award in writing, and filed the same in the probate court, and it was entered as the judgment of the court. The three brothers undertook to settle their differences or disputes growing out of arbitration. On the 8th day of February they entered into an agreement in writing, which was signed by them and their sister. Thereupon, on the 9th day of February, 1897, the administrator filed his accounts for a final settlement. From time to time the cause was continued, and the final decree was rendered on the 2d day of December, 1897. On said settlement, after the account, showing debits and credits and the balance in the administrator's hands for distribution, had been made out and passed upon by the court, the administrator moved the court to charge E. H. Caldwell with the sum of \$27,538.55 as "advancements" made by his father, Hamlin Caldwell, that being the amount ascertained in said award to be due to the estate from said E. H. Caldwell. This motion was resisted, and the questions in the case arose on the hearings of said motion, and the final decree on the granting of the same. Having granted the motion, the court excluded said E. H. Caldwell from participation in the distribution of the balance in the administrator's hands. The other facts of the case are sufficiently stated in the opinion. In making the decree rendered in favor of Almena Caldwell, the court ascertained the aggregate amount of the advancements made to all the heirs by the administrator, and deducted this from the balance in the administrator's hands for distribution, and for the balance thus ascertained a decree was rendered in favor of Almena Caldwell. From the decree on said settlement, E. H. Caldwell prosecutes this appeal.

R. W. Clopton and Tally & Proctor, for appellant. J. E. Brown, for appellee.

TYSON, J. Section 239 of the Code requires on a final settlement of an estate by an executor or administrator the probate court

to allow such executor or administrator, as a set-off against the distributive share of a distributee, any debt owing the estate by such distributee contracted with the deceased in lifetime, or with the executor or administrator in his representative capacity. Should, however, the amount of the debt exceed the distributive share, no decree can be rendered in favor of the executor or administrator for the excess; but he will have to resort to the proper forum to collect this excess due him from such distributee. Code, § 240. It is obvious that the decree ascertaining the amount owing by a distributee to the estate as to the excess is not binding in another court, where a suit is instituted by an executor or administrator to recover this excess. The only jurisdiction conferred upon the probate court is to ascertain that the distributee's indebtedness is equal to or exceeds his distributive share. And it may be that the proper practice, under these sections, would be for the probate court to simply ascertain that the distributee's indebtedness to the estate exceeds the distributive share of such distributee, and that it is set off in favor of the executor or administrator against his distributive share, and he be not allowed to participate in the distribution of the estate. But, when it is apparent that no injury resulted in stating the amount of the indebtedness owing by the distributee in the decree, and none could possibly result, the decree will not be disturbed should it appear that the amount of the indebtedness, as stated in the decree, is too large. Whenever the amount of his indebtedness is confessedly in excess of his distributive share, there is no error of which he can be heard to complain.

We entertain no doubt that the award was binding upon the appellant. It appears there was a written submission of the matters in dispute between the parties, that each appeared before the arbitrator, and each was accorded a hearing. The appellant, after attending upon the sittings of the arbitrator for two days, accompanied by his counsel, withdrew, and refused to further attend and participate. No fraud or unfairness is charged or shown. The award rendered by the arbitrator was fairly responsive to and within the issues presented to him in the written submission, and its rendition was conclusive upon the appellant. The very matter he now complains of here was fairly and impartially, so far as we are advised, adjudged by the arbitrator, and his indebtedness to the estate ascertained to be quite 40 times the amount of his distributive share in the estate.

Much stress is laid upon the word "advancements," as found in the decree and used by the witnesses in their testimony. It may be conceded it was improvidently used; but after all, practically, it is of no consequence whether his indebtedness to the estate arose out of advancements made to him by his father or debts due by him to his father. The only material difference between the two, so

far as the settlement is involved, is that advancements do not bear interest, and debts do. Had the entire amount of his indebtedness to the estate arisen out of advancements made by his father, it would still have been the duty of the probate court to have excluded him from any further participation in the division and distribution of the estate, if the amount of such advancement was equal to or exceeded his share. Code, § 1404. However, as to all these matters the arbitration proceeding was conclusive, and there was no error in admitting the award in evidence. This renders it unnecessary to consider the other numerous assignments of error, since, upon this award, the court could have properly ascertained the amount of appellant's indebtedness to his father's estate to be the sum named in the decree. Decree is affirmed.

(21 Ala. 427)

BOULDIN v. BARCLAY.

(Supreme Court of Alabama. May 16, 1899.)

NOTES — SIGNATURE — ALTERATION — BURDEN OF PROOF.

Where in an action on a note defendant interposes a general plea of non est factum, and plaintiff proves signature, the note itself giving no indication of alteration since signature, the burden of showing such alteration is on defendant.

Appeal from circuit court, Jackson county; J. A. Bilbro, Judge.

Action by Virgil Bouldin, as trustee, against James P. Barclay on notes. There was a judgment for defendant, and plaintiff appeals. Reversed.

The defendant filed a plea of non est factum, in which he averred "that the notes upon which the action is founded were not executed by him, or by any one authorized to bind him in the premises." This plea was verified by the defendant's affidavit. On the trial of the case, W. R. Ivey and other witnesses for the plaintiff testified that the notes sued on were executed and signed by the defendant, and that there had been no alteration or change in them, in any respect, since their execution. In response to questions asked on cross-examination, the said W. R. Ivey and the other witnesses testified that the words "bearing interest from date" were written in said notes before they were executed by the defendant. The defendant, as a witness in his own behalf, admitted that the notes sued on were signed by him; but he testified that the words "bearing interest from date" were not in them when they were executed. Another witness for the defendant, who was shown to have executed notes similar to those sued on, testified that in his notes there was no provision for the payment of interest from date. In his general charge to the jury, the court instructed them, among other things, as follows: "The burden of proof is on the plaintiff to show that the notes sued on were executed by the defendant as they now appear, and that there has been no material

alteration in them since they were executed." The plaintiff duly excepted to this portion of the court's oral charge, and also separately excepted to the court's refusal to give each of the following written charges requested by him: (1) "The notes sued on, not showing any suspicious alterations on their faces, the burden of proof is on the defendant to show any material alterations therein." (2) "The court charges the jury that the burden of proof is on the defendant in this case to reasonably satisfy the jury that the notes have been altered as alleged." There were verdict and judgment for the defendant. The plaintiff appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Martin & Bouldin, for appellant. R. W. Clopton, for appellee.

MCLELLAN, C. J. Where, to an action on a note or bond, the defendant interposes a special plea of non est factum, not denying his signature, but setting up alteration after execution, the burden is upon him to show such alteration, unless the paper itself furnishes some evidence or indication of having been tampered with,—some badge of the alleged fraud, so to speak. *Montgomery v. Crossthwait*, 90 Ala. 553, 8 South. 498; *Barcliff v. Treece*, 77 Ala. 528. This upon the presumption, in favor of good faith and against fraud, where the paper bears no evidence to the contrary, that the paper is as it was when it was signed. In such case the plaintiff may introduce the paper without any evidence of its execution or negating alteration; and, if the defendant offers no evidence, judgment must go for plaintiff. The same presumption against alteration, when there is no appearance of it on the face of the paper, attends the note on a general plea of non est factum. The averment of that plea is that the note sued on was not executed by the defendant, or by any one authorized to bind him in the premises. Where the note does not appear to have been tampered with, this averment, prima facie, is a denial of the signature, and does not inform the plaintiff that reliance will be had upon an alteration. He therefore makes a prima facie case against the plea on proof of signature, and he may then put the note in evidence; and, if the defendant offers no evidence, the presumption against alteration, in connection with proof of signature, entitles him to judgment, just as, where there is a special plea of alteration only, the admission of signature and presumption against fraud makes out the plaintiff's case, and entitles him to recover, unless the defendant proves alteration. Our opinion is therefore that, in the case at bar, when the plaintiff proved that the defendant signed the notes sued on, the papers themselves giving no indication of alteration since the signature, the burden was on the defendant to show that material alterations had been made in them

since he signed them. It follows that the trial court erred in giving the portion of its general charge to which exception was reserved, and in refusing charges 1 and 2 requested by the plaintiff. Reversed and remanded.

(121 Ala. 356)

TUTWILER et al. v. McCARTY et al.

(Supreme Court of Alabama. April 20, 1896.)

SET-OFF — PLEADING — AUTHORITY OF AGENT — HARMLESS ERROR — INSTRUCTIONS — CONSTRUCTION OF CONTRACT.

1. A set-off for less than the amount claimed in the complaint may be pleaded as a defense, under Code 1886, p. 797, authorizing the pleading of a set-off as a defense.

2. Error in holding pleas insufficient is harmless, where, under other pleas, defendants have the full benefit of all matters overruled in the former.

3. On an issue whether a certain person was the superintendent of two persons jointly engaged in mining, two witnesses testified that he was superintendent for one of them, and another that such person stated that he was also tending to the business of the other miner. Held to warrant a charge that such person was the superintendent for both miners.

4. Under such evidence, a charge that it was necessary to show that the superintendent had authority to do the particular act complained of, but it was binding on the principals if within the scope of the general authority conferred on him, was not abstract.

5. An agreement between a miner and the operator of a sawmill, that the latter shall cut and saw all timber required by the former for certain purposes, and that, if he fails to furnish as much as required, the miner shall have the right to procure it from others, and charge the cost to the mill owner, gives the mill owner the exclusive right to supply the miner with all the timbers required by him for such purposes.

6. An objection that the complaint does not show plaintiffs to be the owners of the contract sued on must be made by demurrer.

Sharpe, J., dissenting.

Appeal from city court of Birmingham; H. A. Sharpe, Judge.

Action by W. D. McCarty & Co., a partnership composed of J. W. McCarty and W. D. McCarty, against E. M. Tutwiler and the Tutwiler Coal, Coke & Iron Company, a corporation, to recover damages for the breach of a contract entered into by J. W. McCarty and E. M. Tutwiler and the Tutwiler Coal, Coke & Iron Company, which contract was assigned by J. W. McCarty to W. D. McCarty & Co. From a judgment in favor of plaintiffs, defendants appealed. Reversed.

The said contract was set out at length in the transcript, and, exclusive of the signatures, was in words and figures as follows: "This agreement, made this 18th day of May, 1896, between J. W. McCarty, party of the first part, and E. M. Tutwiler and Tutwiler Coal, Coke & Iron Company, parties of the second part, witnesseth, to wit: The said party of the first part agrees to deliver from the lands belonging to said parties of the second part such sawed lumber, either pine or oak, as may be required by them at or around their Blossburg mines, the new mines, and

the mines to be opened in the Balley Hollow, section 34, township 16 south, of range 4 west, for their own use, or at places required by their customers, provided that for all lumber furnished patrons of said parties of the second part a fair and reasonable price shall be paid for hauling it over one mile; that is to say, if it is hauled two miles from the mill to the site of the work, the second mile shall be paid for. Said party of the first part agrees to furnish lumber promptly after being ordered, that its mill shall be kept in good working order, and it shall control sufficient stock and labor to cut, haul, and saw logs without unnecessary delay. The party of the first part also agrees to furnish well-sawed, sound lumber, of uniform width and thickness, free from splits and wind shakes. Said party of the first part agrees to saw no lumber less than twelve inches in diameter at the butt, and unless otherwise instructed by said parties of the second part. [Here follow the specifications of the lumber to be sawed, and the price to be paid therefor.] Timbers must be stacked at the mouth of the slope convenient for counting and loading on tram cars. If for any reason said party of the first part should fail to get or deliver the required amount of sawed or mine timber, then the parties of the second part can hire others to get them, and charge the cost to the said party of the first part. Said parties of the second part agree to permit said party of the first part to cut all timbers for sawing of not less than 12 inches in diameter at the butt and for mine purposes from its lands now owned or to be acquired in sections 27 and 34, township 16 south, of range 4 west, and to pay the prices above mentioned on its regular pay days, when the conditions of this agreement have been faithfully complied with by said party of the first part. It is distinctly understood that said party of the first part shall do his trading in the store of said parties of the second part, and shall use every legitimate means to make his employes do likewise, and further that he will issue no orders to his employes to any store other than that of said parties of the second part, nor pay any debts contracted by his employes with any other parties. This contract is to be in force until the 18th day of May, 1898. Said parties of the second part agree to give receipts for all sawed lumber as delivered, and to count and receipt for all mine timbers daily, and also to permit said party of the first part to locate his mill and the necessary outhouses to operate same on their lands, free of rent, provided such machinery and houses are not in the way of structures and roads required by said parties of the second part. Parties of the second part agree to permit the party of the first part to make convenient roads through their lands for hauling timbers and lumber, provided they are held blameless for any damage to crops by reason of such roads being made and used through said lands, and that fences are kept up, or gates or drawbars are

put up when roads enter or leave cultivated fields or lands used for pasture. Witness our hands and seals, this 18th day of May, 1898."

The breaches assigned in the complaint for which damages were claimed were as follows: (1) Failure of defendants to permit plaintiffs to cut timber from their lands as contracted for; (2) failure to pay the plaintiffs for timber cut for defendants at contract price; (3) that there was required by the defendants, at and around the mines described in said contract, a large amount of timber and mine lumber, such as was described in said contract, but the defendants failed to permit plaintiffs to furnish same as they contracted to do; (4) that while the defendants required a great deal of lumber and mine timber for use in and around the mines described in said contract, and while the plaintiffs were prepared, willing, and ready to carry out their part of said contract, the defendants, on July 7, 1896, notified plaintiffs that they would not order from plaintiffs any more lumber or timber under said contract.

The defendants filed the following pleas: "(1) That they are not guilty of any of the matters therein alleged. (2) That they never owed nor promised to pay any of the sums of money claimed in the said plaintiffs' complaint, nor any part thereof. (3) Said defendants deny each and every allegation of said complaint charging them, or either of them, with default, failure, or breach of the contract therein set out, and all allegations of said complaint claiming that the plaintiffs have been damaged or injured in the premises by any act or default of the defendants, or either of them. (4) The defendants say, as a defense to the plaintiffs' action, that at the time said action was commenced the plaintiffs were indebted to the Tutwiler Coal, Coke & Iron Company, one of the defendants, by account due, to wit, on the 27th August, 1896, in the sum of, to wit, \$89¹⁴/₁₀₀, which they hereby offer to set off against the demand of the plaintiffs, and they claim judgment for the excess. (5) That the said defendants have in all things fully complied with all their stipulations and undertakings in the contract set out in said complaint; but, notwithstanding this, the plaintiffs have broken and failed to comply with their undertakings in said contract in many respects, to the great damage of the defendants, to wit, said plaintiffs have not furnished the lumber therein contracted to be furnished promptly after being ordered, and they have not furnished well-sawed, sound lumber, of uniform width and thickness, free from splits and wind shakes, and said plaintiffs have not furnished all mine timbers required by the defendants at their slope mines in Balley Hollow, of the kinds and dimensions stipulated in said contract set out in said complaint to be furnished, by which said failures and defaults of the said plaintiffs the defendants have been put to great expense and damaged, to wit, the sum of \$6,000, which they hereby offer and claim to recoup against

the claim of the plaintiffs in this action, and they ask judgment for the excess thereof over said claim, and all costs in this action. (6) The defendants say that the contract set out in said complaint was made to and with one J. W. McCarty, and not with the plaintiffs as individuals or as a partnership, and that the plaintiffs were not at the time this suit was brought the owners or owner thereof, nor were they then entitled to the rights and benefits of said contract, and they are not entitled to sue or recover in this action."

To the first, second, third, and sixth pleas, the plaintiffs demurred upon the following grounds: (1) Said pleas neither traverse nor confess and avoid the material allegations of the complaint. (2) Said pleas are neither the general issue nor any special plea setting up special matters of defense, other than a general denial of the plaintiffs' cause of action. (3) All matters and things which could be given in evidence under said pleas could be given in evidence under the general issue. To the fourth plea the plaintiffs demurred upon the grounds that, while it purports to be an answer to the whole complaint, it shows on its face that it is only an answer to a part of said complaint. These demurrers were sustained, and to the sustaining of the demurrers to each of the pleas the defendants separately excepted. The defendants then offered to file other pleas, numbered from 7 to 14, inclusive. The court allowed two of these pleas to be filed, which were as follows: "(9) The defendants, for answer to the plaintiffs' complaint, say that they never assumed nor promised nor owed in manner and form as in the plaintiffs' complaint is alleged and claimed. (10) The defendants, as a special plea, in answer to the plaintiffs' complaint, say that all the allegations of said complaint are untrue, without this: that the defendants do not deny the execution of the alleged agreement or contract in said complaint set out." The eighth and fourteenth pleas were pleas of set-off, and substantially the same as the fourth plea. The court refused to allow any of these pleas to be interposed, except the ninth and tenth, as stated above, and to this ruling the plaintiffs duly excepted. The trial was had upon issue joined upon the fifth, ninth, and eleventh pleas. The contract involved in this controversy was signed on May 18, 1896.

The testimony for the plaintiffs tended to show that on May 22, 1896, they went to the place of business of Hardy & Tynes for the purpose of buying a sawmill; that Eli Tutwiler went with them; that he (Eli Tutwiler) was the superintendent of the Tutwiler Coal, Coke & Iron Company, and attended to the business of E. M. Tutwiler. Each of the plaintiffs further testified that, upon being told that it would be impossible to get the sawmill in place before 30 days, Eli Tutwiler consented to give them 30 days within which to get their mill ready for work. The testimony for the plaintiffs tended to show that the defendants did not give them any orders for

sawing the timber, notwithstanding there was much lumber needed and required in and around the mines, but that a great deal of the lumber that the defendants were under contract to let them saw was for the defendants hewn by one Daniel Morgan, under contract with the defendants. One of the plaintiffs testified that on June 12th, 14th, and 15th he saw E. M. Tutwiler, and demanded that he should stop Morgan hewing trestle timbers, and give the orders therefor to plaintiffs, to be sawed by them; that on the 15th E. M. Tutwiler stated to said witness that the timber was his, and he would do with it as he pleased; and that it was cheaper for him to have it hewed than sawed. Both of the plaintiffs testified that they went to see E. M. Tutwiler at his office, and made complaints about the timber being hewed, instead of sawed, and that Tutwiler told them he would have their stock of timber hewed, and would give them no more orders, and that, after waiting until July 17, 1896, without having received but a few orders, which they filled, and realizing that the defendants had not complied with their contract, they shut down their mill and finally moved it away; and that by reason of the defendants' refusal to give them orders for lumber, and to allow the timber to be sawed as was contracted for, the plaintiffs were greatly damaged; the amount of damages being variously estimated by the different witnesses. E. M. Tutwiler, as a witness, denied having had a conversation with either of the plaintiffs, as testified to by them, but stated, on the contrary, that he told them he had plenty of orders he would give them; that, after their complaining as to having the timber hewn by Morgan, he wrote a letter to the plaintiffs, in which he offered to pay them the difference between what it cost to have it hewn and the price for sawing the timber under the contract; and that from July 7 to August 1, 1896, he stopped Morgan from hewing the timber, and on July 15th he asked the plaintiffs to resume the sawing under the contract, and offered to arbitrate with them his right to have the trestle timbers hewn, but they refused to comply with his request. It was shown that the plaintiffs traded at the store owned by the Tutwiler Coal, Coke & Iron Company, and that there was a balance due said company from the plaintiffs, on account, of \$89.14.

The bill of exceptions contains the following statement: "The court read the original paper, which is correctly copied and set out in the plaintiffs' complaint, and construed the same and held, and so stated to the jury, that the word 'required,' whenever used therein, must be taken and understood as meaning 'needed for use'; and that the contract must be read as if, in so many words, the defendants had agreed to take and pay for from the plaintiffs exclusively such sawed lumber, either pine or oak, split heading and room crossties, split mine props, and caps, at the prices specified, that might be 'needed for use'

at the places specified in the contract by the defendants and their customers, from the 18th May, 1896, to the 18th May, 1898." And the court allowed said original paper thus construed to go in evidence before the jury, to which construction and admission thereof, severally, the defendants excepted.

Upon the introduction of all the evidence, the court, at the request of the plaintiffs, gave to the jury the following written charges, to the giving of each of which the defendants separately excepted: (11) "If the jury believe from the evidence that Eli Tutwiler was superintendent of defendants' business, then defendants are bound by his acts and declarations done or made within the line and scope of his authority as such superintendent." (12) "If the jury believe the evidence, Eli Tutwiler was superintendent of defendants' business." (13) "In order to show the authority of Eli Tutwiler to bind defendants by particular acts or declarations, it is not necessary to show that defendants specifically authorized said Eli Tutwiler to do those particular acts; but such acts and declarations, if made in the line and scope of such general authority as may have been conferred on him by defendants, would be binding on them."

The defendants requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (4) "That if the jury believe from the evidence that the plaintiffs shut down their sawmill, and refused and failed to deliver lumber and timbers promptly after they were ordered by the defendants, and finally abandoned and removed their mill, and disabled themselves from delivering lumber or timber, under and according to the contract, then the plaintiffs cannot recover in this action for any profits they might have made thereafter by compliance with said contract, even though it may be proved that they might have made such profits thereby." (6) "If the jury believe from the evidence that the defendants, or either of them, gave to the plaintiffs orders for sawed or mine timbers, such as the plaintiffs agreed by their contract, when required, to deliver to the defendants, and that plaintiffs, for any reason, failed to get and deliver promptly the sawed or mine timbers so required and ordered under said contract, then the defendants, from the time of such failure, were authorized to get such sawed or mine timbers from others, and charge the cost thereof to the plaintiffs, and to have such cost recouped and deducted from any demand of the plaintiffs in this action." (7) "If the jury believe from the evidence that the defendants, or either of them, gave to the plaintiffs orders for sawed or mine timbers and lumber, such as the plaintiffs agreed by their contract to deliver to the defendants when required, and if they believe that the plaintiffs failed or refused to deliver such lumber promptly after being ordered, then this was a default and breach of contract, which, as

long as it continued, authorized the defendants to withhold further orders from the plaintiffs, and to get the amount of sawed and mine timbers required by the defendants during such default from others, and charge the cost thereof to the plaintiffs in this action."

There were verdict and judgment for the plaintiffs, assessing their damages at \$460. The defendants appeal, and assign as error the several rulings of the trial court to which exceptions were reserved.

Garrett & Underwood, for appellants.
Bowman & Harsh and C. P. Beddow, for appellees.

MCCLELLAN, C. J. The fourth plea filed by the defendants is in the form prescribed by the Code for a plea of set-off. If proved, it is, in a sense, a defense to the action to the extent of the amount set up in it, though, strictly speaking, set-off is not a defense at all, but in the nature of a cross action. It does not go in denial of the cause of action set up in the complaint, or in bar of recovery upon that cause of action, but asserts only that the defendant has a just claim against the plaintiffs, which should be accommodated in the judgment to be rendered, and, in effect, paid out of plaintiffs' recovery. But, while all this is true, it was competent for the legislature to denominate such cross action a defense, and to prescribe a form for the plea bringing it forward, in which it is called "a defense to the action," though it may not in a given case go to the whole action, or rather to the whole amount claimed. Code 1886, p. 797, form 37; Lang v. Waters' Adm'r, 47 Ala. 624. The trial court erred in sustaining the demurrer to this plea. We deem it unnecessary to pass upon the sufficiency of pleas 1, 2, 3, and 6, which were also held bad on demurrer. The defendants had the full benefit of all the matters averred in these pleas on the trial, and they could not have been injured by the action of the court on the demurrers to them. The same may be said of the pleas numbered 7, 11, 12, and 13, which the court refused to allow to be filed. The defendants could not possibly have been injured by that action of the court. Every issue tendered by the plea was already before the court. Pleas 8 and 14 were pleas of set-off. They were open to the same objection which the city court held good against plea 4. Holding plea 4 to be bad, the court acted consistently in declining to allow these pleas to be filed; for it is never incumbent on a court to allow the filing of a plea which is demurrable. Here we have held the fourth plea to be good; and hence the court's action in respect of pleas 8 and 14 cannot be rested on the ground that those pleas were bad; but the point is saved for appellants in our ruling on the fourth plea, and we need not pass on the propriety of the court's action in refusing to allow the eighth and fourteenth pleas to be filed.

We beg leave to remark that it seems to us

that there was no semblance of occasion in this case for more than three pleas, viz. the general issue (Code, § 3295), set-off, and recoupment. Two witnesses testified that Eli Tutwiler was superintendent of one of the defendants, the Tutwiler Coal, Coke & Iron Company, and one testified without objection that Eli said he was attending to the business of the other defendant, E. N. Tutwiler. There was no evidence to the contrary. One who is attending to the mining business of another may well be said to be that other's superintendent. The court, on this state of the case, committed no error in charging the jury to find that Eli Tutwiler was the superintendent of the defendants, if they believed the evidence. Charges 11 and 13, given at plaintiffs' instance, confessedly state sound propositions of law, and, in view of the evidence as to Eli being the superintendent of the defendants, they are not abstract. We concur in the construction put on the written contract by the trial court. It is so obviously correct, upon a view of the whole writing, that we deem it unnecessary to enter upon a discussion of it.

Charges 4, 6, and 7, refused to the defendants, are bad in that they take no account of the evidence going to show such breach of the contract by the defendants as would authorize the plaintiffs to refuse to further carry it out, if not also upon other grounds. If it were supposed that the complaint does not show that the plaintiffs were the owners of the contract at the time suit was instituted, the defect should have been reached by demurrer. Reversed and remanded.

SHARPE, J., dissenting.

(121 Ala. 150)

EZZELL v. BROWN.

(Supreme Court of Alabama May 17, 1899.)

REFORMATION OF INSTRUMENTS—DEEDS—DEFECTIVE DESCRIPTION—FRAUDULENT CONVEYANCES—EVIDENCE—JUDICIAL SALES—CAVEAT EMPTOR.

1. A bill to correct the description in a conveyance of land lying east of the Chickasaw boundary line, describing it as the north fractional half of section 35, etc., is not defective in failing to locate it east or west of such boundary line, since lands west of it are not described in the government survey by sections.

2. In an action to have a deed from husband to wife declared fraudulent, as against a creditor of the husband whose indebtedness is evidenced by note, the note itself, without proof of its execution, as against the grantee, is not competent evidence of an indebtedness, she being a stranger to the transaction.

3. Where creditors assail a conveyance from husband to wife as fraudulent, as between them and the grantee the consideration recited in the deed is not evidence of its existence, but must be proven by independent evidence.

4. The rule of caveat emptor applies to a purchaser at a judicial sale.

Appeal from chancery court, Franklin county; William H. Simpson, Chancellor.

Bill by Josephine Brown against Laura O. Ezzell, averring the following facts: On De-

cember 23, 1893, Wyatt Brown, the husband of the complainant, executed and delivered to her a deed, in due and regular form, intending to convey to the complainant "the north fractional $\frac{1}{2}$ of section 35, township 6, range 13, in Franklin county, Alabama," but, by mistake of the attorney who drafted said deed, said lands were misdescribed as "the fractional $\frac{1}{2}$ of section 35, township 6, range 13, in Franklin county, Alabama." A copy of this deed was made an exhibit to the bill, and the consideration expressed therein was \$1,200, of the separate estate of Josephine Brown, which the grantor, Wyatt Brown, had converted and used to his own benefit, and for the love and affection the grantor had for the grantee. It was then averred that it was the intention of Wyatt Brown to convey to Josephine Brown "the north fractional $\frac{1}{2}$ of section 35, township 6, range 13, in Franklin county, Alabama," and, knowing that this was the intention on the part of the grantor and the grantee, the complainant, immediately upon the execution and delivery of said deed, on December 23, 1893, went into possession of said north fractional $\frac{1}{2}$ of section 35, township 6, range 13, and had had continuous and uninterrupted possession thereof ever since, claiming the same as her own lands. Wyatt Brown, the husband of Josephine Brown, the complainant in the original bill in this cause, was indebted to John T. Ezzell, by note dated March 20, 1893, for the sum of \$50, payable on December 25, 1893, with interest from date. The payee transferred this note to Laura O. Ezzell, and, payment of it not being made when it was due, she brought suit on it, in the justice's court of W. H. Austin, where she obtained judgment, and the execution issued thereon, on January 30, 1895, was levied, for want of personal property of the defendant, on the lands involved in this suit. On certificate to the circuit court, an order of sale of the real estate levied on was obtained, and on the third Monday in July, 1895, the sheriff sold the lands to Laura O. Ezzell, for \$79.07, and on September 13, 1895, executed his deed to her for them. Laura O. Ezzell, as purchaser at said sale, brought an action of ejectment in the circuit court against the complainant for the recovery of said lands. It was then averred in the bill that Laura O. Ezzell had notice of the conveyance of said lands to the complainant long before the execution was issued, and before the order of sale, and, further, that the complainant had no adequate means of defending the ejectment suit. Laura O. Ezzell and Wyatt Brown were made parties defendant to the bill, and the prayer was that the deed from Wyatt Brown to the complainant be corrected, and be so reformed as to properly describe the lands intended to be conveyed; that the deed from the sheriff to Laura O. Ezzell be delivered up and canceled and removed as a cloud upon the complainant's title; and that an injunction issue, restraining Laura O. Ezzell from further prosecuting her action of eject-

ment. The sheriff's deed to Laura O. Ezzell and the summons and complaint in the ejectment suit were made exhibits to the bill. Upon the filing of the bill a temporary injunction was issued. In the sheriff's deed, the lands conveyed to Laura O. Ezzell were described as follows: "Fractional N. $\frac{1}{2}$ of Sec. 35, T. 6, R. 13, W. of Chickasaw boundary line; 144 $\frac{71}{100}$ acres." The defendant, Laura O. Ezzell, filed her answer, in which she denies that Wyatt Brown conveyed to complainant, Josephine Brown, any part of fractional north half of section 35, township 6, range 13, west of the Chickasaw boundary line, or that she had any notice of his conveying to her such lands, and asserts that she, having obtained a judgment for her debt, and purchased the lands in controversy at sheriff's sale, which lands the deed to Mrs. Brown did not embrace, Mrs. Brown's deed cannot now be reformed or changed, so as to affect her interest or divest her of the title and the right of possession which she acquired in and to the land thereby, and that the deed to Mrs. Brown should be canceled as a cloud on her said title. Her answer also denies that Mrs. Brown paid to her husband, Wyatt Brown, the consideration of \$1,200 recited in his deed, or that Brown ever used that amount of her separate estate, as Mrs. Brown alleges in her bill; and she avers that the said consideration of \$1,200 named in the deed was simulated, and that, in fact, there was no valuable consideration for the conveyance, and that it was voluntary, and was made for the purpose of hindering, delaying, and defrauding Wyatt Brown's creditors, and that she (Mrs. Ezzell) was, as the holder of his note on which she obtained judgment, a creditor of said Wyatt Brown before his said conveyance to his wife. She asks that her answer may be taken as a cross bill, makes Wyatt Brown a party thereto, as well as Mrs. Brown, the complainant in the original bill, and prays that Mrs. Brown's deed from her husband may be canceled, as to these lands, as a cloud on her title, and that the injunction may be dissolved. There was attached to the answer and cross bill of the complainant the note which was executed by Wyatt Brown to John T. Ezzell, and which was alleged in the cross bill to have been transferred to Laura O. Ezzell, and to have constituted the basis of the judgment against Wyatt Brown. There was a decree pro confesso against Wyatt Brown as defendant to the original bill. The complainant in the original bill, Josephine Brown, denies any knowledge on her part of the transfer to Laura O. Ezzell, and she denies any intention on her part, or on the part of Wyatt Brown, of hindering, delaying, or defrauding Wyatt Brown's creditors, in the execution of his deed to the complainant; and she also denies that the consideration mentioned in said deed was simulated, and the deed a voluntary one, but insists that the consideration as expressed in said deed was true and correct. The cause was submitted upon the pleadings, without

any proof, and the chancellor rendered a decree granting the relief prayed for in the original bill, and ordering said cross bill dismissed. From this decree the respondent appeals, and assigns the rendition thereof as error. Affirmed.

Thos. R. Roulhac, for appellant. W. H. Key, for appellee.

TYSON, J. The bill in this cause was filed for the purpose of correcting a misdescription of lands sought and intended to be conveyed by the deed from complainant's husband to her, and to enjoin the prosecution of an action of ejectment brought by the appellant to recover them. The bill avers that the correct description of the lands is the north fractional half of section 35, township 6, range 13, in Franklin county, Ala., while the description in the deed was by mistake written as "the fractional half of Sec. 35, T. 6, R. 13, west." Section 35, township 6, range 13, in Franklin county, is a fractional section, containing only 368.21 acres, lying east of the Chickasaw boundary line. The first contention of appellant, respondent in the court below, is that the description in the bill is indefinite, because it fails to locate the lands east or west of the Chickasaw boundary line. The lands west of this line are no part of section 35, and they are not described in the government survey by section, township, and range. The description in the bill of the land is sufficiently definite and certain.

All the material averments of the bill are expressly admitted by the answer, and the complainant was not, therefore, compelled to resort to testimony to establish her case as made by her bill. The cross bill sought to have the deed proposed to be executed to complainant by her husband declared fraudulent against the respondent as a creditor of the grantee's husband. To this end it is alleged that the recited consideration in the deed sought by the complainant to be corrected was simulated and fictitious. The only allegation of indebtedness by complainant's husband to the complainant in the cross bill is that he executed and delivered his promissory note to one John T. Ezzell, dated March 20, 1893, due December 25, 1893, and transferred to the complainant on the 6th day of October, 1894, for \$50, and reduction of the note to judgment before a justice of the peace, issue of execution, levy of execution upon these lands, order of sale of the lands on motion in the circuit court, and deed by sheriff to the complainant in the cross bill. The note and written transfer thereof were made exhibits to the cross bill. The answer of complainant in the original bill to the cross bill denies the averments of the cross bill. The cause was submitted upon original bill and exhibits thereto, answer to cross bill, decree pro confesso against complainant's husband, answer and cross bill, and exhibits thereto, for final decree. A transcript of the judgment, as alleged in the

cross bill, by the justice of the peace upon the note, was not an exhibit to the bill or cross bill. In fact, the only exhibit to the cross bill was the note and its transfer. There was no evidence offered to prove the execution of the note, and none to prove the existence of the debt it purported to evidence. Certainly the note, as against the complainant, was not competent evidence without proof of its execution, nor were its recitals evidence of any debt against her, she being a stranger to the transaction. *Garrett v. Garrett*, 64 Ala. 263.

There being no proof that complainant in the cross bill was a creditor prior to the execution of the deed assailed, the burden of proof was never shifted to the complainant in the original bill to prove the bona fides of the consideration expressed in the deed from her husband to her. *Smith v. Collins*, 94 Ala. 394, 10 South. 384; *Chipman v. Glennon*, 96 Ala. 263, 13 South. 822; *Bank v. McDonnell*, 89 Ala. 484, 8 South. 137. As between her and her husband, the consideration recited in the deed was conclusive as to its character, and could not have been shown by him to have been other and different than as expressed, though as against his creditors it may have been shown by them to have been simulated or the deed to have been a voluntary conveyance. In other words, as between the creditors of the grantor, when such relation is proven to have existed, and the complainant, the consideration recited in the deed is not evidence of its existence, but must be proven by independent competent evidence. *Houston v. Blackman*, 66 Ala. 562, and authorities there cited.

The complainant in the cross bill, as purchaser, cannot invoke the doctrine of bona fide purchaser for value without notice. The rule of caveat emptor applies to judicial sales. *Goodbar v. Daniel*, 88 Ala. 583, 7 South. 254; *Thomas v. Glazener*, 90 Ala. 538, 8 South. 153; *Lindsay v. Cooper*, 94 Ala. 170, 11 South. 325; *Clemmons v. Cox*, 114 Ala. 350, 21 South. 426. There was no error in the decree of the chancellor, dismissing the cross bill and granting the relief prayed for in the original bill. Affirmed.

(121 Ala. 240)

FERRIS v. HOAGLAND et al.

(Supreme Court of Alabama. April 11, 1899.)

LEASE—LICENSE—BILL TO RESTRAIN TRESPASS—CANCELLATION OF CONTRACT—EQUITY—MOTION TO DISMISS—AMENDMENT—DEMURRER—REVERSAL.

1. A contract under which one person is to cultivate another's vineyard, gather and market the crop, and take his compensation out of the proceeds, the surplus to be returned to the owner, no time being fixed for termination of possession, is not a lease, but a contract of employment, though it states that the owner leased the vineyard to the other.

2. Where one agrees to cultivate another's vineyard, and to gather and market the crop, out of the proceeds of which he is to take his compensation, he has an irrevocable license to

enter on the land, and the owner cannot maintain a bill to restrain him from gathering the crop on the ground that it is a trespass, because he has not performed his contract as to cultivating the land.

3. Where one who has agreed to cultivate a vineyard, and to gather and market the crop, his compensation to be retained out of the proceeds, does the work unskillfully and injuriously, without the owner's fault, and he is insolvent, and the owner has substantially complied on his part, or such compliance has been waived, the owner is entitled to have the contract rescinded.

4. A bill by the owner of a vineyard to cancel an agreement with another to cultivate it, and gather the crop, because the latter has not performed on his part, will, on motion to dismiss, be regarded as amended so as to allege that the nonperformance was without the owner's fault, and that there was a substantial compliance by the latter, or a waiver thereof.

5. Where a demurrer to a bill on several grounds is improperly sustained as to one, the decree will not be reversed if the demurrer should have been sustained on one of the other grounds.

6. The refusal to dissolve an injunction until final decree is not improper where respondent's insolvency is alleged, and he has given no security to perform the decree.

Appeal from Cleburne county court; T. J. Burton, Judge.

Bill by J. A. Hoagland and another against Willett Ferris. From a decree overruling motions to dissolve a temporary injunction and to dismiss the bill, and overruling all grounds of a demurrer except one, respondent appeals. Affirmed.

The complaint avers that on February 13, 1898, plaintiffs entered into a contract with Willett Ferris, doing business under the name and style of Ferris, Anderson & Co., whereby the said Ferris contracted to do certain work upon the vineyard of the complainants in the way of caring for, pruning, trellising, staking, and tying up the vines in said vineyard; that no price was named in said writing to be paid Ferris, Anderson & Co. for the work specified, but a reasonable compensation was to be paid therefor. It was then averred that Willett Ferris, or Ferris, Anderson & Co. had failed to care for and perform the work upon said vineyard as the contract required, and had violated said contract, and breached its requirements, in that they failed to prune and trellis said vines, had failed to stake and tie up said vines, and had failed to "summer prune" said vines, as they had contracted to do; and that "the work he did on said vineyard was unskillfully done, and really worth very little or nothing to the vineyard," and in fact was an injury thereto, but that the said Willett Ferris now demanded and charged an unreasonable price for the work that he had done. It was then averred in the bill that Willett Ferris was claiming the right under said contract to the crop of grapes that were then on plaintiffs' vines, and that, although he had been forbidden to enter said vineyard, because he had not complied with the requirements of the contract, and had breached it, he had entered thereupon, and was gathering and disposing of the grapes in said vineyard,

and, if not restrained by a court of equity, he would deprive the complainants of their crop of grapes. The complainants further averred that Willett Ferris was insolvent, and unable to respond in damages for the alleged trespass, and that, unless he was enjoined from taking said grapes, the complainants would suffer irreparable loss. The complainants offered to pay whatever compensation, if any, might be ascertained by the court to be due said Willett Ferris. The prayer of the bill was that said Willett Ferris and Ferris, Anderson & Co. be enjoined from entering upon and taking any grapes or other things from said vineyard, and that the said contract be canceled and annulled. The contract referred to in the bill, and which was made an exhibit thereto, was in words and figures as follows: "State of Alabama, Cleburne County. Know all men by these presents: That we, John Hoagland and Josie Hoagland, known as the parties of the first part, and Ferris, Anderson & Co., as parties of the second part, all of the town of Fruithurst, Ala. That whereas, we, the parties of the first part, and owners of vineyard lot No. 1,237 in Cleburne county, Alabama, have this day leased unto the parties of the second part our vineyard lot with the following conditions, to wit: All the vines are to be pruned at once as fast as possible by the parties of the second part, and 60 rows of vines are to be trellised with one wire, and the parties of the first part are to furnish the posts therefor. The balance of the vines are to be restaked and tied up. Summer pruning and cultivating are to be done by the parties of the second part. The grapes are to be picked and marketed by parties of the second part, and all over paying for expenses to be paid to the parties of the first part. But, if not enough is received for the grapes of 1898 to pay the expenses, then the parties of the second part are to have the vineyard for the season of 1899 on the same conditions as 1898. But the parties of the second part are to trellis the balance of the vines, by the parties of the first part furnishing the posts therefor, and all that is received for the grapes of 1899 over paying the expenses are to be turned over to the parties of the first part, if any. [Signed] Josie Hoagland. Ferris, Anderson & Co. J. A. Hoagland." On the filing of the bill upon the complainants entering into a bond as fixed by the clerk, a temporary injunction was issued in accordance with the prayer of the bill. The respondent, Ferris, filed his answer to the bill, in which he admitted the execution of the contract, but denied the material allegations of the bill. This answer was sworn to. The defendant moved to dissolve the injunction on the denials of the answer. The defendant also moved to dismiss the bill for the want of equity, and demurred to it upon many grounds, the substance of which was that the complainants had a complete and adequate remedy at law, and that the matters and things complained of in said bill were not of equitable cognizance, and also upon the

following ground: "(11) It fails to show that complainants had any right to interfere with Willett Ferris or Ferris, Anderson & Co. in their or his purpose or avowed intention to gather said grapes, inasmuch as it fails to show that complainants had or would have any right to said grapes, or any portion thereof; it fails to show what said grapes were worth, and what defendants, or either of them, was entitled to for the work they had done on said vineyard, and fails to show that said grapes were worth more than Willett Ferris, or Ferris, Anderson & Co. were entitled to for said work." Upon the submission of the cause upon the demurrers and motions, the court overruled both the motion to dissolve the injunction and the motion to dismiss the bill for the want of equity, and overruled all the grounds of demurrer except the ground numbered 11, which was sustained. From this decree the respondent appeals, and assigns the rendition thereof as error.

Matthews & Whiteside, for appellant. Merrill & Bridges, for appellees.

SHARPE, J. A lease carries to the lessee the right to the possession of the leased premises. 12 Am. & Eng. Enc. Law, 976; Callen v. Hilly, 14 Pa. St. 286. Such possession the landlord has no right to disturb until the expiration of the term, unless under the terms of the contract. Warner v. Abbey, 112 Mass. 355; Darling v. Kelly, 113 Mass. 29. If a right be granted by the owner of land to the grantee merely to be upon or to do acts or work upon land, it is a license, and not a lease. Riddle v. Brown, 20 Ala. 412; Rap. & L. Law Dict. 735; 13 Am. & Eng. Enc. Law, 539; Cook v. Stearns, 11 Mass. 533. If the contract mentioned in the bill of complaint is a lease, then the theory advanced by appellees that the bill has equity for the restraint of a trespass by defendant upon the vineyard must fall, since a trespass, being an injury to the possession, cannot be committed by one who is in rightful possession. The use of the word "lease" in the contract is evidence that the parties meant what the word implies; but, the guide to construction being the intent of the parties, the whole instrument must be examined in view of the subject-matter of the contract, the situation of the parties, and the objects to be accomplished, so far as they are declared by the contract, in determining the rights and interests created by it. Here a vineyard was to be cultivated, trimmed, and trellised, and the grapes, when ripe, were to be gathered and marketed. By the agreement, defendant undertook to do the work, and depend for his compensation upon the crop, with the privilege of reserving it therefrom, and of having the vineyard upon similar terms for the second year if the crop of the first was insufficient to pay him; the surplus proceeds to be paid to complainants. There was no rent to be paid, or sharing in the crop to be had; the sole interest of the defendant being the

collection from the proceeds of his pay. No time was fixed for the termination of any possessory interest, but by inference the completion of the work ended the defendant's right to be upon the premises. Such facts do not establish the relation of landlord and tenant, and the contract must be held one for employment, and not a lease. But, so far as it affects the question of trespass, the result is the same. The contract remained in force, there being no rescission by the parties. It not only conferred the right, but imposed the duty, upon defendant to enter upon the land in the execution of the work of gathering the crop as well as of cultivation. It gave a license to defendant to so enter, which, being granted upon a valuable consideration, was not revocable so as to destroy his right to collect from the crop after it had ripened, and so as to cause a failure in the performance of his obligation to gather and market same. The doctrine of estoppel in pais applies in such case. *Rhodes v. Otis*, 33 Ala. 578; *McAlister v. Walker*, 69 Mo. App. 496. For the purpose of restraining a trespass the bill is without equity, but, if it sufficiently shows a right in complainants to cancel or rescind the contract, it may stand for relief in that aspect. When the remedy for recovery of damages at law is inadequate, equity may decree the cancellation of a contract, at the instance of a party who has substantially complied with it, for its nonperformance by the other party, and where the parties can be placed substantially in statu quo. *Miller v. Phillips*, 31 Pa. St. 218; *Doughton v. Association*, 41 N. J. Eq. 556, 7 Atl. 479; *Light, Heat & Water Co. v. City of Jackson (Miss.)* 19 South. 771; *Trust Co. v. Galesburg*, 133 U. S. 156, 10 Sup. Ct. 316. The contract implies the obligation on the part of defendant to do the work stipulated for in a husbandmanlike manner. The bill alleges, in effect, that it was done unskillfully, and was worthless and injurious to the vineyard. Such defective and worthless performance was equivalent to no performance, and, if such allegations were sustained by proof, it would entitle complainants to rescission, if the allegations and proof were sufficient in other respects. To entitle complainants to such relief, it should appear that the nonperformance of defendant was due to no fault of theirs, and also that there was a substantial compliance, or a waiver by defendant of compliance, on their part, with the obligations rested upon them by the contract. The bill is defective in failing to aver such facts, but, the defect being amendable, the bill will be regarded, on the motion to dismiss it, as amended. The demurrer will be treated as a whole, and, having been sustained upon one of its grounds, the decree thereon will not be reversed. *Steiner v. Parker*, 108 Ala. 357, 19 South. 386; *McDonald v. Pearson*, 114 Ala. 630, 21 South. 534. In view of the alleged insolvency of the defendant, and the lack of security for his performance of the ultimate decree, we cannot say that the retention of the

injunction to await such decree was an improper exercise of the court's discretion. Finding no error in the record, the decree appealed from will be affirmed.

(121 Ala. 626)

BROWN et al. v. TILLMAN.

(Supreme Court of Alabama. May 9, 1899.)

JUDGMENTS — RES JUDICATA — MATTERS WHICH MIGHT HAVE BEEN LITIGATED.

1. A former suit, in which the question whether a sheriff held and sold certain property as a receiver of the court or as sheriff was in issue and determined in favor of his contention that he acted as receiver, where the judgment was not appealed from, is conclusive in a subsequent action between the same parties wherein the sheriff, as such, is sought to be held liable for the proceeds of the sale.

2. In considering whether an issue is res judicata, it is immaterial that such issue was raised in the former suit by the party insisting that it is res judicata, or that he supported the issue by evidence and induced the court to rule and charge in his favor on it.

3. Where an estoppel could have been pleaded in reply to a plea in a former suit, and judgment is rendered for defendant, the matters of original estoppel cannot be relied on in a second action as against the plea of res judicata.

Appeal from circuit court, Butler county; John R. Tyson, Judge.

This was an action brought by the appellee, W. L. Tillman, against the appellant J. F. Brown, as sheriff, and the sureties on his official bond, to recover damages for the alleged wrongful taking and selling by Brown of certain property, described in the complaint. The facts of the case are sufficiently stated in the opinion, as are the pleadings. After the court overruled the demurrers to plaintiff's replications, the defendant filed several rejoinders. To these rejoinders the plaintiff demurred, which demurrers were sustained. Issue was then joined on the replications, and upon the trial there were verdict and judgment for the plaintiff. The defendants appeal, and, among many other rulings of the trial court, assign as error the overruling of their demurrers to the plaintiff's several replications. Reversed.

Lane & Crenshaw and D. M. Powell, for appellants. J. C. Richardson, for appellee.

McCLELLAN, C. J. Tillman prosecutes this action against Brown, as sheriff, and the sureties on his official bond. The facts, substantially uncontroverted, are as follows: One Heard, a merchant, on January 5, 1891, sold and delivered his stock of merchandise to Tillman. On January 10, 1891, Murray and others, creditors of Heard, filed their bill in chancery against Heard and Tillman, attacking said sale and conveyance as fraudulent and void, and praying a decree to that effect, the application of the property to their debts, and the appointment of a receiver. Pilley was appointed receiver by the register on the same day, and at once took possession of the stock of goods. Tillman there-

upon appealed from the register's order appointing the receiver to the chancellor, and gave bond, under which the property was surrendered to him on January 13, 1891. On January 7, 1891, Stanton and McDonald severally sued out attachments against Heard on the ground that he had fraudulently disposed of his property. The writs went into the hands of Brown, the sheriff, and on January 14th, as soon as the property had been returned to Tillman under his appeal and supersedeas bond, he levied them upon a part of the stock of goods in question, and took possession under the levies. January 17th the chancellor disposed of the appeal taken from the order of the register by affirming that order, but he displaced Pilley as receiver, and in his stead appointed Brown, who, as sheriff, was at the time in possession of a part of the property. The chancellor was petitioned to vacate the levies of the attachments, but to this petition he responded: "While any lien which may have been acquired may not be, and is not, discharged, the same is held in abeyance until the further order of this court, and said sheriff shall manage and control the property under the direction of this court. He will not permit any of the same to be replevied, but shall hold the whole of the property as the receiver of this court." Tillman appealed from the order of the chancellor appointing Brown receiver, and that order was affirmed by the supreme court. 9 South. 514. In February, 1891, Brown, as sheriff, advertised the sale of the property upon which said attachments were levied to be made on March 5th. On March 4th Tillman petitioned the chancellor to restrain said sale. On March 11th Brown answered the petition under oath, stating that he had ceased to act as receiver since January 21, 1891, on which day the order appointing him receiver had been suspended by Tillman's appeal to the supreme court, and that he had turned over to Tillman all the property that came into his hands as receiver, except that part which he had levied said attachments upon, etc. The chancellor, on March 17th, denied and dismissed this petition, and Brown, as sheriff, acting under said attachments, and being indemnified in respect thereof, on March 30, 1891, sold the goods upon which the levies had been made, receiving at said sale the gross sum of \$1,203.47. It is confessed in the case that Brown has never paid or accounted for the money thus received to anybody, either as sheriff, or as receiver, or otherwise. On May 21, 1891, motions were made in the circuit court to vacate and set aside the attachment levies. On April 12, 1892, the cause of Murray and others against Heard and Tillman came on to be heard on its merits in the chancery court, and a decree was then rendered sustaining the sale by Heard to Tillman, denying relief, and dismissing the bill. This decree further provided for a settlement by Brown with the register; and on April 25th

Brown filed his accounts as such receiver with the register, but made no showing therein as to the property he had sold under the attachments, or as to the proceeds thereof, nor was he charged therewith on said settlement. In May, 1892, the motions pending in the circuit court to quash the levies of the attachments were granted, and said levies were set aside and vacated. On October 1, 1892, Tillman brought suits in trespass in the circuit court against Brown, the sheriff, and the plaintiffs in the attachments, for the wrongful taking of the property on which the attachments were levied. On the trial of said causes Brown and the other defendants thereto respectively insisted, by pleas, motions to exclude testimony; and requests for instructions, and induced the court to rule and charge, that plaintiff was not entitled to recover the value of the goods so taken, or the proceeds of the sale of such goods, but only the damages that may have been sustained by plaintiff from the detention thereof by Brown, as sheriff, from the time of the levy to the time Brown was appointed receiver, a period of three or four days; and upon these rulings, thus induced by Brown, the jury returned a verdict for \$25 only as damages, and judgment was entered, May 29, 1894, accordingly. No appeal was taken from this judgment. On November 8, 1892, after due notice, the report of the register on the accounts, acts, and doings of Brown as receiver was submitted for confirmation. There were no exceptions to the report, and on December 12, 1892, it was in all things confirmed. In the report thus confirmed Brown was not charged with the property now in controversy, nor with the proceeds of the sale thereof, nor concerning any act relating thereto. Brown's immunity from liability to account for this property or its proceeds was rested in the chancery court on the idea that he held it, disposed of it, and received the proceeds of its sale, not as receiver in the chancery cause, but as sheriff under the writs in the attachment suits; and in the actions of trespass at law he rested his immunity from liability for the property and for its proceeds on the ground that he had held it all the time it was in his possession, except the three or four days intervening the levy of attachments and his appointment as receiver, and had sold it and received the proceeds of its sale, not as sheriff, but as receiver in the chancery case.

On July 25, 1894, Tillman demanded of Brown the property, or, if he had disposed of it, the reasonable value thereof. Brown failing to comply with this demand, Tillman, on September 30, 1894, instituted this suit. The complaint contains two counts. Each is for a breach of Brown's official bond as sheriff. Each is based upon Brown's dealings with the plaintiff's property under writs running against the estate of Heard. The first count avers that plaintiff lost his said property by reason of Brown's taking and disposing of it

under said writs, and claims the value of it with interest. The second also counts upon such loss, alleges the sale by Brown under the writs, and claims the sum that Brown received at said sale. There was a demurrer to the complaint on the ground that the two counts were repugnant and inconsistent, and misjoined, in that (it is insisted) the first count is *ex delicto*, for Brown's tort in taking and disposing of the property, and sounds in damages, and that (it is further insisted) the second count ratifies Brown's dealings with the property, waives his tort, and claims the money he received at the sale in assumption. It would seem to follow, from what is said above, that the complaint is not open to the objection taken by the demurrer. But we need not decide this point. Conceding defendants' position in this regard, the only effect would be the emasculation of the first count. On the theory of the demurrer, the second count waives the tort relied on in the first. The fact that the tort is relied on in the first cannot affect the waiver of it in the second count, nor the integrity of that count. Had the demurrer been sustained, the first count would, of necessity, have gone out of the case. That count was effectually put out of the case by the charge of the court for a verdict on the second count, and the bringing in of a verdict on that count; so that, if error was committed in overruling the demurrer, it involved no injury to the defendants.

The defense interposed was that the issues presented by the complaint here had been adjudicated in a former action between Tillman and Brown,—the action brought by Tillman against Brown and the obligors on his bond of indemnity, in trespass, for the taking of the property involved in this suit,—wherein judgment was rendered for the plaintiff in the sum of \$25, which judgment has been paid. To the several pleas setting up this former adjudication the plaintiff replied substantially as follows: The former action, judgment therein, and payment of the judgment are admitted, and so, also, that said judgment has not been set aside or reversed, but is still of full force; and the plaintiff goes on to say: (1) That in said action he offered evidence showing that Brown had sold the property in question after levying upon the same, and the extent of his damages resulting from such disposition of said property, and sought in said action to recover said damages; that said Brown and the other defendants in said action offered evidence tending to show that Brown held the property as receiver under the appointment of the chancery court, and, while so holding it, sold it; that said defendants asked the court to rule in said case that plaintiff could have no recovery for any damages by reason of the sale of said goods, and by objection to the relevancy of testimony as to said sale and by requests for instructions to the jury they induced the court to hold and to charge the jury

that the plaintiff could not recover in said action on account of said sale; and that there was no issue as to said sale in said case. Wherefore plaintiff says that there was no adjudication of his present cause of action in said former suit, and that the said Brown and his co-defendants in this cause are, by reason and means of the acts and doings of said Brown in the former cause, whereby he procured the court to rule that there was no issue in said former suit as to plaintiff's alleged damages arising out of the sale of said goods, estopped now to maintain that the cause of action of plaintiff arising out of said sale has been adjudicated: (2) That the defendants are estopped from setting up as a defense in this suit that one of the issues in the former suit was plaintiff's damages arising out of the sale of said goods by Brown as sheriff, because in said action the defendant Brown and others induced the court to hold that there was no such issue in that cause, in this way: that said Brown and the other defendants therein pleaded and adduced evidence to show that Brown, after January 17, 1891, held and sold said property while it was in his possession as receiver of the chancery court, and thereby and otherwise, at their instance and request, the court was induced to hold, and did hold, that by reason of the possession of said Brown as receiver there was no issue in said cause as to the sale of said goods, and the issue that passed into judgment in said cause was upon the plea of said Brown that he held said goods as receiver when he sold them, whereon Brown induced the court to direct a verdict that the plaintiff could not recover in said action for the trespass of selling said property; that, on account of the said plea and the evidence offered by said Brown, the only trespass for which the plaintiff recovered in said cause was for the taking of said goods and holding the same for the three or four days intervening the levy and Brown's appointment to be receiver in the chancery suit. (The third replication is a mere joinder of issue on the pleas.) (4) That in the chancery cause of Murray and others against Heard and Tillman, the plaintiff here, respondent in that case, upon Brown's advertising said property for sale under said attachments, filed a petition to the chancellor, alleging that Brown had possession of said goods as receiver, and praying an order restraining said Brown from making said proposed sale; that said Brown answered said petition under oath prior to said sale, and alleged in his answer that his possession of said goods as receiver had terminated, and that he held and had advertised the same for sale as sheriff; and that, by reason of said answer and said averment therein, plaintiff's petition was denied by the chancellor, and Brown proceeded to sell said goods as sheriff. Wherefore plaintiff now claims and alleges that defendants are estopped to deny in this action that Brown sold said property as sheriff.

There were demurrers severally to these replications, and the circuit court overruled them. Those to the first and second replications made the objection that those replications showed that one issue in the former case was whether Brown held possession of the property after January 17, 1891, and sold the same, March 30, 1899, as receiver of the chancery court, or as sheriff, acting under the writs of attachment; and it is very clear to us, from the replications, that that issue was in that case, was litigated in the trial thereof, and was determined in favor of Brown,—the court holding that he held the property and sold it as receiver, and not as sheriff. This, in our opinion, is fatal to the replications in question. Showing these facts, so far from answering the pleas of former adjudication, they but confess, not only the adjudication pleaded, but its tenor and scope, to the inclusion therein of a judgment upon an issue in the present action vital to the plaintiff's cause of action. It is of no consequence, of course, that the rulings of the court in this regard in the former action may have been erroneous. Assuming they were, plaintiff's only remedy against the consequent judgment was an appeal from it. While it stands unreversed, it is conclusive, as if no error were committed in its rendition. "On a second trial, it can never become an inquiry whether the first issue was rightly determined, either in matters of law or of fact. Whether the issue was within the scope of the pleadings, whether it was the same as that on trial, and whether it was submitted and determined on its merits, are the subject and extent of permissible testimony on the defense of *res adjudicata*." *Haas v. Taylor*, 80 Ala. 459, 464, 2 South. 633, and authorities there cited; *Liddell v. Chidester*, 84 Ala. 508, 4 South. 426. Brown is here sued as sheriff, and the other defendants are sued as sureties on his official bond as sheriff, for that, in that capacity, he wrongfully took, held, and sold plaintiff's property. A vital issue is whether he did these things as sheriff. That issue was within the scope of the pleadings on the former trial, and it was on that trial submitted and determined, properly or otherwise, on its merits. That determination being pleaded here, the issue itself cannot be here again gone into. It is forever foreclosed. Nor is it of any consequence that the issue was made by the present defendant Brown in the former case. If presented at all, it had to be made by one of the parties to that suit; and, presenting a matter of defense, it was upon the defendant therein to make it. And it is equally immaterial that the party presenting the issue naturally supported it by evidence, and induced the court to rule and charge in his favor upon it. All judgments of courts are rendered at the instance of parties to them; and a judgment can be none the less determinative of the issues and conclusions on them upon which the judgment is rested because it is arrived at in line with the pleadings and

other insistence of the party in whose favor it is entered. In the case at bar, the rulings and judgment in the former suit to the effect that Brown held and sold the property as receiver, and the further consequent ruling that he could not be held to answer for its value or for the proceeds of its sale as sheriff, and for taking and holding and selling it under the attachments, are none the less binding upon the plaintiff, for that they were made and entered at Brown's instance and request. There is no matter of estoppel set up in these replications Nos. 1 and 2. The theory that he is estopped to insist upon the former judgment, because it was rendered at his instance, is wholly untenable. His contention here is directly in line with his contention there. If he were being sued here as receiver, he might well be estopped—by his pleadings, acts, and doings in the former case, where he insisted that he held and sold the property as receiver, and induced the court to so hold—to now say that he in fact did not hold and sell the property as receiver. He cannot recover in one case on pleas setting up that he was receiver and not sheriff, and in another on pleas alleging that he was sheriff and not receiver, when his original contention and the results flowing from it are properly brought to the court's attention in the second suit; but, having formerly pleaded and recovered on his receivership, he not only may rely upon that judgment in a subsequent action, but, if not to his interest to do so, he may be forced to stand upon it, and estopped to deny it. *Lehman v. Clark*, 85 Ala. 109, 4 South. 651. Our conclusion, therefore, is that the circuit court erred in overruling the demurrer to replications 1 and 2.

A judgment is conclusive against every defense that might have been made against it, whether pleaded or not. Where a plaintiff recovers on a cause of action which he might have been estopped to assert on matters then existing, but which were not pleaded, he cannot afterwards be estopped by such matters to rely on his judgment; and where a defendant recovers—i. e., defeats plaintiff's recovery—on a defense pleaded which might have been eviscerated by the replication of matters which would have estopped him to rely on such defense, such matters of original estoppel are foreclosed. They cannot be relied upon by the plaintiff in a second action against the defense of a former judgment. Their existence only argues that the former judgment was improperly rendered, or, accurately speaking, that its rendition would have been erroneous, had the estoppel been replied to the plea. Hence our conclusion that the fourth replication was also bad. The matter set up in it would have been good against Brown's plea, in the former suit, that he held and sold the property as receiver. Having in the chancery cause answered the petition for an order restraining the sale of the property, which petition proceeded on the ground that he had possession of the goods as receiver, and in his

answer stated under oath that his possession as receiver had terminated, and that he held and had advertised the property for sale as sheriff, acting under the writs of attachment, and having by such averment induced the chancellor to refuse the restraining order, he should not have been allowed to say, in the subsequent action against him as sheriff, that he held the property and had sold it as receiver, and doubtless would not have been so allowed, if his said answer and the decree of the chancellor upon it had been brought to the attention of the court by a replication to his plea setting up the receivership in the action of trespass. But it was not so replied to that plea. The plea was held to be good by the court, and held to be proved by the jury, and judgment went accordingly. That judgment must stand as determinative of the issues involved on the pleadings, though another issue might have been made by replying this matter of estoppel to the plea, and though, upon said issue being made, the judgment rendered would not have been rendered. The matter of estoppel not having been replied to that plea, and judgment on the plea having been entered for the defendant, the estoppel is as fully foreclosed and emasculated as if it had been there replied, and there had been judgment for the defendant, the estoppel to the contrary notwithstanding. We hold, therefore, that the fourth replication was no answer to the plea of former adjudication, and that the court should have sustained the demurrer to it.

Defendants proved their pleas of former adjudication, and, with the special replications eliminated from the case, they will be entitled to the affirmative charge on another trial. Reversed and remanded.

(121 Ala. 106)

DANFORTH v. McELROY.

(Supreme Court of Alabama. April 18, 1899.)

WAREHOUSE RECEIPTS—RIGHTS OF BONA FIDE HOLDERS.

Under Code, § 4222, providing that warehouse receipts, unless stamped "Not negotiable," may be transferred by indorsement, so that the transferee will be deemed the owner of the property therein specified, so far as to give validity to any transfer made by him, a purchaser for value, without notice, from one to whom the receipt was indorsed by the original holder in payment of a gambling debt, has title to the property, as against the original owner.

Appeal from circuit court, Jefferson county; James J. Banks, Judge.

Detinue by Lizzie McElroy against the McKnight Warehouse Company. A. T. Danforth intervened as claimant. From a judgment for plaintiff, claimant appeals. Affirmed.

The defendant filed its answer, suggesting A. T. Danforth as claimant of the cotton sued for. After this suggestion, the claimant filed a plea alleging that said bale of cotton was his, and "that the title had never passed from him; his indorsement on said cotton receipt

having been procured in fulfilling a gambling contract, and for no valuable consideration." Upon issue thus formed, the cause was tried upon an agreed statement of facts, which was as follows: "Claimant is a farmer, and deposited in the warehouse of McKnight one bale of cotton shortly before the bringing of this action. The value of said cotton was \$30. He received from McKnight, the warehouseman, a warehouse receipt therefor. That night, or shortly thereafter, claimant went on a spree, and played cards and gambled with certain parties in the city of Birmingham. During the pendency of the game, claimant lost in gambling a considerable amount of money, and for such gambling consideration assigned and transferred in writing his said warehouse receipt. No other consideration was paid for said warehouse receipt. Plaintiff at the time was the manager and proprietor of a house, with furnished rooms to rent. One Al Grey rented rooms from her, and was indebted to her in the sum of \$12, and, on demand being made on him for such rent, settled with plaintiff in the following manner: He transferred to her the said warehouse receipt for the payment of the rent due, \$12, and \$8 paid to him by plaintiff. Plaintiff had no knowledge, directly or indirectly, of the acquisition of the receipt at a gambling table or otherwise, was not a party or privy to said gambling, nor knew anything about it. The party from whom she obtained said warehouse receipt left the city shortly afterwards, and plaintiff has not seen him since. The same day the warehouse receipt was obtained by and transferred to her, which was the day after it was transferred by Danforth, she caused demand to be made upon Mr. McKnight, the warehouseman, for the cotton, and he refused to deliver it on said demand; and this was about noon. Said receipt had on it only the indorsement of Danforth. The words 'Not negotiable' did not appear on said warehouse receipt." The court, hearing the cause without the intervention of a jury, rendered judgment for the plaintiff. From this judgment the claimant appeals, and assigns the rendition thereof as error.

Vassar L. Allen, for appellant. A. A. Coleman, for appellee.

SHARPE, J. By force of the statute, gambling contracts are void, and it has been held that invalidity follows the contract into the hands of a bona fide holder for value. Hawley v. Bibb, 69 Ala. 52. In respect of their use, as authorized by statute in the disposition of property, warehouse receipts are not contracts. By the statute, unless stamped "Not negotiable," they "may be transferred by the indorsement thereof, and any person to whom the same is transferred must be deemed and taken to be the owner of the things or property therein specified so far as to give validity to any pledge, lien or trans-

fer made or created by such person." Code, § 4222. In such use the receipts do not represent money or value, but are the representatives of property, symbolizing its delivery into the possession of the assignee, investing him with such rights as it is the intention of the parties to pass in the property itself. *Bank v. Hurt*, 90 Ala. 130, 12 South. 568.

The agreed statement of facts shows that the warehouse receipt for the cotton in suit was transferred by the claimant, Danforth, to Grey, in payment of a gambling debt, that thereafter Grey sold and transferred it without further indorsement to the plaintiff, and that the receipt "had on it only the indorsement of Danforth." The facts do not otherwise show the form of the indorsement; but, since an indorsement is made by writing the transferor's name only, the statement that the receipt had on it only the indorsement of Danforth is equivalent to the statement that the indorsement was in blank. As in the case of other instruments which may be transferred by indorsement, such blank indorsement carried with it authority to the plaintiff to complete the form of transfer to herself, and no further indorsement by Grey or Danforth was necessary. The facts further show that the plaintiff bought for value and without notice that Grey's acquisition rested upon a gambling consideration. The transfer to her, under the claimant's indorsement, was precisely of the character to which the statute in terms gives validity. It was not the transfer of a void contract, but a transfer to the plaintiff of the cotton specified in the receipt. The purchase having been induced by the claimant's indorsement, he is estopped to assert, as against the plaintiff, the claim which under the statute he might have asserted against Grey. The judgment of the circuit court will be affirmed.

(121 Ala. 446)

NORTON v. KUMPE et al.

(Supreme Court of Alabama. April 19, 1899.)

REGISTER OF DEEDS—INDEXING CONVEYANCES—LIABILITY ON OFFICIAL BONDS—CONSTRUCTIVE NOTICE—DAMAGES—PLEADING—LIMITATION OF ACTIONS.

1. Act Feb. 28, 1887 (Acts 1886-87, p. 661), requires certain judges of probate to keep a general index of the record in their offices of all deeds and mortgages of lands, or any estate or interest therein. A judge failed to index a mortgage recorded in his office, and plaintiff, after searching such index, purchased the premises described in the mortgage, in the belief that it was unincumbered, and was dispossessed by foreclosure. *Held*, that the statute imposed the performance of a ministerial duty on the judge, and that plaintiff, in an action on his official bond, was entitled to recover nominal damages, and such actual damages as proximately resulted from the failure to index the mortgage, regardless of the motive of the judge in not indexing the mortgage.

2. Act Feb. 28, 1887 (Acts 1886-87, p. 661), requiring a judge of probate to prepare and keep a general index of the records in his office of all deeds and mortgages of lands, or any estate or interest therein, applies to prior as well

as subsequently recorded conveyances, and demands the same degree of care and accuracy in its execution as did the statutory direction to record and index the conveyances.

3. The constructive notice which the registration statutes impute from the filing of a conveyance for record is for the protection of those claiming under it, and does not protect the recording officer from liability for failure to index a conveyance when required so to do by law.

4. A complaint which shows the plaintiff to be entitled to nominal damages is not demurrable.

5. If a complaint alleges damages which are too remote, defendant's remedy is by motion to strike out, and not by demurrer.

6. When the complaint alleges proximate damages from a wrongful act, the amount recoverable is to be determined by the proof.

7. The obligors in an official bond are liable for the nonperformance of a ministerial duty imposed by a statute passed subsequent to the execution of the bond, under Code, § 3087.

8. The statute of limitation, to be available as a defense, must be set up, not by demurrer, but by special plea, in order that plaintiff may plead matters which would permit the bar from attaching.

Appeal from circuit court, Lawrence county; H. C. Speake, Judge.

Action by T. H. Norton against J. O. Kumpe and others on an official bond. From a judgment in favor of defendants, plaintiff appealed. Reversed.

The complaint, as amended, averred the following facts: James C. Kumpe was elected judge of probate of Lawrence county, Ala., in August, 1886, and qualified and took upon himself the duties of the office, which he continued to exercise until his re-election in 1892. Before entering upon the duties of the office after his election in 1886, he executed a bond conditioned for the faithful performance of the duties of his office, with the other defendants in this case as sureties thereon. On February 28, 1887 (Acts 1886-87, p. 661), an act of the general assembly was approved, which required the probate judge of Lawrence county "to prepare and keep general, direct and reversed index of the records in his office, of all deeds and mortgages of lands or any estate or interest therein." On April 6, 1881, Nellie Dickson, who owned lands situated in Lawrence county, executed, with her husband, a mortgage upon said lands to one Moore, which was filed for record in the office of the judge of probate of Lawrence county, and recorded in Mortgage Record No. 11. Afterwards, in December, 1888, Nellie Dickson and Barton Dickson sold to the plaintiff, T. H. Norton, the lands which they had previously mortgaged to Moore. Subsequent to this sale, the note to secure which the mortgage was given not being paid, the lands were sold under said mortgage, and Norton was dispossessed of them by the purchaser at said sale, and said lands became wholly lost to the plaintiff. The plaintiff then alleged in said complaint that prior to the purchase of said lands from Nellie Dickson in December, 1888, he examined the general, direct, and reversed index which was kept in the office of the judge of probate of Lawrence county, and said index

did not disclose the existence of the mortgage on said lands from Nellie Dickson to Moore, and that, thereupon, relying upon said index, which did not disclose any incumbrance upon said lands, he purchased the same, and paid the purchase money. It was then averred that the said J. C. Kumpe, as judge of probate, had not faithfully performed the duties of his office, and had committed a breach of the conditions of his official bond, in that he did not prepare and keep a correct general, direct, and reversed index of the records in his office of all deeds and mortgages of lands, and, further, that he did not enter or have entered upon the general, direct, or reversed index of the records in his office the said mortgage which was executed by Nellie Dickson and her husband to Moore, previous to the purchase and payment for the said lands by the plaintiff, and that by reason of such failure by James C. Kumpe, as judge of probate, the plaintiff was induced to believe that said lands were unincumbered, and he purchased the same and paid the purchase money therefor, and was therefore injured to the extent of the money so paid for said lands. To this complaint the defendants demurred upon many grounds, among which were the following: (1) The complaint fails to show that the mortgage was not indexed in Mortgage Record No. 11, where it is alleged in the first, second, and third counts of said complaint the said mortgage was recorded; (2) because the complaint fails to show that the plaintiff examined all the mortgage records of the probate office to ascertain whether the said property was incumbered, before buying the property described in the complaint; (3) because it is not shown by said complaint that the act omitted to be done was omitted with the intention to injure the plaintiff; (4) because it is shown in said complaint that the mortgage from Nellie Dickson to Moore was recorded in Mortgage Record No. 11 of Lawrence County at the time the plaintiff purchased the lands described in the complaint. The court sustained each of the grounds of demurrer above set out, and overruled the other grounds of demurrer. Among the grounds of demurrer which were overruled was the following: That it is shown by the complaint that the action on the bond was barred by the statute of limitations of six years before the institution of this suit. The plaintiff duly excepted to the court's sustaining the grounds of demurrer which are set out above, and, the plaintiff declining to plead further, judgment was rendered in favor of the defendants. The plaintiff appeals, and assigns as error the ruling of the court in sustaining the several grounds of demurrer.

James Jackson and D. A. McGregor, for appellant. Lowe & Almon, James Abercrombie, and Kirk & Almon, for appellees.

SHARPE, J. By the act of February 28, 1887 (Acts 1886-87, p. 661), probate judges of

each of certain counties, including Lawrence, were required "to prepare and keep a general, direct and reversed index of the records in his office, of all deeds and mortgages of lands or any estate or interest therein." A ministerial duty was thus enjoined upon the probate judge, as the recording officer, in which all persons affected by the notice imparted by registration, and all having occasion to use the index in the examination of the records, have a direct interest. It is a principle of general application that for the neglect of a ministerial duty which a public officer owes, not merely to the public, but to individuals, an action will lie in favor of the individual who may be injured thereby. *Cooley, Torts, 383; Commissioners v. Duckett, 20 Md. 468; Stephenson v. Manufacturing Co., 28 U. S. 292, 84 Fed. 114.* And the motive of the officer is immaterial. *Clark v. Miller, 54 N. Y. 528.* The principle applies to a recording officer for failure to comply with a statutory requirement to index records of conveyances. *Throop, Pub. Off. § 748; Cooley, Torts, 383, 386; Hunter v. Windsor, 24 Vt. 327; Green v. Garrington, 16 Ohio St. 549; Morton v. Smith (Tex. Civ. App.) 44 S. W. 683; Insurance Co. v. Dake, 87 N. Y. 257; Jennings' Lessee v. Wood, 20 Ohio, 281; 20 Am. & Eng. Enc. Law, 564.* The direction to prepare and keep a general, direct, and reversed index of prior as well as subsequently recorded conveyances was as imperative, and demanded the same measure of care and accuracy in its execution, as did the statutory direction to record and index in the first instance. The purpose of the enactment was to afford facilities for a search of the record, and such purpose would fail if no reliance could be had upon the general index. If it carried no presumption of verity, the searcher must resort to the records, as if there was no general index. The general index, if consulted at all, would become a snare, rather than a guide, if, when purporting to point to all incumbrances, it was silent as to some. The mere constructive notice which the registration statutes impute from the filing of a conveyance for record is for the protection of those claiming under the conveyance, and does not exist for the protection of the recording officer from liability for nonperformance of official duty.

If, by reason of a breach of the duty imposed by the statute upon the probate judge, the plaintiff's search of the records was rendered futile, and he was kept without actual notice of the Moore mortgage, and was so misled to his injury, as alleged in this complaint, then the plaintiff's right of action is complete, at least for the recovery of nominal damages, and also for such actual damages as proximately resulted from the wrong.

As a general rule, a complaint good to recover even nominal damages is safe from demurrer. *Pryor v. Beck, 21 Ala. 393.* If it allege damages which are too remote, the defendant's remedy for its correction is by mo-

tion to strike out. Within the allegations of proximate damages, the proof must control as to what are recoverable. The question as to what special damage may be recovered is not raised by this record.

Though the duty was created subsequent to the execution of the bond, its performance was within the obligation, and binding upon the sureties as well as upon the officer. Code, § 3087, and cases there cited.

To be availed of as a defense to an action, the statute of limitations must be set up, not by demurrer, but by a special plea; otherwise the plaintiff has not the opportunity of pleading matter which would prevent the bar from attaching. *Huss v. Railroad Co.*, 66 Ala. 472. The judgment in sustaining the demurrer was erroneous, and must be reversed. The cause will be remanded.

(121 Ala. 572)

GWIN et al. v. NATIONAL BUILDING & LOAN ASS'N.

(Supreme Court of Alabama. May 10, 1899.)
BUILDING ASSOCIATIONS — PAYMENTS ON STOCK —
PARTIAL PAYMENTS — SATISFACTION OF RECORD.

A borrowing member of a building association was to pay so much a month on her stock, which included premium, dues, and interest, which payments were to continue until, with the dividends, they equaled the par value of the stock. Under the by-laws of the association, whenever the stock was fully paid up, it could be applied in part payment of the loan, but, in case of six months' default in the payments, they were to be forfeited. *Held*, that the payments were not partial payments on the mortgage securing the loan, and hence the borrower could not compel the association to enter them as a partial satisfaction on the margin of the record of the mortgage as authorized by Code, § 1065.

Appeal from city court of Gadsden; John H. Disque, Judge.

Action by Mattie Gwin and another against the National Building & Loan Association. There was a judgment for defendant, and plaintiffs appeal. Affirmed.

This action was brought to recover from the defendant the statutory penalty of \$200 for its failure to enter upon the margin of the record of a mortgage in the office of the probate court partial payments upon said mortgage, which plaintiffs had, in writing, requested the defendant to do. The defendant pleaded the general issue. On the trial it was shown that Mattie Gwin was a stockholder in the National Building & Loan Association, owning 20 shares of the capital stock, and, desiring a loan on said shares of stock, she made application therefor, and obtained said loan, by executing to the building and loan association a mortgage upon certain lands owned by her, together with the shares of stock. Her husband joined her in this mortgage. In the contract looking to the negotiation of the loan, and in the mortgage, the borrower, Mattie Gwin, agreed to pay \$19 per month upon her stock, — \$7 as premium, \$7 as monthly dues, and \$5 as interest; and it was further stipu-

lated that said payments should continue until the dues so credited upon said stock, together with the dividends declared thereon, should equal the par value of the stock. After having held the said stock for $4\frac{1}{2}$ years, the said Mattie Gwin and T. B. Gwin served written notice upon the National Building & Loan Association, requesting it to enter on the margin of the record of the mortgage given by them to it the dates and amounts of all partial payments made upon said mortgage, and that said association failed for 30 days to enter said partial payments as demanded. The cause was tried by the court without the intervention of a jury, and upon the hearing of all the evidence the court rendered judgment for the defendant. The plaintiffs appeal, and assign as error the rendition of said judgment.

Geo. D. Motley, for appellants. W. E. Hol-
loway, for appellee.

TYSON, J. Partial payments made by a mortgagor upon the mortgage debt must be such as he is entitled to have applied to the satisfaction of the debt pro tanto at the time he makes the demand of the mortgagee to enter them upon the margin of the record of the mortgage. If this right is undeterminable, or dependent upon an act to be performed in the future, at the date of the making of this demand, he cannot maintain an action under section 1065 of the Code against a mortgagee who fails or refuses to make the entry after demand in writing within the time prescribed. The appellants became members of the defendant building and loan association, and subscribed for 20 shares of its stock, and obtained a loan of \$1,000, securing their contract by mortgage. Under the by-laws of the association they were entitled to one vote for each share of stock owned by them, and otherwise to participate in the management of the association. On the 1st day of the months of January and July in each year the association was required to apportion and credit all undivided profits upon the shares in force. The dues required to be paid by the shareholders are the only source of income to the association by which any profits can be accumulated by the association to be applied to the payment of the shares of stock. Whenever the stock has been fully paid up by the profits earned by the association, the holder of the stock can have its value applied in part payment of the loan. And it is this alone that they have the right to have applied as a credit upon their mortgage debt. And this they cannot demand and enforce should they make default for six months in the payment of their dues, for upon such forfeiture they would not be entitled to have the mortgage debt abated to the extent of the aggregate of the payments made by them on their stock subscription prior to their default. *Southern Building & Loan Ass'n v. Anniston Loan & Trust Co.*, 101 Ala. 582, 15 South. 123, and authorities there cited. It is nowhere shown.

nor is it contended here, that appellants' stock has matured, or that they have repaid their loan; non constat, they may have, after the institution of this suit, made default. Under the authority last above cited the monthly payments are not partial payments upon their mortgage. See, also, *End. Bldg. Ass'ns*, §§ 132, 477, 480-482. The judgment must be affirmed.

(121 Ala. 485)

NEW SOUTH BUILDING & LOAN ASS'N v. BOWIE.

(Supreme Court of Alabama. May 16, 1899.)

MORTGAGES—INTEREST—PARTIAL PAYMENT—SATISFACTION OF RECORD—DEMAND.

1. Payment of interest stipulated in the mortgage is a "partial payment" within Code 1886, § 1868, requiring a mortgagee to enter partial payments on the margin of the mortgage record.

2. A letter from a mortgagor's attorney to the mortgagee identified the mortgage, and requested that the mortgagee "enter on the margin of the record of this county where said mortgage is recorded each and every partial payment made thereon" by the mortgagor, and stated, "In any event, we demand the entry of partial payments to be made on the margin of the records." *Held*, that under Code 1886, § 1868, requiring a mortgagee to enter partial payments on the margin of the record on written request of the mortgagor, this was a sufficient request, and was not affected by the fact that the letter also contended the mortgage was paid in full, and demanded satisfaction in full, and erroneously contended other payments were partial payments.

Appeal from circuit court, Talladega county; George E. Brewer, Judge.

Action by A. Y. Bowie against the New South Building & Loan Association. There was a judgment for plaintiff, and defendant appeals. Affirmed.

This action was brought by the appellee, A. Y. Bowie, against the appellant, the New South Building & Loan Association, to recover of the defendant the statutory penalty of \$200 for failure to enter on the margin of the record of a mortgage the dates and amounts of partial payments made thereon, after request to do so in writing. As originally framed, the complaint contained three counts. Demurrers being interposed to each of these counts, they were amended. Demurrers were again interposed to the counts, and were sustained to the first and third counts of the complaint. In the second count the plaintiff averred that, after having executed to the defendant a mortgage on certain real estate, which mortgage was recorded in a certain designated book of mortgages in the office of the probate judge of Talladega county, and after the execution of said mortgage, beginning on March 1, 1891, the plaintiff paid to the defendant the sum of \$4 interest on said mortgage indebtedness, and continued to do so each month thereafter up to March 1, 1897. The mortgage above referred to was executed by the plaintiff to secure a loan of money made by the defendant to him in the sum of, to wit, \$800,

and then further averred that: "In and by said mortgage it was stipulated and agreed that the plaintiff was to pay to the defendant the sum of four dollars per month interest upon said loan for each month thereafter, which payment was to be made on, to wit, the last Saturday of each month thereafter, and said mortgage was executed to secure the payment of said interest, as well as principal; and it was further stipulated and agreed that the plaintiff was to pay the sum of four dollars per month on or by the last Saturday of each month thereafter as premium upon said loan; and plaintiff further avers that he was to pay to said defendant the sum of \$5.60 per month for each month successively after that time on, to wit, the last Saturday of each month, until the maturity of said mortgage indebtedness, which payment was called 'dues' upon alleged issue of stock made by the defendant to the plaintiff at or about the time of the execution of said mortgage." It was then further averred by the plaintiff in said count that defendant was requested by him, on March 20, 1897, in writing, to enter on the margin of the record on said mortgage the dates and amounts of all partial payments which it received on said mortgage, but that the defendant failed for 30 days after receiving said request to enter said partial payments on the margin of the record of said mortgage, and that by reason of such failure and such omission on the part of the defendant it has forfeited to said plaintiff the sum of \$200; wherefore he brings this suit.

To the second count of the complaint the defendant demurred upon several grounds, the substance of which is the following: (1) That the payments of interest on the mortgage indebtedness in monthly installments, as herein averred, are not partial payments on the mortgage indebtedness, or such a partial payment thereon as entitled the plaintiff to recover the statutory penalty for the failure on the defendant's part to enter such payments on the margin of the record of the mortgage after demand in writing; it being averred that all of such payments are payments of interest on the indebtedness, and none of such payments reduced the principal of the indebtedness; and said count shows affirmatively that the plaintiff made no "partial payment" on the principal of his indebtedness to the defendant secured by such mortgage. (2) On the ground that payment of premium and dues on stock as therein averred are no part of the indebtedness of \$800 secured by said mortgage. Such payments of said premium, dues on stock, and interest is not such a partial payment or payments on the mortgage debt as entitles the plaintiff to maintain this action. (3) It is not averred that any demand was made by plaintiff to enter said payments of premium and dues on stock on the margin of the record of said mortgage, nor is it averred that the payment of such installment of premium or dues on stock were secured by said mortgage. (4) It affirmatively appears in

said count as amended that no part of the principal indebtedness of \$800 secured by said mortgage was paid by the plaintiff, and no part of such principal is averred to have been paid. This demurrer to the second count was overruled, and to this ruling the defendant duly excepted. To this count of the complaint the defendant filed six pleas. The first and second pleas were, in substance, the general issue. The substance of the remaining pleas were as follows: Third. Plaintiff was indebted to it in the sum of \$800, which indebtedness was secured by a mortgage described in the complaint, and that the plaintiff had not, before the commencement of this suit, made any partial payment or payments upon the principal of said indebtedness. Fourth. That the plaintiff was a stockholder in the defendant corporation, owning eight shares of stock; and by the terms of such mortgage agreed to make monthly payments on said shares of stock, aggregating \$5 per month, and also stipulated to pay the defendant, as premium, 50 cents per month on every \$100 of money borrowed by him of defendant until such indebtedness should be taken up, aggregating \$4 per month, and averring that plaintiff borrowed \$800, and to secure such sum, and the note evidencing the same, executed to the defendant the mortgage in the complaint mentioned; and that said monthly payments on stock and the premium were not payments upon the said indebtedness of \$800 secured by such mortgage. Fifth. The plaintiff never requested or demanded in writing that defendant so indorse on the margin of the record of such mortgage the payment of dues on stock, the premium made by the plaintiff to the defendant, and that such dues owing by the plaintiff to the defendant on the stock of this defendant owned by him, and such premium, was an amount paid by the plaintiff under the rules and regulations of defendant, as a borrowing stockholder, plaintiff having borrowed \$800 from the defendant, and secured the same by said mortgage. Such dues on stock and premium averred to have been paid were no part of plaintiff's indebtedness to defendant on such loan, and the payments thereof were not partial payments of such indebtedness. Plaintiff had never fully paid or matured said stock before the commencement of this suit, and the plaintiff had never paid anything but the accrued interest on said indebtedness. Sixth. That plaintiff made no partial payments upon the principal of the indebtedness secured by said mortgage but the monthly installments of interest on the same as the same accrued, and that such payment of interest was not a partial payment of said debt of \$800 under the statute under which this suit is brought. Defendant filed an additional plea, which averred that the plaintiff was a stockholder in the defendant corporation, owning eight shares of stock, and the alleged payments of dues on stock were made on such stock, and were not made upon said debt in the complaint mentioned.

To each of the several pleas the plaintiff filed demurrers, which were, in substance, as follows: (1) That it was unnecessary to show that plaintiff made any partial payment or payments on the principal of the indebtedness to entitle him to maintain this action, and that it was unnecessary for him to show more than that he had made payments of interest as set out in the complaint, the receipt of which were not denied by the plea. (2) That it was immaterial whether payments made by him upon the alleged stock or upon the premium therein referred to were payments upon the principal indebtedness or not, since it is not denied by the plea that plaintiff paid interest upon said indebtedness, and defendant failed to credit such payments of interest. The demurrers to the fifth plea and sixth plea being, in substance, that said pleas showed affirmatively that plaintiff paid interest upon the loan as the same fell due. And to the additional plea the same grounds of demurrer were assigned and the further ground that the averment therein that said payments were dues on stock, and were made on the plaintiff's shares of stock, and not upon the debt, is immaterial to the issue, and is no answer to the complaint,—all of which demurrers were sustained.

The court, against the objection of the defendant, admitted in evidence a copy of a letter written by the plaintiff's attorneys to the defendant on March 20, 1897, as testified to by F. L. Vance, notice having been given for the production of the same. Two copies of such letter were offered and introduced in evidence against the defendant's objection, each being identical, and the objections to each copy being the same. The letter, in substance, referred to the mortgage by its date and record; that the writers had been employed by the plaintiff, or stated that the writers had been employed by the plaintiff, and that it was their contention that this mortgage had been paid; and requesting the defendant to mark upon the records of Talladega county the fact that it had been paid in full, and to return to them the papers; containing the further statement, as follows: "We further request that you enter upon the margin of the records of this county, where said mortgage is recorded, each and every partial payment made thereon by said A. Y. Bowie," stating that, unless the mortgage was satisfied on the records, and the papers returned to them, they would file a bill to cancel the same as a cloud on the title, and concluding with the clause: "In any event, we demand the entry of partial payments to be made on the margin of the records. We further demand the satisfaction of the mortgage upon the records." The objections to such letter, eight in number, were, in substance: (1) Because there is a demand to satisfy said mortgage in full. (2) That it is not a demand to enter on the margin of said records the payments of interest on such in-

debtedness. (3) There is no demand in such letter for the entry of the date and amounts of partial payments on such indebtedness on the margin of the record. (4) It is not stated that the partial payments therein referred to were partial payments made by the plaintiff to the defendant on the indebtedness. To the ruling of the court in admitting said letter in evidence, the defendant duly excepted.

The court also admitted, against defendant's objection, a letter purporting to be from the defendant, dated March 26, 1897, and purporting to be in reply to such letter of March 20th, the signature to said letter being typewritten; the substance of the objection being that there was no proof of the signature, or that it was made by any authorized agent of defendant, and the genuineness of such letter was not sufficiently proven. To which ruling the defendant excepted.

It was admitted that the plaintiff had paid to the defendant monthly installments of interest on the indebtedness secured by said mortgage, on or by the last Saturday of each month from the date of the mortgage to March 20, 1897. Defendant offered to prove that at the time of the execution of the mortgage the plaintiff was a stockholder in the defendant corporation, owning 8 shares of stock of \$100 each, and continued to own such stock to the time of the trial. The court refused to permit such proof, and sustained the plaintiff's objection thereto on the ground that it was immaterial and irrelevant, to which ruling of the court the defendant excepted.

The cause was tried by the court without the intervention of a jury, and upon the hearing of all the evidence judgment was rendered in favor of the plaintiff. From this judgment the defendant appeals, and all of the rulings of the court overruling the defendant's (appellant's) demurrers to the second count of the complaint as amended, and sustaining the plaintiff's demurrers to the defendant's pleas; and the ruling of the court in admitting in evidence the letter of March 20, 1897, written by the plaintiff's attorneys to the defendant, against the defendant's objection, and admitting the alleged letter of the defendant in reply thereto, together with the judgment of the court on the facts in favor of the plaintiff, are here assigned as error.

Whitson & Graham, for appellant. Brown & Dryer and Knox, Bowie & Dixon, for appellee.

MCCLELLAN, C. J. This is an action by Bowie against the New South Building & Loan Association to recover the penalty prescribed by section 1065 of the Code (section 1868, Code 1886) for a failure on the part of the defendant to enter alleged partial payments made by plaintiff upon a mortgage which he had executed to defendant on the margin of the record of said mortgage, request that such payments be so entered hav-

ing, the complaint avers, been made. There are really but two questions in the case, viz.: First, whether the payment of stipulated installments of interest are partial payments on this mortgage, under the statute; and, if so, second, whether the mortgagor made the statutory request that they be entered on the record of the mortgage. The mortgage, in terms, secures the payment of the debt and interest,—the sum of \$800 loaned to the mortgagor, and monthly installments of \$4 as interest thereon. It is shown—admitted, indeed—that divers sums of \$4 each have been paid under the mortgage as interest on the principal of \$800 from month to month; that none of these payments have been entered on the record, and, for the purposes of this case, that nothing has ever been paid on the principal. Our opinion is that these payments of interest were "partial payments," within the intent and letter of the statute. They were secured by the mortgage in the same way that the principal is secured. The liability for their payment at maturity was upon the mortgagor and upon the mortgaged property, just as was the liability for the payment of the principal sum. At maturity these installments were just as much, in every sense, a debt from the mortgagor to the mortgagee secured by the mortgage as was the principal. To the extent of the amounts of the installments so paid the failure to enter the payments on the record was of the same detriment to the mortgagor as a failure to enter part payment of the principal would have been, and such failure is as clearly within the purposes of the statute. They are, in other words, within the scope and purposes of the enactment, and they also fill all its terms, if they can be said to be "partial payments." Under this mortgage the sum secured at any given time was made up of two items, viz. the unpaid principal and the accrued interest. The aggregate of these items was the amount to the reduction of which any payment less than the whole was to be applied. Any payment less than the total of principal and interest was essentially a "partial payment" of the sum secured. It is of no consequence that by the terms of the mortgage the monthly payments of four dollars were payments on and of the interest. Had there been no provision in the mortgage for the separate payment of interest, but only that the interest should be four dollars per month, and had these several payments of four dollars been made generally, without reference in the mind of the mortgagor to the interest, the law, even apart from our statute, would have applied them to the interest. And the statute not only so directs, but in doing so affords a definition of "partial payments," which embraces payments of interest only, and which is of special force as applied to the section (1065) we are considering, as the definition is part of the body of laws of which said section is another part. The statute referred to is section 2629 of the Code (section

1753, Code 1886), and is as follows: "Partial payments applied to interest.—When partial payments are made, the interest due is first to be paid, and the balance applied to the payment of the principal." Here is a clear recognition of the unity of the items of principal and interest as constituting and aggregating the debt to be paid, and an equally clear recognition of all payments less than the whole made against that aggregate as "partial payments." The sum paid in a given instance is none the less a "partial payment" under the statute, and none the less so denominated by it for being in part applied to accrued interest; and, too, it would obviously be none the less a "partial payment" on the debt if less in amount than that part of the debt made up of accrued interest, and wholly applied to the interest. And there is another Code definition of the phrase "partial payment" to the same effect. Section 2811 (section 2628, Code 1886) provides that "a partial payment made upon the contract by the party sought to be charged before the bar is complete" will take the obligation out of the statute of limitations; and it is thoroughly well settled, of course, that the payment of interest is a "partial payment" under this provision. There is, as we have seen, no conceivable reason to be found in the context of section 1065, or in its purview,—its objects and intents,—for applying to the term "partial payments" as employed therein a different meaning from that which attaches to it under the common law, and which is given to it wherever it is used in other parts of the Code; and we have no doubt of correctness in reaching and declaring the conclusion of the trial court that the payment of the interest secured by this mortgage was a partial payment within the spirit and letter of that section, which the mortgagor was entitled to have entered on the margin of the record of the mortgage. In so holding we do no violence to the doctrine that a penal statute must be strictly construed. However highly penal an enactment may be, there can be no warrant for excluding from its operation anything falling both within its purposes and its expressed terms. We are also of opinion that the written request was sufficient, and that the fact of its having been made was sufficiently proved. The letter which was sent to the mortgagee by the mortgagor's attorneys, and which was received by the defendant, identified the mortgage, and requested that the mortgagee "enter upon the margin of the records of this county where said mortgage is recorded each and every partial payment made thereon by said A. Y. Bowle," the mortgagor; and the letter contained this further statement: "In any event, we demand the entry of partial payments to be made on the margin of the records." This, considered by itself, was, upon all the authorities, a sufficient request. *Jordan v. Mann*, 57 Ala. 597; *Steiner v. Snow*, 80 Ala. 45; *Loeb v. Huddleston*, 105 Ala. 257, 16 South. 714. And it is of no consequence that in the same letter it is

said: "It is our contention that this mortgage has been paid. We therefore request you to mark upon the records of this mortgage in this county the fact that it has been paid and satisfied in full, and that you return to us the papers." This request for an entry of satisfaction, to which the mortgagor may not have been entitled, did not relieve the mortgagee from its duty to enter payments which had been made, and the making of the two requests in the same letter did not evince that one which the mortgagor had a right to make. Nor is it material that the mortgagor considered that not only the installments of interest, but the premiums and dues on stock paid, were partial payments on the mortgage, while the mortgagee thought otherwise, and may have been right in so thinking. That the defendant thus in good faith conceived that it had and may have had substantial grounds to contend that the payment of "premiums" on the loan and dues on the stock were not partial payments on the mortgage can afford it no excuse for failing to enter the payments of interest, which were clearly partial payments under the statute, and which the company must be held as matter of law to have known. The case was tried on the second count as amended. This count avers stipulations for the monthly payment of premiums on the loan and stock dues, and this averment is proved by the mortgage; but it does not aver the payment of such premiums and dues, or either. The argument of counsel to the effect that, even if payments of interest be partial payments under the statute, plaintiff, having averred payment of premiums and stock, was bound to prove such payments before he can recover, etc., is lacking in the necessary basis of fact. The questions decided in the case of *Gwin v. Association* (at the present term) 25 South. 843, are not involved in this record. The judgment of the circuit court must be affirmed. Affirmed.

(121 Ala. 120)

BIRMINGHAM RAILWAY & ELECTRIC CO. v. JAMES.

(Supreme Court of Alabama. April 21, 1899.)

STREET CARS—INJURIES TO PASSENGER ALIGHTING—ARGUMENT OF COUNSEL—INSTRUCTIONS—NEGLECT—DISCHARGE OF PASSENGER—SUDDEN STARTING—CONTRIBUTORY NEGLIGENCE.

1. In an action for death of a passenger, caused by a sudden jerk of a street car while he was attempting to alight therefrom, the evidence tended to show that, through negligence of the conductor, the car was carried beyond the passenger's destination. The conductor testified that the passenger was drunk, used profane language, and made faces at some women on the car. There was evidence to contradict these statements. *Held*, that a statement of plaintiff's counsel, in argument, that, not satisfied with taking the passenger's life, the conductor attempted to rob him of his good name, was not improper.

2. In an action for death of a passenger, claimed to have been caused by a sudden jerk of a street car while he was alighting, a passenger testified for the company that, to the best of his recollection, the car stopped at

the crossing. All of the company's testimony was not introduced to show that the car so stopped. *Held*, that a charge that some of the testimony offered by the company tended to show that the car stopped at the crossing was not erroneous.

3. In an action for death of a passenger, claimed to have been caused by a sudden jerk of the car while he was alighting therefrom, a witness testified that the car slowed up almost to a standstill, it being hard to tell whether it was going or standing still. The court charged that some witnesses testified that the car so nearly stopped that its motion was almost imperceptible, but subsequently withdrew the statement, saying merely that some of the testimony tended to show that the car slowed up. *Held* not error.

4. Where a street car, having failed to stop at a crossing in compliance with a passenger's request, slows up beyond such crossing to such an extent as to imply an invitation to him to alight, it is the duty of the operatives not to cause the car to jerk suddenly so as to endanger his safety.

5. Where a street car slows up to allow a passenger to alight, and he is injured by a sudden jerk thereof, his attempting to alight before the car actually stops cannot be held contributory negligence, as matter of law, but it is for the jury to determine, though the passenger carried a small bundle under one arm (which, however, was not shown to have incumbered him), whether he was negligent or not.

6. In an action for injuries to a passenger, some witnesses testified that, when the street car had slowed up nearly to a standstill, the passenger attempted to alight, and by a sudden jerk of the car was thrown down. Other witnesses testified that the passenger was thrown from the platform after the car had started, and while it was going six or eight miles an hour. It was admitted that the passenger was negligently riding on the steps or platform in violation of the rules. *Held*, that a charge that such negligence, alone, would not defeat a recovery, unless it proximately contributed to the injury, was proper.

7. In an action for injuries to a passenger, claimed to have been caused by a sudden jerk of the car, throwing him off, a charge that, if the injury resulted from the passenger's riding on the platform, he could not recover, was properly refused, as it did not hypothesize such riding as the proximate cause.

8. Ordinarily it is not, as a matter of law, contributory negligence for a passenger, when the street car is slowing up to allow him to alight, to go upon the platform or steps before the car has actually stopped.

Appeal from circuit court, Jefferson county; James J. Banks, Judge.

Action by Mollie James, as executrix of Lewis H. James, deceased, against the Birmingham Railway & Electric Company. From a judgment entered on a verdict for plaintiff, defendant appeals. *Affirmed*.

Appellee, the plaintiff below, sued to recover damages received by the intestate, her husband, resulting in his death, alleged to have been received while a passenger on an electric car operated by appellant, defendant below, through the negligence of the persons in charge of the car. There were three counts in the complaint, the first charging simple negligence, and the other two negligence of a wanton and intentional character on the part of defendant. The case was tried, under the rulings of the court, alone on the first count.

After its introductory part, that count charges, that on the day the accident occurred, "plaintiff's intestate, Lewis H. James, was upon one of said two cars, being carried by defendant, as its passenger, to a point on said railway, to wit Thirty-Ninth street, and while so upon said car, and upon the steps or platform thereof, engaged in and about alighting from said car, at or near said decedent's destination as aforesaid, defendant so negligently conducted itself in or about carrying plaintiff as its passenger as aforesaid, that said cars were given an impetus forward or pulled or jerked suddenly, and as a proximate consequence thereof said intestate was knocked, thrown or caused to fall from the platform or steps of said car, and was run over by one or both of said cars, and so injured that he died."

The defendant pleaded not guilty, and in substance, that the plaintiff's intestate contributed proximately to his injury and death by negligently riding on the platform of the car while the same was in motion and while he was intoxicated; for negligently being or riding on the platform or steps of the car while in motion; that he was riding on the back platform of the car while it was in motion, without holding, or without taking due precaution to prevent himself from falling from said car; that his injury and death arose from the negligent manner in which he alighted or attempted to alight from defendant's car; and that his injury and death arose from the negligent manner in which he was riding on the car.

C. T. Farrer, a locomotive engineer, testified for plaintiff in substance, that he was a passenger on the same car with James, which was the leading and closed car, followed by an open car; that witness sat on the platform with his back to the wall and James came out and was talking to him and one or two others on the platform, when the conductor came out; that James said to the conductor, "Stop at Thirty-Ninth street; I want to get off there," and the conductor told him "All right;" that he remained on the car till James got hurt, which was "exactly a car length and a half, beyond Thirty-Ninth street," a car length being 30 feet; that the car, after passing the station, did not stop entirely still, but came nearly to a stop, and gave a sudden move off; that James was on the bottom step, with his right hand on the supporting bar, a bundle under his left arm and one foot on the step, and all at once the electricity was turned on the car, which jerked forward and threw him from his balance and around off towards the car; that he wheeled and tried to recover, but fell to the ground; that his left foot was ready, it seemed, for getting off the car when it stopped, and his foot never touched the ground until his body was gone; that he was not drunk but sober as any man; may have had a drink or more than one, but he could not tell that he was under the influence of an intoxicant.

P. D. Self, for plaintiff, testified, that he was standing at the station waiting for a car to go to town, and the car that killed James came up and did not stop at the station; it rolled on by the station 10 or 15 feet and then slowed almost to a standstill; it was hard to tell whether it was going or standing still; that he was within 3 or 4 feet of James on the left side of the car going east when he was in the act of stepping off the car; that his foot struck the ground, the other being on the car, and as it did, the car gave a quick jerk, and jerked the man under the rear car and it ran over him; that the car went about 50 feet before it stopped and came back; that when James was about to step off, the car started all at once and jerked him off; it made a quick jump and twisted him right under and between the two cars; that at the time James fell the whole train had passed the shed at the station, and James had his hand on the hand hold.

Several witnesses testified for the defendant that the train stopped at the Thirty-Ninth street station and started again without a jerk, and that James did not get off when the train stopped. One of the witnesses swore he made no effort to get off, and when the train started from the station, he was standing on the platform, and when it had gone two or three car lengths, running six or eight miles an hour, he fell from the platform of the car. None of them saw him fall, except one Harris, whose evidence was admitted on showing, and by that showing it appears, that after the train started, and had gone two or three car lengths, James, still standing on the platform of the car, fell to the ground when it was running six or eight miles an hour, and in the fall was injured.

The conductor swore, that deceased was drunk, but had not seen him drink any; that the first he knew any one was hurt, was when after the train left the station, and was about three car lengths away, he heard some one say, "Stop the car, you have hurt a man," and he caused the car to be stopped as quickly as possible, and went back and picked James up. He also swore that deceased was passing out of the car onto the platform and back again several times, but this part of his evidence was in conflict with that of other witnesses. One of defendant's witnesses, Dickinson, testified that James went out to the platform, that after James walked out to the platform, witness shut the door and it stayed closed till the deceased got hurt.

The other facts of the case adduced on the trial, which are necessary to an understanding of the decision on the present appeal, are sufficiently stated in the opinion.

Plaintiff's counsel in the course of his argument to the jury, in his opening speech in this cause, said: "Not satisfied with taking the life of this man, this witness attempts to rob him of his good name." The defendant objected to the said statement made in argument by plaintiff's counsel, and defendant re-

quested the court to instruct the jury that such argument was improper, and that the jury should pay no attention thereto. The court refused to so instruct the jury, and the defendant excepted.

In addition to the portions of the court's oral charge, which were excepted to and which are copied in the opinion, the defendant also separately excepted to the following portions of the court's oral charge which are numbered 4 and 5 to correspond with the assignments of error, based upon the giving by the court of such instructions: (4) "Well, if the car passed Thirty-Ninth street crossing without stopping for Mr. James to alight, and then if it slowed up to such an extent as would imply, on the part of those persons who had charge of the car, that that was an invitation for Mr. James to alight at that point, and he endeavored to do so, why then it was just as much their duty not to jerk the car suddenly, or give it a forward impetus so suddenly as to imperil his life or his safety, as if it had been at the crossing itself. If they stopped the car, or if they slowed it up beyond Thirty-Ninth street crossing to such an extent, and if that was an invitation to Mr. James to alight at that point, why then, I say they were under just as much duty to protect him against injury as if the stop had been made right at Thirty-Ninth street crossing; and if they gave the car a sudden impetus or jerk at that point, that would constitute on their part a breach of duty to Mr. James." (5) "Now, then, as to whether or not Mr. James was guilty of contributory negligence in attempting to alight from the car while in motion at that point, would depend upon circumstances. That would be a question for you to determine. It would be a question for you to say whether or not a man of ordinary prudence and care would have undertaken to alight from a train or an electric car that was moving at the speed that that car was moving at that time and at that place. Would a man of ordinary prudence and care have alighted from it, or would he have undertaken to have alighted from it under those circumstances? If so, then an attempt on his part to do so would not constitute contributory negligence. If a man of ordinary prudence and care would not have undertaken to do it under those circumstances, then his attempting to do it would be contributory negligence, and would defeat his right to recover in this action."

At the request of the defendant, the court, by and with the consent of the plaintiff, instructed the jury as follows: "I charge you that the undisputed evidence shows that Lewis H. James was guilty of negligence in riding on the platform or steps of the car against and in violation of the rule of the defendant." In this connection, the court gave to the jury, at the request of the plaintiff, the following charges, to the giving of each of which the defendant separately excepted: (1) "Though the jury believe from the evidence that plain-

tiff's intestate, Lewis H. James, was guilty of negligence, yet such negligence would not defeat a recovery, if plaintiff is otherwise entitled to recover, unless the jury are reasonably satisfied from the evidence that such negligence contributed proximately to his death." (2) "Though the jury believe from the evidence that Lewis H. James rode on the platform or on the steps, and yet if the jury are not reasonably satisfied from the evidence that so riding on the platform or on the steps proximately contributed to his death, his so riding on the platform or steps would not, of itself, prevent a recovery by the plaintiff in this case."

The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "I charge you that if you believe from the evidence that plaintiff's intestate's injury and death was the result of his riding on the platform of the car while the same was in motion, you must find for the defendant." (2) "I charge you that the evidence in this case shows that the plaintiff's intestate was guilty of negligence that proximately contributed to his death in attempting to leave the car while the same was in motion." (3) "If you believe, from the evidence, that at the time the plaintiff fell from the car he was standing upon the steps of the car, and that the car was then in motion, you must find for the defendant." (4) "If you believe, from the evidence, that Lewis H. James fell from the step of the car, you must find for the defendant." (5) "If you believe the evidence, you cannot find that the conductor, Brooks, was guilty of any negligence." (6) "I charge you that if you believe, from the evidence, that plaintiff's intestate's death was caused by his having gotten upon the steps of the car while the same was in motion, then you must find for the defendant." (7) "I charge you that the undisputed evidence in this case shows that the plaintiff was guilty of negligence that proximately contributed to his injury in riding upon the platform of the car while the same was in motion." (8) "I charge you that if you believe, from the evidence, that plaintiff's intestate's death was proximately contributed to by his having gotten upon the steps of the car while the same was in motion, then you must find for the defendant." (9) "If you believe, from the evidence, that Lewis H. James fell from the platform of the car, you must find for the defendant." (10) "If you believe the evidence, you must find for the defendant." (11) "If you believe the evidence, you must find for the defendant under the first count of the complaint." (12) "When a passenger has made known to the conductor of a street car his destination, and while the car is slowing up for such destination, and while the car is still in motion, it is negligence for the passenger to get upon the step of the car and pre-

pare to alight from the car; and if such passenger, while upon the step of the car, under such circumstances, is thrown to the ground and injured by a sudden jerk of the car, caused by the negligence of those operating the car, such passenger cannot recover for such injury because of the negligence of such passenger." (13) "If the jury believe, from the evidence, that the plaintiff's intestate attempted to leave the car while it was in motion; and further believe, from the evidence, that he was injured by reason of such attempt, then their verdict must be for the defendant." (14) "If the jury believe, from the evidence, that the plaintiff's intestate left the platform while the car was in motion, and got on the step and was thrown off said step by a jerk of the car, then their verdict must be for the defendant." (15) "If the jury believe, from the evidence, that the plaintiff's intestate without necessity went out of the car onto the platform and onto the step before the car reached Thirty-Ninth street, and while the car was in motion was thrown off said step by a sudden jerk of the train, then their verdict must be for the defendant." (16) "I charge you, gentlemen of the jury, that it is negligence in a passenger to attempt to leave a moving car without necessity." (17) "I charge you, gentlemen of the jury, that it is negligence in a passenger to attempt to leave a moving car." (18) "The undisputed evidence, if the jury believes it, shows that the plaintiff's intestate was guilty of contributory negligence." (19) "I charge you that Lewis H. James owed to the defendant the duty not to be on the platform or step of the car while it was in motion." (20) "I charge you, gentlemen of the jury, that when a street car reaches a regular stopping place, the destination of passengers, while it would be the duty of the conductor to have the car stopped, and to wait a sufficient length of time to enable the passengers to alight in safety by the exercise of reasonable diligence, and, in any event, to see and know that no passenger is in the act of alighting, or is otherwise in a position which would be rendered perilous by the motion of the car, when he again causes the car to be put in motion. It is also the duty of such passengers not to go out of the car upon the platform or steps of the car until the car stops." (21) "I charge you, gentlemen of the jury, that when a passenger has made known to the conductor of a street car his destination, and while the car is slowing up for such destination, and while the car is still in motion, it is negligence for the passenger to get upon the steps of the car and prepare to alight from the car."

There were verdict and judgment for plaintiff, assessing her damages at \$10,000. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Walker, Porter & Walker, for appellant.
Bowman & Harsh, for appellee.

HARALSON, J. In a case of recent impression in this court, the principles governing this appeal, in its essential features, were fully discussed and settled. It was there held, sanctioned as stated by the great weight of authority, many of which are cited, that the act of a passenger in leaving a car while it is in motion, is not negligence per se. It is stated also that there are some exceptions to this rule, such as the great speed of the train, the age or infirmity of the passenger, or his being incumbered with bundles or children, or other facts which render the attempt to alight so obviously dangerous that the court may, as a matter of law, when the testimony is undisputed, declare that the passenger's conduct was reckless and negligent. "But ordinarily, it is for the jury to say whether he acted as a reasonably cautious and prudent man would act under like circumstances." Again, the doctrine is there expressly recognized, that it is not negligence in law for a passenger to take, with ordinary care, a position on the steps of a car preparatory to alighting, nor for him to attempt to alight from a train moving so slowly, that it would not appear dangerous to do so, to a man of ordinary prudence; but it was further held that, ordinarily, the question of negligence vel non should be submitted to the jury. *Watkins v. Electric Co. (Ala.) 24 South. 392.* As further applicable to one phase of this case, we may extract from that decision what was said in reference to increasing the speed of a train at a moment when a passenger is presumed to be about to alight, as follows: "There were no exceptional circumstances attendant upon appellant's attempt to alight from the car, or upon his taking a position on the step preparatory to alighting, that rendered his conduct so obviously dangerous as to justify the court in declaring it negligence as a matter of law, and withdrawing from the jury the issue of negligence on the part of the plaintiff. He had notified the conductor that he desired to get off at Twenty-Fourth street, and, when the train slowed up on approaching the crossing, he had a right to assume, that it was being slowed up for the purpose of enabling him to get off, and that its speed would be gradually lessened until it stopped at the crossing, rather than increased with a sudden jerk. He assumed, of course, the risk of the ordinary movement of the train slowing up at a street crossing to let off a passenger, but not the risk of a sudden negligent movement at the very place where, and moment when, it should have stopped, and where,—in view of the commonly known custom of passengers on street cars, permitted, if not actually encouraged by the companies,—those in charge of the train, after having been notified to stop, should have known of the position of the plaintiff."

The witness, Brooks, for the defendant, was the conductor on the train. Through his negligence, as the evidence tended to show, James was carried beyond his destination,

and thus he contributed certainly though not proximately to the injury which caused his death. He testified that deceased was drunk, used profane language on the cars, and misbehaved himself in making faces, while he was on the platform, at some colored women inside the car. There was evidence tending to show that these statements were not true. The argument of counsel excepted to, was based on this evidence, and he had the right to state any inferences the evidence afforded, even if reflective on the witness, to aid the jury in arriving at a correct conclusion. *Electric Co. v. Wildman (Ala.) 24 South. 548; Brown v. State, 25 South. 744.*

The court, in its oral charge, stated that "some of the testimony offered by the defendant tends to show that the car stopped at Thirty-Ninth street station." It is insisted that the use of the word "some" in the charge rendered it erroneous, for that each of the five witnesses examined by defendant testified that the car stopped at said station. In this, counsel have fallen into inadvertent error. Dickinson, who was a passenger and examined by defendant, did not testify positively that the car stopped, but stated, that to the best of his recollection, the train stopped at the station. Moreover, the court did not charge, that some of defendant's witnesses testified that the car stopped, but that some of the testimony offered by defendant tended to show that the car stopped. This statement was literally true. All the testimony offered by defendant was not introduced to show, and did not tend to show, that the train stopped.

The other part of the oral charge excepted to, that "some of the witnesses [for plaintiff] testifying that it [the train] so nearly stopped, that its motion was almost imperceptible," is quite as unsubstantial as the foregoing exception. In point of fact, one of the plaintiff's witnesses, P. D. Self, testified, that the car "rolled by the station about 10 or 15 feet and then slowed up almost to a standstill. It was hard to tell whether it was going or standing still." A fair construction of this language would be "that its motion was almost imperceptible." But, more than that, the court, after using that expression, added, "I believe that was the language of the witness. Let I trench upon your province, however, I withdraw that statement from you, and simply say, that the testimony of some of the witnesses for the plaintiff tends to show that some feet beyond Thirty-Ninth street crossing, the cars slowed up," and that statement was literally true. It was not without the province of the court to state to the jury the undisputed, as well as the disputed evidence. Code 1896, § 3826.

There was no error in those portions of the court's charge, made the basis of assignments 4 and 5. These charges are consistent with principles decided in *Watkins' Case*, supra. The fact that deceased had a single bundle under his left arm while on the train, which

one of the witnesses stated looked like dry goods, and about 8 inches in diameter by 10 or 12 in length, was not shown to have incumbered him at all. The charge fairly left to the jury the question of contributory negligence in attempting to alight from the car before it came to a full stop.

There was no vice in the other part of the oral charge, assigned as No. 6. The court had just charged the jury that it was negligence in the deceased to ride on the rear platform, and then follows the part of the charge excepted to, viz.: "Then the question for you to determine is, whether or not the want of care on his part contributed proximately to his injury. Would his injuries have been inflicted anyway, whether he was riding on the rear platform or not? If they would, why then, that would not be the proximate contributory cause." We fail to discover that there was any error in this instruction. It is well understood that negligence which did not contribute proximately to the injury will not defeat a recovery.

The court at the request of defendant, the plaintiff's counsel consenting thereto, charged, "that the undisputed evidence shows that Lewis H. James was guilty of negligence in riding on the platform or steps of the car against or in violation of the rules of the defendant."

The court gave at the instance of plaintiff, as would seem in connection with the foregoing, two charges to which defendant excepted. These charges, when referred to the evidence in the case, were proper instructions.

The first charge asked by defendant was properly refused, if for no other reason, for that it did not hypothesize deceased's riding on the platform as the proximate cause of his injury. *Thompson v. Duncan*, 76 Ala. 334; *McDonald v. Railway Co.*, 110 Ala. 161, 20 South. 317.

The remaining refused charges all present in one form or another, and more or less plainly, the same question,—whether it is contributory negligence for a passenger when approaching his destination to attempt to leave a moving train, or to go upon the platform or steps while the same is slowing up for the station. This question, as we have seen, has, by the decisions of this court above referred to, been settled adversely to appellant.

We find no error in the rulings of the court below in the trial of the cause, nor in overruling the motion for a new trial.

Affirmed.

(121 Ala. 137)

WEINGARTEN et al. v. MARCUS et al.
(Supreme Court of Alabama. April 19, 1899.)

FRAUDULENT CONVEYANCES—CONFESSION OF JUDGMENT—REMEDY—EQUITY.

1. A confession of judgment on a simulated debt is invalid as against existing creditors.

2. A transfer of goods to one alleged to be a secret partner of the transferor may be attacked as fraudulent by creditors of the trans-

feror by a bill in equity, notwithstanding the existence of a remedy at law against the alleged secret partner, since Code, § 818, gives to simple contract creditors the remedy in chancery to subject property fraudulently conveyed by the debtor to the payment of their debts.

Appeal from city court of Birmingham; W. W. Wilkerson, Judge.

Bill by Levi Weingarten and others against S. Marcus, Jr., and others. From a decree dismissing the bill, complainants appeal. Reversed.

The bill in this case was filed by creditors of S. Marcus, Jr., alleging that the latter had confessed judgments in favor of several different parties, including Ike Adler; that all of said judgments were fraudulent and void; that execution had been issued thereon, and levied on a stock of goods belonging to said Marcus, which was at that time in the possession of said sheriff under said levies; and that, if he was allowed to sell the property, and pay over the money, complainants would be without relief, and would lose their debts. All of the plaintiffs in said judgments and George M. Morrow, sheriff, were made parties defendant. The prayer of the bill was that the judgments might be set aside and the property levied on condemned to the satisfaction of complainants' demands; that, in the meantime, if the sheriff should have sold said goods, he be required to hold the proceeds of sale to satisfy the claims of orators, and that the other defendants be held trustees in invitum of said property. The bill was afterwards amended by striking out all the parties defendant except Ike Adler. In the amended bill it was alleged that Marcus had fraudulently confessed judgment in favor of Adler, and that execution had issued on such judgment, and had been levied on the stock of goods of Marcus; that said stock had been sold by the sheriff, and had been purchased by Adler. It was further averred that said Ike Adler had been secretly interested in the business carried on by Marcus on account of which complainants' debts were contracted, and was interested in the business; that the debt on which the judgment was confessed was simulated, and used fraudulently to transfer the property to Adler. There were other allegations of fraud, not necessary to be stated. The defendant Ike Adler moved to dismiss the bill for the want of equity. Upon the submission of the cause upon this motion the court sustained the motion, and ordered the bill dismissed, the complainants being allowed 30 days within which to amend. From this decree the present appeal is prosecuted, and the rendition thereof is assigned as error.

Mountjoy & Tomlinson, for appellants. Ca-boniss & Weakley, for appellees.

SHARPE, J. The bill contains ample averments to bring the case within section 818 of the Code. Besides the charge of actual fraudulent intent actuating the confession of judgment in favor of defendant, it is alleged

that the debt upon which the judgment was founded was simulated, which fact would of itself vitiate the transaction as against existing creditors. By the uniform decisions of this court a suit which is collusive, being begun and carried on for the purpose of hindering, delaying, or defrauding creditors by the creation of a lien upon the property of the debtor, or by placing the property in the custody of the law, or otherwise obstructing the collection of rightful claims, is as rigidly condemned by the statute as a fraudulent conveyance in contract form. *Cartwright v. Bamberger*, 90 Ala. 405, 8 South. 264; *Bamberger v. Voorhees*, 99 Ala. 292, 13 South. 305; *Alabama Nat. Bank v. Mary Lee Coal & Railway Co.*, 108 Ala. 288, 19 South. 404; *Comer v. Heidelberg*, 109 Ala. 220, 19 South. 719; *Pollak Co. v. Muscogee Mfg. Co.*, 108 Ala. 467, 18 South. 611; *Bank v. Lauchheimer*, 102 Ala. 454, 14 South. 776; *Steiner v. Parker*, 108 Ala. 357, 19 South. 386. It is not claimed by complainants that the specific goods can be reached under this bill, to which the transferee corporation is not a party, and any relief under it must be by personal decree enforceable by execution as upon a judgment at law. Therefore appellee insists that, in view of the allegation in the bill to the effect that he was secretly interested as a partner of Marcus, appellants' remedy at law is adequate; a personal judgment at law and execution being as effective for the collection of the debt as a personal decree and execution in equity. It is the general rule that fraud is cognizable in equity only when the law court is without power to afford the peculiar relief sought, and that rule would seem to apply to this case unless avoided by the statute conferring upon the chancery court the jurisdiction invoked by this bill. Originally, only judgment creditors who had exhausted their legal remedy could come into equity to subject to their debts property which had been fraudulently conveyed by their debtors. Section 818 of the Code gave to simple contract creditors the remedy in chancery to discover or to subject such property to the payment of their debts. When a case falls within the statute, the jurisdiction of the chancery court attaches by its express provision, independent of its original jurisdiction respecting fraud. In *Railway Co. v. McKenzie*, 85 Ala. 548, 5 South. 324, referring to section 818 of the Code, this court, by Chief Justice Stone, said: "The only claim of equitable ground in that statute was the fraud imputed, which is not always and per se a subject of equity jurisdiction. A majority of this court so decided in *Smith's Ex'r v. Cockrell*, 66 Ala. 64. See, also, 2 Pom. Eq. Jur. § 914, and note. In the absence of statute it is certainly not a ground of equitable jurisdiction when the gravamen of the complaint is that tangible personal property has been conveyed in fraud of creditors. Yet through all these years relief has been granted to creditors without a lien in the chancery court, and under that statute." It

has been held by this court that the remedy extends to the value as well as to the proceeds of such property converted by a fraudulent grantee. *Dickinson v. Bank*, 98 Ala. 546, 14 South. 550. In that case it was said: "The proceeds of property fraudulently conveyed in the hands of the fraudulent grantee may be condemned and ordered paid to the creditor, or the right enforced against the vendee by personal decree and execution. So, also, if the goods have been otherwise converted or appropriated by the fraudulent grantee, he is liable upon an accounting by personal decree and execution to pay the value thereof in discharge of the claims of the creditor." It results from such construction of the statute that the jurisdiction conferred by it upon the chancery court is not dependent upon the character of the relief which may be afforded, but attaches to relieve against the particular class of fraud there mentioned by any appropriate process and decree. A transfer of partnership goods to an individual member of the firm may be fraudulent as to creditors, and therefore within the jurisdiction given by the statute. The remedy at law against the alleged secret partner was not exclusive. The right of election existed on the part of complainants to regard the ostensible partner with whom they contracted as their sole debtor and the secret partner as a stranger. *Ex parte Hodgkinson*, 19 Ves. 294; *Ex parte Norfolk*, Id. 454. The bill is not without equity, and the decree of dismissal must be reversed. The cause will be remanded to the city court. Reversed and remanded.

(121 Ala. 158)

SHORTER v. SOUTHERN RY. CO.

(Supreme Court of Alabama. April 19, 1899.)
RAILROADS—DEATH OF BRAKEMAN—CONTRIBUTORY NEGLIGENCE—EVIDENCE—HARMLESS ERROR.

1. In an action for causing the death of a brakeman killed between cars while attempting to couple them, when one of them was in motion, a rule of the railroad company prohibiting brakemen from going between cars while coupling them is admissible on an issue of contributory negligence.

2. A brakeman having entire charge of a car approaching another, and failing to so regulate the speed of the former as to give himself time to set the coupling pin in the latter, is guilty of contributory negligence, precluding a recovery for his death, by the falling on him of a load from the former while he was setting the pin.

3. A brakeman failing to use a coupling stick with which he is provided is guilty of contributory negligence, precluding a recovery for his death while he was guiding the coupling link with his hands.

4. A judgment will not be reversed for erroneous admission of evidence, where appellee would have been entitled to an affirmative charge if the evidence had been rejected.

Appeal from city court of Birmingham; H. A. Sharpe, Judge.

This action was brought by the appellant, Phillip Shorter, as administrator of the estate of Jacob Shorter, deceased, against the Southern Railway Company, to recover damages for

the alleged negligent killing of the plaintiff's intestate. The defendant pleaded the general issue and contributory negligence on the part of plaintiff's intestate. The undisputed evidence shows: The plaintiff's intestate, who was a brakeman in the defendant's service, was riding a flat car loaded with car wheels and trucks down to make a coupling between the flat car and one of 14 standing cars on a side track, in the daytime. The flat car had just been "kicked" into the siding by the assistance of the plaintiff's intestate, and was going at a rate of speed variously estimated at from four to six or seven miles an hour; and after it was kicked it was exclusively under the charge and control of plaintiff's intestate, who could stop it altogether or regulate its speed, as he chose, by means of a brake which was in good order, and which was located at one end of the car. The trucks and wheels were kept in position at each end of the car by a heavy piece of timber laid across the floor of the car against which the wheels rested, the timbers themselves resting against upright oaken stanchions, two at each end, and one at or near each corner of the car; the stanchions being $3\frac{1}{2}$ or 4 inches in thickness, trimmed down at the end, which fitted into the pockets fixed into the body of the car for holding them. Just before the moving car got to the standing cars, the deceased jumped off the moving car, ran ahead of it, and in front of it, and went in entirely between the cars which were to be coupled together, although he had a coupling stick in his right hand, and attached to his wrist by a string, furnished him to prevent going between the cars to couple them, and almost immediately thereafter the cars came together, and the man's chest and body were crushed in the collision in some way, so that he died in a short while. It was unnecessary for him to have gone in, in such manner, between the cars, in order to have performed his duty of making the coupling. After the accident, the deceased was found lying outside of the rails of the track, he having stepped out from between the cars before he fell, both stanchions at the end of the car nearest the standing cars were found broken off even, or almost even, with the pockets holding them, the crosspiece was lying across the track, and the front pair of trucks had rolled off the end of the car, and the axle was resting on the drawhead of the flat car. The wheels were 33 inches in diameter. There was a written contract of employment between deceased and the railway company, which, among other things, prohibited him (1) from coupling cars except with a stick; (2) from going between cars, under any circumstances, for the purpose of coupling when an engine was attached to such cars or train, to the observance of which, and other requirements of the contract, he bound himself in consideration of being employed; (3) which specified that the employé understood that the danger of going between cars to couple them was greatly increased by the fact of many

foreign cars having no bumpers attached to them; (4) that no conductor or engineer had the right or authority to alter, amend, or suspend any of these provisions, or to discharge or punish the employé for observing these provisions. This contract was in force at the time of the accident. Upon the defendant offering to introduce this contract in evidence, the plaintiff objected. The court overruled the objection, and the plaintiff duly excepted. Three printed rules of defendant, of which deceased was informed, and which were described as "K," "L," and "M," were also in force at the time of the accident. Rule "L" required that every employé must exercise the utmost caution to avoid injury to himself or to his fellows, "especially in the switching of cars, and in all movements of trains, which work each employé must look after, and be responsible for his own safety"; and called the employé's attention to the fact that "jumping on or off trains or engines in motion, getting between cars in motion to couple or uncouple them, and all similar imprudences are dangerous, and in violation of duty." Upon the defendant offering to introduce in evidence the rules "K," "L," and "M," the plaintiff objected to their introduction, upon the grounds that they were unreasonable, immaterial, and irrelevant. The court overruled this objection, and the plaintiff duly excepted. There was testimony introduced on the part of the plaintiff tending to show that the stanchions which supported the trucks on the moving car were rotten, and that when a moving car struck a stationary car these stanchions broke, and the trucks fell upon the defendant, and they caused the injury. Upon the introduction of all the evidence, the court, at the request of the defendant, instructed the jury as follows: "If the jury believe the evidence, they must find a verdict for the defendant." To the giving of this charge the plaintiff duly excepted. There were verdict and judgment for the defendant. The plaintiff appeals, and assigns as error the rulings of the trial court to which exceptions were reserved. Affirmed.

Bowman & Harsh, for appellant. Smith & Weatherly, for appellee.

McCLELLAN, C. J. We construe rule "L," introduced in evidence by the defendant, to prohibit getting between cars, either of which is in motion, to couple or uncouple them. The deceased got between cars, one of which was in motion, to couple them, and was killed in consequence of being there. This rule was pertinent, therefore; and, in view of it, we concur with the trial court in holding that he was guilty of contributory negligence, barring plaintiff's recovery in this action. Whether he was between the cars for the purpose of setting the coupling pin or of guiding the link is immaterial. If it was necessary for him to go in there to set the pin, he should have done this before the cars came dangerously near to each other, and,

having entire control of the moving car by means of a brake, he might, had he been duly careful, have regulated its approach, so as to have afforded time for him to have set the pin and to have withdrawn his body before the cars came together. Not to so control it, and to go in to set the pin, when, in consequence of his own want of care in not properly regulating its approach, he could not withdraw before the collision, was, in view of the rule, at least proximate contributory negligence on his part. On the other hand, having a coupling stick, and being under a duty to use it, there could have been no necessity for him to go between the cars in the manner the uncontroverted evidence shows he did for the purpose of guiding the link; and, if he went in there for that purpose, he was likewise guilty of proximate contributory negligence in exposing his person, in violation of the rule and without necessity, to the peril which killed him.

We attach no importance to the fact that death was caused by the dislocation and falling of the trucks with which the moving car was loaded. The car and its load constituted one thing. The load was a part of the car. The load and the car together made up the element of danger which the rule forbade deceased to encounter as he did, and it was, in the sense of the rule, the moving car which produced the result complained of. Had the trucks not fallen, but deceased had come to his death by reason of their being on the car, it could not be insisted that the violation of the rule was not the proximate cause of his death; and had the car not been freighted at all, but the injury had been inflicted by some part of it being torn by the violence of the collision away from it, and hurled against the deceased, mashing him against the other car, and killing him, it could not be reasonably contended that such injury was not incident to his being between the cars, in violation of the rule. The evidence is without conflict that deceased's whole body was between the cars at the moment they came together. All occasion there could have been for his offices between the cars at that time was to guide the link into the drawhead. With the aid of the stick which he had, and which it was his duty to use, the evidence is without conflict in showing that he could have performed this service without placing his body where it would be and was mashed between the falling trucks and the other car. There is nothing, therefore, appearing from the evidence to at all palliate his violation of the rule, or to relieve his forbidden act of its negligent character. Whatever might be said, in the absence of the rule to which we have referred, as to whether his act was negligent per se, with the rule and its palpable violation before the jury, the city court properly gave the affirmative charge for the defendant. If the court erred in any of its rulings on testimony, it was error without injury. With all the evidence admitted against plaintiff's

objection—except rule "L," which we have held to have been properly admitted—out of the case, and the evidence offered by plaintiff which was excluded on defendant's objection before the jury, the court should still have given the affirmative charge for the defendant. Affirmed.

(121 Ala. 419)

JORDAN et al. v. JORDAN et al.

(Supreme Court of Alabama. May 16, 1899.)

RECEIVERS—APPOINTMENT—NECESSITY—POWER OF COURT.

Where a bill for the sale of partnership lands did not aver facts showing the necessity for the appointment of a receiver, and the stipulation on which the decree was entered did not provide for such appointment, the court had no authority to make it.

Appeal from chancery court, Marshall county; W. H. Simpson, Judge.

Bill by Annie Jordan and others against W. G. Jordan and others. There was a decree for complainants, and respondents appeal. Modified.

The bill was filed for the settlement of the partnership of Jordan, Manning & Co., said partnership having been composed of David C. Jordan, Thomas J. Cochran, James L. Jordan, and William Manning, all of whom were dead at the time of the filing of the bill except William Manning. Upon the hearing of said bill, an order was made, as therein prayed for, appointing one Thomas L. Farrow as receiver of Jordan, Manning & Co. There were also decrees in said cause ordering the sale of the personal property belonging to said firm, and a decree was rendered ordering a reference before the register to ascertain, and for him to report, the state of the accounts, as between the several partners of Jordan, Manning & Co., On July 2, 1897, under the direction of the court, Thomas L. Farrow filed his account of receipts and disbursements, which, by the register, was duly audited and allowed, and a balance was found to be due said Thomas L. Farrow for and on account of disbursements made by him as such receiver. This report of the register was confirmed by a decree of the court. On January 18, 1899, while the suit was still pending in the court, the following agreement was entered into between the parties to said cause: "In this cause it is agreed, by and between all of the parties to this bill, both complainants and defendants, as follows: First. That complainants file at once, or as soon as practicable, a supplemental bill in this cause, setting out, as near as can be, a complete description of all of the real estate belonging to the late partnership business of Jordan, Manning & Co., for the winding up of which this suit was brought; said supplemental bill to pray for an order of sale of said lands for the purpose of paying the amount due Thomas L. Farrow, receiver, according to the report of the register hereto-

fore filed, and the decree of the chancellor thereon, and other costs that may be due herein, and for the further and other purpose of division among those entitled there-to according to their respective interests. Second. That, on the filing of said supplemental bill, a decree be entered without further delay, and without the issuance of any other or further notice or summons; this agreement being taken, treated, and accepted as a confession of said supplemental bill. That said decree direct the sale of said lands for the purposes above set out, and may be rendered by the chancellor in term time or in vacation, whenever submitted to him. Third. That said decree direct that said lands be sold at public auction, in front of the courthouse door in said county, after thirty days' notice by publication in some newspaper published in said county, for one-third cash, the balance in two equal annual installments, with the legal rate of interest, with the retention of a vendor's lien and two approved sureties. Fourth. That the chancellor refer it to the register to ascertain what, if any, rents have been received by the said Thomas L. Farrow on lands belonging to said Jordan, Manning & Co. since the last accounting by him as such receiver." In obedience to this agreement, Annie Jordan, and the other children of James L. Jordan, deceased, through their guardian, Thomas L. Farrow, and others, filed the present supplemental bill against the other parties in the original suit, setting out the facts as above stated. The prayer of this supplemental bill was as follows: "Your orators pray that, by decree of this court, the said lands be ordered sold for the purpose of paying off and discharging said costs, debts, and charges, and for the purpose of distribution among those entitled thereto, and that it be referred to the register to ascertain and report what amounts, if any rents, have been received by Thomas L. Farrow since his last accounting as receiver, and what amounts, if any, he has expended in necessary repairs, or in the payment of taxes, and the discharging of any liens or incumbrances on said lands by reason of any unpaid taxes or otherwise, and for such other and further relief as may be just and equitable and proper in the premises." Upon the submission of the cause upon the pleading and the written agreement of the parties, as above set out, the chancellor rendered a decree ordering (1) that the lands described in the supplemental bill of complaint be sold for the purpose of paying the amount due Thomas L. Farrow as receiver and the other charges and costs that may be due in said suit; (2) that the lands be sold at public auction; (3) that Thomas L. Farrow be appointed receiver for the purpose of selling said lands, and collecting the deferred payments and rents on said lands; (4) that the receiver report to the next term his actions under this decretal order; (5) that he report to the register, as soon as practicable after

sale, a statement of the rents received by him; and (6) that said Thomas L. Farrow be directed to enter into a bond, conditioned and payable as the law requires, in the sum of \$6,000. From this decree the respondents appeal, and assign the rendition thereof as error.

O. D. Street, for appellants. Lusk & Bell, for appellees.

TYSON, J. The supplemental bill in this cause was filed and submitted in vacation pursuant to a written agreement signed by the respondents. By the agreement it was expressly agreed the purposes for which the bill was to be filed, and that upon its filing a decree should be rendered in vacation, ordering that the lands be sold. In accordance with the terms of the agreement, the cause was submitted by the complainants upon the bill and agreement in vacation to the chancellor for decree. By the filing of the agreement, and a submission of the cause upon their bill and agreement, the complainants were conclusively precluded from ever attacking the decree, in so far as it is within the scope of the bill and agreement. The decree sought to be reviewed by this appeal was rendered by him ordering a sale of the lands in accordance with the averments of the bill and the terms of the written agreement, and also appointing one Farrow, one of the complainants, as receiver for the purpose of selling the lands. It is that portion of the decree appointing Farrow as receiver to make the sale of the lands that the appellants assail. There is no averment in the bill of any facts for the necessity of the appointment of a receiver, and certainly there is nothing in the agreement between the parties which can be construed into a consent by them to his appointment; and, unless the order appointing him can be justified upon one or the other of these grounds, it was erroneous. It may be regarded as elementary law that a receiver should not be appointed except upon a bill or petition filed praying it, and after answer thereto, "unless the necessity be of most stringent character," without consent of all parties to the record. Code, § 799; Meyer v. Johnston, 53 Ala. 349; Iron Works Co. v. Foster, 54 Ala. 622. And besides, Farrow, being one of the complainants in the cause and interested in the subject-matter of the suit, was not a suitable person to act as receiver. "A receiver appointed by the court should be capable, honest, impartial, and without personal interest to serve." Etowah Min. Co. v. Wills Valley Min. & Mfg. Co., 106 Ala. 500, 17 South. 522.

As we have said, there being no averment in the bill which will sustain this portion of the decree, it may be argued that the agreement consenting that the decree of sale be ordered by the chancellor, and nothing said as to whom he should appoint to conduct the sale, that, therefore, the respondents should be held to have consented to the adoption of

any mode which the chancellor might select. They are presumed to have consented that the sale be made under the direction of the court, and to be conducted by such person, to be designated by the chancellor, as is usual in such cases, and as the law directs in cases involving no extraordinary necessity for a receiver. This is as far as their consent can be construed to extend. There was nothing in the facts or pleading before the court which authorized the resort to the extraordinary remedy of the appointment of a receiver, and could not have been within the contemplation of the parties when the agreement was made. The portion of the decree appointing the receiver was not only beyond the purview of the bill, but outside the agreement.

The decree ordering a sale of the lands was correct. It follows that that portion of the decree ordering a sale of the lands should be allowed to stand, and the portion of the decree appointing the receiver should be annulled. The cause is remanded, in order that further proceedings may be had in conformity with the views here expressed. The costs of this appeal are imposed equally upon the appellants and appellees. Affirmed in part, and reversed in part, and remanded.

(121 Ala. 234)

LOUISVILLE & N. R. CO. v. HINE.

(Supreme Court of Alabama. May 9, 1899.)

CARRIERS — PASSENGERS ON FREIGHT TRAINS — EJECTION OF PASSENGER — PLEADING — DAMAGES.

1. If a passenger holding a ticket is ejected from a train, his action against the carrier may be either in tort or on the contract.

2. A passenger bought a ticket, and requested the ticket agent to procure him a permit to ride on a freight train, which the agent promised to do, and give the permit to the conductor. The agent procured the permit, but neglected to give it to the conductor, in consequence of which plaintiff was ejected from the train. *Held*, that plaintiff could recover of the carrier.

3. Plaintiff obtained a ticket of defendant's agent, who promised to procure plaintiff a permit to ride on a freight train, and to give it to the conductor, but the agent neglected to do so. In an action for plaintiff's ejection, *held*, that defendant's rule prohibiting passengers from riding without permits, and plaintiff's knowledge of the rule, were no defense.

4. In an action to recover for wrongful ejection from defendant's train, a demurrer will not lie to a part of the complaint, as the remedy is by motion to strike out the objectionable parts.

5. Plaintiff, who was wrongfully ejected from defendant's freight train, was entitled to recover all damages proximately resulting from the wrong, including the expense and inconvenience to which he was put, and for humiliation and indignity suffered by him.

6. Plaintiff was wrongfully ejected from defendant's train, but was invited by the conductor to re-enter the train, which the passenger refused to do until the train was backed to where he was standing. *Held*, that plaintiff could not recover his damage resulting from delay in his journey.

7. Plaintiff, who was wrongfully ejected from defendant's train, cannot recover damages for humiliation resulting from his being "guyed" about being put off by persons who were not present when he was ejected, as such damages are too remote.

Appeal from circuit court, Limestone county; H. C. Speake, Judge.

Action by Silas R. Hine against the Louisville & Nashville Railroad Company. There was judgment for plaintiff, from which defendant appeals. Reversed.

The complaint claimed \$1,000 damages, and its averments were as follows: That on October 7, 1896, "it became necessary for the plaintiff to make, on the defendant's freight train, then near due, a hasty trip from Athens to Decatur, stations on the defendant's railroad in this state about fifteen miles apart, on opposite sides of the Tennessee river; the urgent purpose of this trip being to bring from Decatur to Athens the already delayed wedding garments of a lady to whom he was engaged to be married on the next evening. That thereupon, about five o'clock p. m. October 7, 1896, the plaintiff applied to George L. Sherrell, as the defendant's depot, ticket, and telegraph agent at Athens, for a regular ticket, and a special permit to go and ride on such freight train to Decatur, then explaining to him the necessity and importance of such trip. That thereupon the plaintiff paid for and received from such agent such ticket, signed, and delivered to such agent twenty-five cents for such permit, to be obtained by such agent by telegraph from the defendant's general superintendent, at Nashville, Tennessee. That thereupon such agent informed the plaintiff that he need not wait for such permit; that he (such agent) would give such permit, when it came, to the conductor of such freight train when he arrived; such permit being generally, if not universally, given to male passengers, such as the plaintiff, when asked for. That such freight train arrived at Athens about 7 o'clock p. m., October 7, 1896, when the plaintiff, with such ticket, in reliance upon such agent as to such permit, boarded such freight train where it had stopped, over one hundred yards from defendant's depot in Athens, therein took his seat as one of the passengers thereon; and, after such freight train had proceeded several hundred yards on its way to Decatur, the conductor demanded of the plaintiff, in addition to such ticket, such permit, which the plaintiff then did not have, stopped the train, and expelled the plaintiff therefrom, after the plaintiff had informed him of all that was said and occurred between him and such agent about such permit. And that such agent had received such permit from the superintendent before the train arrived at Athens. And the plaintiff avers that, in consequence of all which, he lost the money he thus paid, was grievously disappointed in reference to the preparations for his wedding, was humiliated, was subjected to ridicule, and was subjected to indignity, whereby he suffered damage to the amount of one thousand dollars; hence this suit." To this complaint the defendant interposed the following demurrers: "(1) To that portion of the complaint in these words: 'It became necessary for plaintiff to make on de-

defendant's freight train, then near due, a hasty trip from Athens to Decatur, stations on the defendant's railroad in this state about fifteen miles apart, on opposite sides of the Tennessee river; the urgent purpose of his trip being to bring from Decatur the already delayed wedding garments of a lady to whom he was to be married on the next evening,"—because (a) It is immaterial, on the averments of the complaint, what plaintiff's object or purpose was; (b) the matter stated is not an element of damages for which a recovery could be had against this defendant; (c) said matter is a conclusion of the pleader, and not a statement or allegation of a traversable fact. (2) To that portion of the complaint which seeks a recovery of defendant because plaintiff "was grievously disappointed in reference to the preparations for his wedding, was humiliated, was subjected to ridicule, and was subjected to indignity," (a) because, under the averments of the complaint in this cause, said matters are not elements of damages for which a recovery could be had against this defendant; (b) because it is immaterial, under the averments of said complaint, whether the results of plaintiff's failure to obtain passage on said train were as stated in said paragraph or not, not being such character of damages or injuries as would entitle plaintiff to recover therefor. (3) Because, upon the allegations of said complaint, the remedy of the plaintiff, if any, is an action upon the contract, and was not an action sounding in damages. (4) Because, upon the allegations of said complaint, if a remedy exists, it is an action *ex contractu*, and not *ex delicto*." This demurrer was overruled, and the defendant then filed the general issue and the following special plea: "Second. On October 7, 1896, there was in existence and in force a rule of the defendant company to the effect that passengers must not be carried on freight trains without permission from the general manager or the superintendent, except as provided for upon the time-tables, and by special instructions that might from time to time be issued; that under this rule, which was known to the plaintiff at the time, the defendant company, before accepting any one as a passenger, required a ticket for passage, with a permit from the general manager or the superintendent to ride upon such particular train, all of which was known to plaintiff at the time, and plaintiff thereupon tendered to the conductor a ticket for transportation from Athens to Decatur, but he did not accompany said ticket with a permit from the general manager or superintendent, nor exhibit to said conductor such permit. Wherefore defendant says plaintiff is not entitled to recover, and puts itself upon the country." The plaintiff moved to strike the second plea from the file. The court granted this motion, and the defendant duly excepted.

The facts of the case, as disclosed on the trial, were substantially as follows: In October, 1896, the plaintiff, Hine, applied to one

Sherrell, the agent of the defendant at Athens, Ala., for a ticket and permit to ride on a freight train, then near due, to Decatur, Ala. He was informed by Sherrell that it would be necessary for him to get a permit from the superintendent of that division. The superintendent lived at Nashville, and the plaintiff requested the agent to telegraph to him for such permit, the plaintiff paying for the telegram. The agent promised to deliver the permit to the conductor of the train on which the plaintiff intended to make his journey. It appears from the evidence that one Speake also intended to take this train, and had requested the agent to telegraph to Nashville for a permit allowing him to ride on said train, whereupon the agent telegraphed for a joint permission for Speake and the plaintiff, and delivered the permit to Speake, on his calling and asking for it. Speake testified that, the train being a little late, he decided to postpone his journey, and forgot to give the permit to Hine. Hine boarded the train at the station, and, when it had moved off some four or five hundred yards, was asked by the conductor for his ticket and permit. He produced his ticket, but did not have a permit. He explained to the conductor that the agent had promised to deliver the permit to the conductor of the train, and that he had telegraphed to Nashville for a permit, and that he was very anxious to continue his journey. The conductor replied that he had orders not to allow any one to ride on his train unless they had a permit, and that he would have to put him off. When the train had been brought to a stop, the plaintiff, protesting, got off. No insulting or unnecessarily harsh words were used, nor was there any force or violence done the person of the plaintiff. It appears from the pleadings and the evidence that the object of the plaintiff's journey was to bring from Decatur to Athens the wedding garments of his bride in time for his marriage the next day; and it was shown that the garments were received in time for the wedding, and did not cause a postponement of the marriage. It also appears from the evidence that the defendant had a regulation that no passengers would be allowed to ride on its freight trains unless they had a permit from the division superintendent or the general manager.

The court, in its general charge, among other things, instructed the jury as follows: (1) "If you find for the plaintiff, in estimating his damages you can look to the fact, if it be a fact, that he was humiliated by being put off the train; that he suffered ridicule and was subjected to indignity; that he was disappointed in his arrangements for the wedding, and the same postponed. If you find that such was the fact, you can look to these things as elements of damages to which the plaintiff is entitled, in making up your verdict." To this portion of the court's general charge the defendant duly excepted, and also duly excepted to the court's refusal to give, at

the request of the defendant, the following written charge: (1) "As I told you in my general charge, you cannot give punitive damages in this case. Punitive damages are such as are given as a penalty or punishment to deter or prevent the party from again committing a similar offense. But I now charge you again that, if you find the plaintiff is entitled to recover at all in this case, then damages for the 'indignity, humiliation, and ridicule,' if such there were, are actual damages to be allowed by you in such sum as you may think right, not exceeding one thousand dollars." The defendant then requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "If the jury believe the evidence, you will find for the defendant." (4) "I charge you, gentlemen of the jury, that, under the undisputed evidence in this case, the conductor had the right to refuse to carry the plaintiff as a passenger from Athens to Decatur, Ala., and the plaintiff is not entitled to recover in this action." (6) "If the jury believe from the evidence that the rules of the defendant require the plaintiff to have a permit to ride on the freight train going from Athens to Decatur on the evening of October 7, 1896, it was the duty of the plaintiff to furnish to the conductor evidence, beyond his own statement, of his right to passage on the said freight train; and if the jury further believe from the evidence that the plaintiff had sent a telegram, and in response thereto the superintendent had telegraphed a permit for the plaintiff to ride on the said freight train, yet, if the plaintiff did not have the said permit in his possession, to exhibit to the conductor when requested so to do, your verdict should be for the defendant." (7) "If the jury believe from the evidence that the rules and regulations of the defendant required the plaintiff to have a permit from the general manager or superintendent to ride on a freight train going from Athens to Decatur on the evening of October 7, 1896, it was the duty of the plaintiff to furnish the conductor evidence beyond his own statement that he had such permit; and if the jury believe from the evidence that he failed to furnish such evidence, and the plaintiff got off said train when informed by the conductor that he could not permit him to ride on such freight train, then your verdict should be for the defendant, notwithstanding the fact that he had a ticket from Athens to Decatur." (8) "It is the duty of a passenger undertaking to ride on freights, when the rules and regulations of the railroad require him to obtain permits from the superintendent and general manager, to see to it before he takes a train that he has such a permit as will carry him on that train." (9) "I charge you, gentlemen of the jury, that under the law in this state a passenger is not allowed to ride on freight trains, where the rules and regulations of the railroad company require passengers to obtain permits to so ride from the general man-

ager or superintendent, unless the passenger produces and tenders to the conductor a permit from the general manager or superintendent, accompanied with a ticket or legal pass; and if, upon demand for a permit from the conductor or proper official of the road, the passenger fails or refuses to produce it, he may lawfully be expelled from the cars." (10) "A railroad company is not liable for damages for ejecting a passenger from a freight train, riding without a permit, when the rules and regulations of the railroad company require persons traveling on freight trains to have a permit from the general manager or superintendent." (18) "If the jury believe the evidence, then the plaintiff can recover nothing in this case but nominal damages." (16) "I charge you, gentlemen of the jury, that the fact that the plaintiff was humiliated, if such was the fact, is not an element of damages in this case." (17) "I charge you, gentlemen of the jury, that the disappointment of the plaintiff in reference to the preparations for his wedding, if such was a fact, is not an element of damages in this case." (18) "I charge you, gentlemen of the jury, the fact that the plaintiff was subjected to ridicule, if such was the fact, is not an element of damages in this case." (19) "I charge you, gentlemen of the jury, that the fact that the plaintiff was subjected to indignity, if such was the fact, is not an element of damages in this case."

There were verdict and judgment for the plaintiff, assessing his damages at \$250. From this judgment the defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Thos. G. Jones, Chas. P. Jones, and Alex. C. Birch, for appellant. McClellan & McClellan, for appellee.

SHARPE, J. A breach of the duty which a common carrier, as such, owes to its passengers, involves misfeasance as well as nonfeasance; and for an injury caused by such breach an action lies in favor of the passenger in tort, as well as upon the contract of carriage. 2 Sedg. Dam. (8th Ed.) § 859; 5 Am. & Eng. Enc. Law [2d Ed.] 691; Railroad Co. v. Gaines (Ky.) 36 S. W. 174, 59 Am. St. Rep. 465; Sheldon v. The Uncle Sam, 18 Cal. 527.

A passenger is bound to conform to the reasonable and proper regulations of the carrier respecting the time and mode of transportation, and it may be conceded that ordinarily the conductor of a freight train may require of one attempting to take passage thereon evidence, beyond his own statement and the production of a ticket, that he has conformed to a regulation requiring special permission as prerequisite to his right to do so. It does not appear from the complaint, however, that there was any rule of the defendant which required absolutely one who has actually ob-

tained such permission to himself exhibit to the conductor the written evidence of such permission. In the absence of notice to the plaintiff of such absolute requirement, he had a right to assume that the defendant's ticket and telegraphing agent knew his duties, and would perform them. If, therefore, as appears from the complaint, the plaintiff was induced to board the train, and begin the journey, disarmed of the written permit, by the conduct of the defendant's agent, and in reliance upon his advice, and his undertaking to give the permit to the conductor, the defendant could not rightfully eject him from the train for failure to exhibit a written permit to the conductor.

The carrier cannot shield itself from the consequences of misconduct or mistake on the part of one of its agents, acting within the scope of his duties, which has naturally betrayed another of its agents into the final act of injury to the passenger. *Murdock v. Railroad Co.*, 137 Mass. 293, 50 Am. Rep. 307; *Railroad Co. v. Fix*, 88 Ind. 381, 45 Am. Rep. 464; *Hufford v. Railroad Co.*, 64 Mich. 631, 81 N. W. 544, 8 Am. St. Rep. 859; *Head v. Railroad Co.*, 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434; *Railroad Co. v. Gaines*, *supra*.

Upon such considerations, it appears that the demurrers to the whole complaint were properly overruled. For the reasons last stated, it also appears that the plea numbered 2 contained no sufficient answer to the complaint, and the action of the court in striking it out was without error.

A demurrer does not lie to part of a complaint unless the suit be one upon a bond, assigning breaches. To rid it of objectionable parts, the remedy is by motion to strike them out. *Hester v. Ballard*, 96 Ala. 410, 11 South. 427; *Kennon v. W. U. Tel. Co.*, 92 Ala. 399, 9 South. 200; *Pryor v. Beck*, 21 Ala. 393.

The issue being found in favor of the plaintiff, he was entitled to recover the damages proximately resulting to him from the wrong, including the expense and inconvenience to which he was put. Humiliation and indignity, if suffered by him from the ejection, are also elements of actual damages. Such damages may arise from a sense of injury and outraged rights engendered by the ejection alone, without regard to the manner in which it was effected, and though done only through mistake. *Head v. Railroad Co.*, *supra*; *Railroad Co. v. Flagg*, 43 Ill. 364; *Railroad Co. v. Hoeflich*, 62 Md. 300, 50 Am. Rep. 223; *Smith v. Railroad Co.*, 23 Ohio St. 10.

We think that, under the undisputed facts appearing in the record, the plaintiff was not entitled to recover for disappointment in respect of arrangements for his wedding, or for any ridicule to which he may have been subjected, so far as is shown by the proof. It is an undisputed fact that, after plaintiff had left the train for a short distance only, he was invited by the conductor, through a special messenger, to board the train and resume his journey, and that he refused to do so, ex-

cept upon condition that the train should be backed to him. While by refusing such offer the plaintiff did not forfeit his right of action for the ejection, he could not be allowed to aggravate his injury or to enhance his damages by a voluntary abandonment of the trip. On the contrary, it was his legal duty to use ordinary care to make his damage no greater than was necessary, and to adopt reasonable and convenient means to that end; and the application of that rule would certainly have required of plaintiff his return to the train, if the accomplishment of the journey was important. *Railroad Co. v. Fullerton*, 79 Ala. 298; 5 Am. & Eng. Enc. Law, 693; *Car Co. v. Blum*, 109 Ill. 20; *Sedg. Dam.* (7th Ed.) 56. Under such circumstances, it cannot be held that the failure of plaintiff to make the trip, or a consequent postponement of arrangements for his marriage, was the necessary or proximate result of the wrong complained of.

There was no proof that plaintiff was subjected to ridicule, other than his statement that he "was gayed by some of the boys about town for being put off and not being permitted to ride." It is not shown that the persons who did the "guying" were present when plaintiff was ejected, or that he alone did not inform them of it, or that their conduct was in any sense approximate upon the wrong.

From what we have stated as the law controlling the case, it follows that charges numbered 17 and 18 requested by the defendant should have been given, and that the remainder of those charges were properly refused; and also the written charge requested by plaintiff, because it affirmed the mentioned ridicule to be an element of damage, should have been refused. The part of the oral charge excepted to was correct, so far as it affirmed that humiliation could be the subject of plaintiff's damage; and the exception thereto, covering too much, was not well taken. For the errors indicated, the judgment must be reversed, and the cause remanded.

(76 Miss. 898)

TORRE et al. v. JEANNIN et al.
(Supreme Court of Mississippi. May 8, 1899.)
PUBLIC LANDS—PATENTS—IDENTITY OF PATENTEE—EVIDENCE—HARMLESS ERROR—ALIEN.

1. Louis Fayard, in 1793, settled on a tract of land, residing there till his death, in 1830, and his children occupied it thereafter. The land was always known as the "Louis Fayard Claim." In 1847 a patent to the land was issued to Louis Fasiar. The oldest inhabitants had never heard of any one named Fasiar, but all knew the Fayards, and the title of Fayard's descendants had not been challenged in the 50 years following. *Held*, that Fayard and Fasiar were the same person.

2. Errors in the admission and exclusion of hearsay evidence in a controversy over ancient boundaries are harmless where they do not materially affect the result.

3. A witness was asked, "Of what country was your father a subject?" and he answered, "France,—Paris." *Held*, that this was too vague and unsatisfactory to prove the father, who lived many years in this country, and died here, was an alien.

Appeal from circuit court, Harrison county; T. A. Wood, Judge.

Action by Joseph Torre and others against M. L. Jeannin and others. There was a judgment for plaintiffs, and defendants appeal. Affirmed.

Action of ejectment by appellees against appellants. The plaintiffs claim title as the heirs of J. B. Jeannin, their father, and deraign their title as follows: A patent issued to Louis Faslar; a partition proceeding in the probate court of Harrison county among the heirs of Louis Fayard, by which lot 2, according to a plat of the commissioners, dividing the land, was allotted to Alexis Fayard, one of the heirs of Louis Faslar, and a deed from him to J. B. Jeannin, their father, who died intestate. This action was brought to recover lot 2. Defendants denied that they were in possession of lot 2, and deraigned title to the land they were in possession of through one Lyons, who claimed under a tax title, and they claimed title by adverse possession of said Lyons. The defendants objected to the introduction of patent from the United States to Faslar as the foundation of plaintiffs' title, issued in 1847, as the heirs among whom the land was divided had their names written Fayard. They also objected to the introduction of the partition proceedings because the identity of the two names had not been established. There was some controversy as to the boundary lines of lot 2, and parol evidence was introduced to establish the lines. When plaintiffs closed their case, the defendants made a motion to exclude all their evidence, because, *inter alia*, the evidence showed that J. B. Jeannin, the father of plaintiffs, through whom they claimed, was an alien. The opinion contains a further statement of the facts.

J. I. Ford and Frank Johnston, for appellants. Denny & Woods, A. Y. Harper, and W. R. Harper, for appellees.

WOODS, C. J. It would be hazardous for a court not familiar with the French language to undertake to settle important property rights on the sole ground that proper names of parties asserting such rights are not identical in sound and orthography with that of their ancestor, as disclosed by the patent obtained from the United States. Whether the name Fayard has similar or identical sound with the name of Faslar as written and pronounced in old French, we are utterly unable to say, after looking at it in the light of the evidence in the record before us. But this is not vital to the issue. The identity of Louis Fayard with the person called Louis Faslar in the patent cannot be said to be doubtful. In the year 1793, Louis Fayard, the ancestor of him through whom the father of the appellees claim title, settled upon this land, and continued to reside upon the same until his death, about the year 1830, and his children continued to occupy and claim the

land after his death. In the year 1847 a patent was issued to Louis Faslar, as the name is therein written, in pursuance of the provisions of an act of congress of March 3, 1819. By the terms of a treaty between the United States and Spain, by which the territory of East and West Florida was ceded by the latter to the former, the United States undertook to respect existing private rights in property in the ceded territory. Besides protecting private ownership under grants from the several foreign governments who had successively owned the ceded territory, the act of congress of 1819 made provision for grants of lands, not exceeding 640 acres, to settlers actually occupying their holdings. The claim of Louis Fayard, written Faslar in the patent, was established to the satisfaction of the interior department, and a patent issued, after the government survey had been made, to section 26, township 7, range 7 west, the same being the land settled upon by Fayard in 1793, and continuously occupied by him until his death, and afterwards by his heirs at law. In the year 1849, the land involved in the present suit was allotted, under regular proceedings had by the heirs of Louis Fayard for that purpose in the probate court of Harrison county, to Alexis Fayard, one of the sons of said Louis Fayard, as lot 2, the other lots—1, 3, 4, 5, and 6—falling to the several other children or descendants of said Louis Fayard; and these various allotments have stood as then made for 50 years. The entire body of the lands embraced in the patent of 1847 has always been called and known as the "Louis Fayard Claim." The oldest inhabitants in that region—and one who testified was over 100 years old when her deposition was taken—have never known or heard of any person whose family name was Faslar, while all knew the Fayards, and one knew Louis Fayard in his lifetime, and when he was in actual occupation of the Fayard claim. The title of Louis Fayard and of his descendants and their grantees has never been before challenged. That Louis Fayard, the settler of 1793, and Louis Faslar, the patentee from the United States, were one and the same man, appears to us to be perfectly certain; and the title to the lot in controversy, derived by conveyance to appellees' father from Alexis Fayard, is perfectly made out. The court below did not err in so holding, and in peremptorily instructing the jury so to find.

Whether the land described in the declaration was lot 2 was left to the jury, under all the evidence. That the defendants (appellants here) were in possession of the property was admitted by their plea, and evidence offered by them to deny possession was unavailing. That they had no title derived from some unnamed tax sale is too clear to require remark. That possession, under color of title from one Lyons, for less than 10 years, did not bar plaintiffs' (appellees') right of recovery, is also clear.

Complaint is made to the court's action in

admitting and excluding evidence. That hearsay evidence is admissible in controversies over ancient boundaries seems to be well established. That some errors were committed may be conceded, but they could not have materially affected the result,—the only result which could have been rightfully reached having been reached.

It is argued by counsel for appellants that the purchaser of this property, the ancestor of appellees, from Alexis Fayard, was at the time of the purchase a nonresident, unnaturalized alien, and incapable of holding or transmitting by descent, real estate situated in this state. Under the views which we entertain touching the 10 words of evidence found in the record on this point, it will be unnecessary to consider at all the treaty of 1853 between France and the United States by which the rights of a French alien to hold and dispose of real estate in the United States were placed on the same footing with those of citizens of this country, or to examine the decisions of the United States supreme court on this subject. The only scrap of evidence on this point is found in one question, and the answer to it. One of the appellees was asked, "Of what country was your father a subject?" to which she replied, "France,—Paris." The answer seems to show that the witness was giving the nativity of her father, and it was too vague and unsatisfactory to warrant the counsel's contention. There is absolutely nothing to show that the father of appellees was never naturalized during the many years of his life when he resided in this country. "An alien is one who is born out of the jurisdiction of the United States, subject to some foreign government, and who has never been naturalized under the constitution or laws of the United States, or any of them." 1 Am. & Eng. Enc. Law, 456. The appellees are not to be subjected to the loss of their inheritance by evidence so inconclusive and unsatisfactory. The evidence of alienage must be clear and satisfactory, and these 10 words are neither clear nor satisfactory proof of the facts that the father was a subject of France, and that he died without ever having been naturalized. Affirmed.

(77 Miss. 1)

CARTER et al. v. HARVEY et al.

(Supreme Court of Mississippi. April 24, 1899.)

HUSBAND AND WIFE—RIGHT TO SHARE IN THE OTHER'S ESTATE—WILL—PROVISION FOR HUSBAND—RENUNCIATION BY CREDITORS.

1. Where a testatrix provides that her husband, if he survives their children, shall inherit her property, all of which she devised to them, Code 1892, § 4497, providing that, if a husband or wife makes no provision for the other, the survivor shall share in the decedent's estate, does not apply, and he takes under the will, and not under the statute.

2. Creditors cannot renounce for their debtor a provision made for him in his wife's will, so as to entitle him to share in her property, as provided by Code 1892, § 4497, where no provision is made for him.

Appeal from chancery court, Oktibbeha county; Baxter McFarland, Chancellor.

Bill by W. H. Harvey, Jr., and others against Carter Bros. & Co. and others. From a decree in favor of complainants, defendants appeal. Affirmed.

On June 27, 1885, Mrs. E. A. Harvey died testate, leaving her husband and three minor children as her only heirs. In her will she devised all her property to her three children, and made her husband executor of the estate and guardian of the children, with entire control of same until the children became of age; and further provided that, if the children should die before the husband, he should inherit all the property. Appellants Carter Bros. & Co. held an unsatisfied judgment for about \$1,000 against W. H. Harvey & Co., of which firm W. H. Harvey was a member, and levied upon one-fourth interest of the estate of Mrs. E. A. Harvey, claiming that, under section 4497 of the Code of 1892,—which provides that, "if the will of the husband or wife shall not make any provision for the other, the survivor of them shall have the right to share in the estate of the deceased husband or wife for the other of them,"—the husband had a right to share in the estate of the deceased wife. On March 18, 1886, the original bill in this case was filed by the Harvey children, setting up the probate of the will of Mrs. E. A. Harvey, and praying for an injunction to prevent the sale of this property for the debt of their father, which injunction was granted. By his own motion, W. H. Harvey was made a party to this suit. Defendants moved to dissolve this injunction. The motion was overruled, and an answer filed, alleging the will to be a forgery, and an issue of *devisavit vel non* was made up. At the trial complainants introduced in evidence the will of Mrs. E. A. Harvey, the records showing the probate of the will, and a number of depositions and affidavits of witnesses, who testified that the will introduced in evidence was the will of Mrs. E. A. Harvey. The issue was, by agreement, heard by the chancellor without a jury. The decree was adverse to defendants, and they appeal.

Thos. J. O'Neill, for appellants. H. L. Muldrow, Wiley A. Nash, and Alexander & Alexander, for appellees.

WOODS, O. J. 1. Looking at all the evidence in the record, documentary and other, we have no hesitation whatever in affirming the finding of the learned court below as to the genuineness of the paper purporting to be the will of Mrs. Harvey. That the paper was wholly written and signed by the testatrix is overwhelmingly established by all the evidence.

2. The will of Mrs. Harvey did not fail to make any provision for her husband. The error of the counsel for appellant arises out of his reading into section 4497 of our

Code the words any "adequate" or "sufficient" provision for the husband. The plain and unambiguous language is: "If the will of the husband or wife shall not make any provision for the other, the survivor of them shall have the right to share in the estate of the deceased husband or wife, as in the case of the unsatisfactory provision in the will of the husband or wife, for the other of them." In the case before us there was no failure to make any provision by the will of the wife for the husband. He was made executor of the will and guardian of the infant children (then of very tender age), without bond, with the right to use the estate, as he always had done, for the benefit of the infants. He thus had some provision made for him. Besides, the whole estate was bequeathed and devised to him absolutely, in the event of the children of the testatrix dying before reaching their majority. These provisions of the will were satisfactory to the husband, for he has never renounced the will, and it is not for his creditors to renounce for him. The decree is the only one which could properly have been rendered. Affirmed.

ILLINOIS CENT. R. CO. v. TRAIL.

(Supreme Court of Mississippi. April 24, 1899.)

PASSENGER ON FREIGHT TRAIN—PERSONAL INJURY—GROSS NEGLIGENCE—PROXIMATE CAUSE.

Plaintiff boarded defendant's freight train, which was not designed to carry passengers, and jumped off at a station, to which he had purchased a ticket, on its failure to stop, and while it was running at from six to eight miles per hour, and was injured. *Held*, that though defendant was guilty of gross negligence, for which only it was liable, under Code, § 3557, plaintiff's own recklessness was the proximate cause of his injury, and he could not recover.

Appeal from circuit court, Panola county; Z. M. Stephens, Judge.

Action by A. P. Trail against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Mayes & Harris, for appellant. Eugene Johnson, for appellee.

TERRAL, J. The appellee, being on a through freight train of the appellant company,—a train not designed to carry passengers,—and desiring to get off at Batesville, jumped off the train while it was running at a speed of eight miles per hour, and was considerably hurt and injured by the fall received from so alighting, and recovered in the circuit court \$235 for his damages; and from a judgment for said sum the railroad company appeals.

The plaintiff below was, as he testifies, expert in getting on and off moving trains. He boarded the train at Oakland, and paid his fare to Batesville, where he desired to stop, at the suggestion of a friend that he might get a job of tinwork there; he being

a tinner by trade. As the train was approaching the station, he says, it was running so slowly that he thinks he could have alighted with perfect safety, and he supposed it would stop at the station; but it immediately increased its speed, and when it passed the station house, and came to the next point where he supposed he could alight with safety, it was running between six and eight miles per hour, when, upon jumping, his foot was placed upon a rock, or other object, about the size of a guinea egg, which threw him to the ground, and caused the injury of which he complains. The company claims it should have had a peremptory instruction, and its refusal is the only material error assigned. As was said in *Dowell v. Railway Co.*, 61 Miss. 519, the plaintiff's own rashness has caused his misfortune. It is obviously too hazardous to jump off a train moving eight miles per hour, without assuming all the consequences of such action. The evidence for the company shows the train was running much faster, but the defendant himself swore that the train was running between six and eight miles an hour. The plaintiff's own evidence settles the case against him. By section 3557, Code, a railroad company is not liable for injuries to passengers on trains not intended for both passengers and freight, except for the gross negligence of its servants. Of necessity, the gross negligence must be the proximate cause of the injury. The train should have stopped at Batesville. It was a wrong to plaintiff that it did not do so. But its not being stopped was not the proximate cause of the injury. The injury done to the plaintiff was caused solely by his own recklessness in disembarking from a swiftly-moving train. Reversed and remanded.

(77 Miss. 56)

SUNFLOWER LAND & MFG. CO. et al. v. WATTS et al.

(Supreme Court of Mississippi. April 24, 1899.)

DEED OF LEVEE COMMISSIONERS—TITLE—ACTS 1888, C. 23, § 1.

Acts 1888, c. 23, § 1, which provides that deeds of conveyance executed by Gwin and Hemingway, as levee commissioners, shall be taken and held in all courts of the state as prima facie evidence that the land embraced therein was duly and legally sold to said board of levee commissioners, up to and including the sales of 1874 for the taxes due thereon, and that the title conferred by said deeds is, to all intents and purposes, valid, does not relieve a person holding under a deed by Gwin and Hemingway, which does not show when or by what particular sale the title to the land was acquired by the levee board, from proving the particular title by which the levee board claimed.

Campbell, Special Judge, dissenting.

Appeal from chancery court, Sunflower county; A. H. Longino, Chancellor.

Bill by J. E. Watts and another against Sunflower Land & Manufacturing Company and another. From a decree in favor of complainants, defendants appealed. Affirmed.

Appellee Watts filed his bill in chancery to remove clouds upon his title to lots 13 and 14, section 35, township 22, range 4 W., in Sunflower county, and derails his title from a grant from the United States to the state of Mississippi; then through a series of conveyances to John J. Hooker, through whose heirs he claims to have derived title; then down to himself. Defendants claim ownership by virtue of sales of the land for taxes to the state in 1883 and in 1886, and a sale to the liquidating levee board, and a deed from Gwin and Hemingway, commissioners of the chancery court of Hinds county, appointed in the case of Green against Gibbs, and also a deed from the auditor, made in pursuance of the act of 1888, together with certain mesne conveyances. Complainants contend that the two sales to the state above mentioned were void, because in the assessment roll under which the first sale was made this land was assessed to the state, and that the assessment roll made in the year 1883, under which the second sale was made, was not filed by the assessor with the clerk of the board of supervisors at the time fixed by law, no action having been taken by the board to cure the invalidity arising from the delay of filing; and introduced in evidence the land assessment roll for Sunflower county, showing assessment of land in controversy, with indorsement of filing, etc.; and also introduced in evidence a deed from Vassar, levee commissioner, conveying these lands, in 1871, to appellee's vendors. Appellants, defendants below, contend that, notwithstanding their failure to show a good title vested in the state by reason of either of the two sales for taxes, and the consequent inefficiency of the auditor's deed, the deed of Gwin & Hemingway vested title, which had not been assailed by complainants, and complainants have no title to the land which gives them a standing in court for litigating with appellants the validity of appellants' title, and alleged in their answer that the lands in controversy were sold to the liquidating levee board in 1873 or 1874, for delinquent taxes due thereon, and in support of the allegation introduced in evidence the deed from Gwin and Hemingway to one of its vendors. At the trial in the court below, a decree was rendered in favor of complainants, and defendants appeal.

Griffin & Larkin and Frank Johnston, for appellants. Baker & Moody and P. C. Chapman, for appellees.

WOODS, C. J. The only question presented by this appeal is as to the effect of a deed to the land in controversy made by Gwin and Hemingway, levee commissioners, to E. C. Gordon, in the year 1881, viewed in the light of section 1, c. 23, Acts 1888. The deed from the levee commissioners does not show when, or by what particular sale, the title to the land was acquired by the levee board; and in the case of National Bank of Republic v.

Louisville, N. O. & T. Ry. Co., 72 Miss. 447, 17 South. 7, this court, in construing the third section of this chapter 23, Acts 1888, held that the auditor's deed to purchasers of levee lands, though declared to be evidence of paramount title, did not operate to absolve such purchasers from pointing out the particular title by which the state claimed. That opinion governs the case in hand. We can add nothing to the reasoning employed in the opinion named, and we shall not mar its symmetry by making quotations from it. Affirmed.

CAMPBELL, Special Judge. I dissent in toto from the above view.

WHITFIELD, J., disqualified.

(77 Miss. 766)

HIGDON et al. v. SALTER.

(Supreme Court of Mississippi. May 1, 1899.)

TAXATION — VOID SALE — LIMITING SEPARATE TRACTS.

Under Code 1892, § 3813, directing the manner of selling land for taxes, and of offering it in subdivisions, and requiring the collector to proceed to sell until the requisite amount is produced, or until all the land constituting one tract, and assessed to the same owner, is offered, the collector cannot unite the lands of two owners of separate tracts and sell them together.

Appeal from circuit court, Copiah county; Robert Powell, Judge.

Action by S. G. Salter against Watt Higdon and others. There was a judgment for plaintiff, and defendants appeal. Reversed.

Action of ejectment by appellee against appellants to recover possession of 520 acres of land in Copiah county. The suit was brought against W. Higdon and Joe Middleton, and the Topeka Trust Company, the owner of all the lands, was admitted to defend. The cause was tried before the court, a jury having been waived. Appellee claimed under a tax deed executed by the tax collector of Copiah county on the 2d day of March, 1896, the land having been sold for the state and county taxes for the year 1895. The opinion contains a further statement of the facts.

R. P. Willing, for appellants. R. N. Miller, for appellee.

WOODS, C. J. The lands embraced in this litigation are all included in one conveyance from the tax collector to appellee, and were sold by the former, at the tax sale, to the latter, as one tract, the tax collector first offering 40 acres, and, receiving no bid, adding another 40 acres, and so continuing until the entire 520 acres were put up, when appellee bid \$22.40, that being the amount of taxes due on all the land, including costs and damages. The assessment roll under which the tax collector sold, and under and in pursuance of which he could only sell, showed the lands assessed as two separate tracts, to two separate owners, more than 200 acres being as-

essed to Salter, and something less than 300 acres being assessed to "unknown owner." Section 3813, Code 1892, directs the tax collector to sell land on which the taxes remain unpaid, or so much or such parts of the land of each delinquent taxpayer as will pay the taxes due by him, with costs and charges, to the highest bidder for cash. The manner of offering subdivisions in making the sale is then pointed out, and the collector is then directed to so proceed to sell until the requisite amount is produced, or "until all the land constituting one tract, and assessed as the property of the same owner, be offered." The statute is plain that all the land constituting one tract, and assessed to the same owner, may be sold if the requisite amount cannot be produced by the offer of subdivisions of the land; but it was never in contemplation that a collector, acting on his private opinion touching the constitution of separate parcels making one tract, or of the ownership of separate parcels, and utterly disregarding what was clearly shown on the assessment roll, might unite the lands of two distinct owners of separate tracts, and sell all for the taxes unpaid of one or the other or both of the owners. We held, in *Nelson v. Abernathy*, 74 Miss. 164, 21 South. 150, and in *Gregory v. Brogan*, 74 Miss. 694, 21 South. 521, that a tax sale was void because of the tax collector's failure to designate the several 40-acre legal subdivisions composing the tract sold by their proper description at the time of offering the same, and that such error was not cured by sections 3813, 3815, Code 1892. Surely, in the face of those decisions, the sale of separate tracts of land, assessed to different owners, in one body, was fatally erroneous, and the purchaser at such sale acquired no title. Reversed and remanded.

BOOKOUT et al. v. ANDREWS.

(Supreme Court of Mississippi. May 1, 1899.)

TAXATION—VOID SALE—LEGISLATION.

The imposition by the legislature of the war taxes of 1861, in aid of the rebellion, being void, a sale of land thereunder was void, and could not be validated by subsequent legislation.

Appeal from chancery court, Sunflower county; A. H. Longino, Chancellor.

Action by O. T. Bookout and others against F. M. Andrews. There was a judgment for defendant, and plaintiffs appeal. Affirmed.

Appellants filed their bill against appellee, claiming title to lot 1 of section 33, township 18, range 5 west, situated in Sunflower county, Miss., and ask the court to cancel appellee's deed as a cloud upon appellants' title. Appellants set out their deraignment of title, showing that their rights are conferred by auditor's deed to them of this lot, which was claimed by the state under and by a sale for taxes, made on the 7th day of July, 1862. To this bill appellee interposed a demurrer on

25 So.—55

the following grounds: (1) Because the taxes for which the land in controversy was sold in 1862, and through which sale plaintiffs claim title, were in aid of the rebellion, and said sale was illegal and void; and (2) because said sale was made on a day other than the one fixed by law. At the trial in the court below the demurrer was sustained and the bill dismissed, and from this decree an appeal was prosecuted.

Baker & Moody, for appellants. W. S. Chapman and Chapman & Chapman, for appellee.

TERRAL, J. In this case it is sought to maintain the validity of a sale of land for taxes made in July, 1862, which by former decisions of this court have been held void because the taxes levied or a part of them were in aid of the rebellion, on the ground that subsequent statutes, by a sort of side wind, have validated such sales. This contention is based upon the power of the legislature to cure by subsequent legislation such irregularities in tax sales as it could have provided against beforehand.

It is sufficient to say that the power of the legislature to cure irregularities in tax proceedings does not apply to a matter of this sort. The imposition by the legislature of the war taxes of 1861 was not a mere irregularity. It affected the validity of the sale, and the sale itself was void. The legislation quoted, in our opinion, was not intended to validate sales of land for war taxes; for we could not impute such intention to the legislature, unless it was clearly expressed or necessarily implied. The action of the chancery court is affirmed.

(77 Miss. 28)

YAZOO & M. V. R. CO. v. ANDERSON.

(Supreme Court of Mississippi. May 8, 1899.)

CARRIERS—EXPULSION OF PASSENGER.

Where a baggage man collusively agreed to carry a person who had no intention of paying his fare, the company was not liable for injuries caused by the baggage man forcing him to jump from the moving train.

Appeal from circuit court, Claiborne county; W. K. McLaurin, Judge.

Action by Floyd Anderson against the Yazoo & Mississippi Valley Railroad Company. There was a judgment for plaintiff, and defendant appeals. Reversed.

This was an action brought to recover damages for an alleged wrongful expulsion of plaintiff from the baggage car of the company by the baggage master while the train was running at a high rate of speed, by reason whereof he was injured. The plaintiff was a laborer working on a bridge gang under a man by the name of Ratliff, in Louisiana. Plaintiff lived in Knoxville, Miss., and, desiring to go home, applied to his foreman for transportation. At the trial plaintiff testified that he knew that he was required by

the rules of the railroad company to have a pass entitling him to transportation, and that he applied to his foreman for same, and that the foreman failed to get the pass, but made arrangements with the baggage master to have plaintiff carried to Knoxville, Miss.; that he got on the train at Cabbare, and went into the baggage car; that before the train got to Knoxville the baggage master told him to get ready to get off, and that when they reached Knoxville he was told by the baggage master to get off, when he (plaintiff) asked if the train was going to stop, and, as the train did not stop, he asked permission of the baggage master to be carried to the next station, which the baggage master refused, and told plaintiff to get off; that he hesitated to get off; and that the baggage master pulled out his gun, and said, "Get off," when plaintiff sprang off, and, falling under the train, his left leg was cut off.

Mayes & Harris, for appellant. Martin & Anderson and McLaurin & McKnight, for appellee.

WOODS, C. J. Accepting as true the evidence of the appellee himself, the peremptory instruction asked for the appellant should have been given. By the fraudulent collusion of the appellee, the bridge foreman, and the baggage master, the appellee was admitted to the baggage car to be carried some distance in violation of the rules of the company, against its interests, and in fraud of its rights. He knew he must pay fare or have a pass, and, though he endeavored to secure the pass, he failed to get it; and he did not pay his fare, and never intended so doing. The baggage master and the appellee were aware of the propriety of keeping the appellee out of sight while in the baggage car, and when the train reached Knoxville, the point to which the baggage master collusively agreed to carry appellee, the train not stopping, the baggage master compelled the appellee to jump from the rapidly-moving car, whereby he lost a leg. The baggage master may be liable to appellee for his injury, but not the railroad company. The case is controlled by the opinions of this court in *Railroad Co. v. Latham*, 72 Miss. 32, 18 South. 757, and *Williams v. Railroad Co.* (Miss.) 19 South. 90.

Reversed and remanded.

(76 Miss. 693)

HOOKER et al. v. McINTOSH et al.
(Supreme Court of Mississippi. May 1, 1899.)
PUBLIC LANDS—AGREEMENT TO RELINQUISH HOMESTEAD ENTRY—VALIDITY—NOTES—CONSIDERATION—INSTRUCTIONS.

1. An agreement by the filer of a homestead entry on public lands to relinquish his entry, to permit another to enter on the lands, is valid.
2. A note given in consideration of the payee relinquishing a homestead entry on public lands, to enable the maker to enter on the lands, is founded on a sufficient consideration.
3. Where the defense to notes given in consideration of the relinquishment of an entry on public lands, to enable the maker to enter

thereon, was that, after having so entered, the parties agreed that, in lieu of paying the notes, the maker should sell the lands and divide the proceeds with the payee, and that he had sold the lands and paid the payee part of his share of the proceeds, a charge that the maker had the burden of showing payment of the notes by a preponderance of the evidence was erroneous, since the defense was that there had been a novation of debts, and not that the notes had been paid.

4. The court having charged, at the request of the payee, that he could recover, notwithstanding the agreement to sell the lands and share the proceeds, if the maker had failed to pay him his share of the proceeds of the sale of the lands, it was inconsistent to charge, at the request of the maker, that no recovery could be had if the agreement had been made, and the maker sold the lands pursuant thereto.

Appeal from circuit court, Lawrence county; W. P. Cassidy, Judge.

Action by D. A. McIntosh and another against John Hooker and another. There was a judgment for plaintiffs, and defendants appeal. Reversed.

In 1885 John Newson entered for a homestead 160 acres of land in Lawrence county, and proceeded to build a house on this tract of land, and to clear up and cultivate the land. In 1890 Newson sold his interest in the land and the improvements to one John Hooker for \$300, and received from Hooker three promissory notes, of \$100 each, payable in one, two, and three years. After the price was agreed upon, Newson and Hooker went to the land office at Jackson, Miss., and Newson canceled his claim, and Hooker entered the land the same day. McIntosh, who had by some means obtained possession of, or acquired some interest in, these notes, together with Newson, brought this suit on two of the promissory notes against Hooker, as principal, and Herring as surety, on the notes. It was claimed by appellants (defendants below) that after Hooker entered the land he was disturbed by the White Caps to such an extent that he could not live on the land, and that there was a second contract between Newson and Hooker, in which it was agreed that Hooker was to sell his homestead interest for what he could get, and divide equally the proceeds between himself and Newson, and that Hooker sold his interest for a horse worth about \$50, and that he paid to Newson about 30 gallons of molasses, at 35 cents per gallon, and a yearling worth \$6, and that Newson never called for the balance. These claims were denied by complainants. The first instruction given for plaintiff is as follows: "The court instructs the jury, for the plaintiff, that the notes sued on in this case are prima facie evidence of the defendants' indebtedness to the plaintiff, and entitle the plaintiff to recover, and they will find for the plaintiff unless they believe from the evidence that the defendants have settled these notes. And on the question of payment the burden of proof is on the defendants, and they must show the payment by a preponderance of the evidence." Second instruction for plaintiff: "The court instructs the jury, for

the plaintiff, that although they may believe from the evidence that the plaintiff Newson agreed for the defendant Hooker to sell the land for what he could get for it, if he would pay him one-half of whatever he got for the land, and that he would accept this one-half in payment of the notes, still the plaintiff is not debarred from recovering on these notes if they believe from the evidence that Hooker sold the land for a mare worth fifty dollars, and that he did not pay Newson one-half thereof." The following is the third instruction for defendants: "The court instructs the jury, for the defendants, that if they believe from the evidence that, after the execution of the notes sued on, John Newson and John Hooker entered into an agreement that Hooker was to sell whatever right he had to the land for whatever he could get for it, and pay to Newson half of what such right was sold for, and Newson released and relinquished all right he had to enforce payment of the notes, and agreed to take the one-half of such sale as the amount due him, then, if Hooker sold such right, Newson cannot recover on the notes, and the jury should find for defendants." At the trial in the court below judgment was in favor of plaintiffs, and defendants appeal.

John H. Arrington and McWille & Thompson, for appellants. McIntosh & Bro. and Brame & Brame, for appellees.

WOODS, C. J. The arrangement between Newson and Hooker, whereby the former agreed with the latter to relinquish his claim to and abandon the land, and to cancel his entry at the land office, in order that the latter might enter the land and ultimately secure a patent therefor, was not illegal, and constituted a sufficient consideration for Hooker's notes given to Newson. It was simply the relinquishment of Newson's possessory right in the premises, with the improvements made thereon by him. The authorities on the subject are collated in 19 Am. & Eng. Enc. Law, pp. 323, 324, and notes, and Id. pp. 332-334, with notes. The case must, however, be reversed because of erroneous instructions. The first instruction given for the plaintiff confined the jury to a question of payment of the notes. That was not really the defense offered. No one pretended that the notes had been paid. The question was, had there been a novation of the original indebtedness? The second instruction given for the plaintiff, and instruction given for the defendant marked "No. 3" in the transcript, are not harmonious. Reversed.

(76 Miss. 758)

ILLINOIS CENT. R. CO. v. BISHOP et al.
(Supreme Court of Mississippi. April 3, 1899.)
RAILROADS—INJURY TO SECTION HAND—CAUSE—
NEGLECT OF CO-EMPLOYE—LIABILITY.

1. When a hand car was crowded, it had been the custom of section men to lay a plank across it, with ends extending beyond the sides a foot

and a half, so as to afford seats for extra men, and its use was not dangerous. A section hand, while thus seated, was struck by the lever of a drawbridge which was left in an improper position. *Held*, that the accident was not due to the use of the plank, but to the improper position of the lever.

2. A section hand, in crossing on a hand car a draw bridge within the section on which he worked, was struck by the bridge lever which had been left in an improper position. *Held*, if the accident was due to the negligence of the bridge tender, who was also employed by the railroad company, and whose duty it was to keep the draw closed, and signal the crew when to go forward, that they were co-employees, and he could not recover.

Appeal from circuit court, Hinds county; Robert Powell, Judge.

Action by Julia Bishop and others against the Illinois Central Railroad Company. There was a verdict for plaintiffs, and defendant appeals. Reversed.

This was a suit by Julia Bishop to recover damages of the railroad company for the death of her son, Oscar Bishop, which occurred in the state of Louisiana. Oscar Bishop was a section hand working on a section of the railroad which lay in the state of Louisiana. The section on which deceased worked was divided by Pass Manchac; the track of the railroad company crossing the pass over a drawbridge which was owned by the company, and a part of its track. The draw was operated by a bridge tender by the name of Strauther, whose business it was to open and close the draw,—open the draw when boats had to pass, and close it so that trains could pass over the bridge in safety. At the time of the injury, deceased was riding on a hand car, sitting on a plank which was provided by the railroad company in cases where the crew consisted of too many for one hand car, and not enough for two. The plank was provided to afford extra seating for laborers, and was laid loose across the hand car, with the ends extending beyond the sides of the car about a foot and a half. Deceased was sitting on one end of this plank, holding to a keg of beer; and, while crossing the drawbridge, the end of the plank struck the handle of the draw, which had been left by the bridge tender in an upright position. This striking of the handle knocked Oscar Bishop from the plank, and he was precipitated into the water, and drowned before he could be rescued. At the trial several witnesses testified that use of the plank was usual and ordinary in the company's business. It was also established by the testimony of several witnesses that on the day on which deceased was injured the regular section foreman, Ed Cushman, was sick, and the crew went out under the supervision of Fred Cushman, and that this Fred Cushman was a mere laborer in the crew himself; that the section hands, including the foreman or boss, were all under the immediate supervision of what was known as the "supervisor," this supervisor having charge of all the section hands in a certain district, this district being divided into sec-

tions, and each section assigned to a particular crew, but all were under the constant and immediate supervision of a supervisor. At the final hearing, there was a verdict for the plaintiff for \$1,000, and the railroad company appeals.

Mayes & Harris, for appellant. Williamson & Potter, for appellees.

WOODS, C. J. 1. The use of the plank on the hand car is shown by all the evidence to have been employed by appellant and its employees continuously for at least 15 years prior to the accident which resulted in the death of appellee's son. Its use was not only customary, but is shown also to have not been a dangerous appliance. The brother of the deceased, who was introduced as a witness for appellee, testified that the use of the plank was as safe as walking in a road. The use of the plank was not the cause of the injury complained of. The accident was caused directly by the improper position of the lever used in closing and fastening the drawbridge.

2. The bridge tender was not the superior of the section crew,—the alter ego of the railroad company. He was simply a fellow servant of the deceased, and engaged in the same employment. He had charge of a small portion of the track in the section upon which the crew to which the deceased belonged worked. The small part of the track in this section which he had charge of was that part of the line where the rails of the track rested upon the superstructure which spanned Manchac Pass, which connected Maurepas and Pontchartrain lakes. So far as his duties to the section crew were concerned, he had only to keep the draw closed, and signal the crew to go forward. But his duty to give signals did not make him a superior officer of the section crew. He was no more a superior officer, than any ordinary switchman, whose duty it is to open and close switches, is superior to conductors and engineers whom he signals to go forward with their trains. If the lever to the drawbridge was left in an improper position by him, it was the negligence of a fellow servant, simply. In what manner, or by what means, or by whose agency, the lever was left in an upright position on the occasion in question, nowhere appears. But, we repeat, if it was so improperly left upright by the bridge tender, it was the negligence of a fellow servant, merely, for which the railroad company was not liable.

3. We need not determine whether the section foreman is a vice principal, within the principles of any decision to be found in the Louisiana Reports. The courts of that state have never held a section foreman to be a vice principal, but, if they had so held, or if such character might be fairly imputed to him by reason of his being within the principles of any adjudication of the supreme court, still the plaintiff should not have recovered, because no negligence of the foreman was shown by the evidence. We have already

said that the use of the plank by him for seating a part of his crew was not negligence. The requiring the deceased to hold the keg, though improper, perhaps, was harmless, for the holding the keg in no way contributed to the injury. That was occasioned by negligence of the bridge tender in leaving the lever upright, if we assume that he did negligently so leave it. A very careful examination of the Louisiana cases leads us to our conclusion. Reversed and remanded.

(76 Miss. 321)

CHAPMAN et al. v. WHITE SEWING-MACH. CO.

(Supreme Court of Mississippi. April 10, 1890.)
FRAUDULENT CONVEYANCES—DEED TO WIFE AND SON—CONSIDERATION.

A father, indebted to his wife and son, conveyed lands to them jointly, delivering the deed to the wife alone, and told her it was to secure her. There was no understanding as to what was to be paid for the property, and afterwards the wife recovered a judgment against the husband for the debt. The son knew nothing of the conveyance until after it was recorded, and he had no agreement with his father that the latter should secure him, and he never made any claim to the profits of the lands, and permitted his father to control it. Held, that the conveyance was valid as against the husband's creditors as to the wife, but invalid as to the son, it never having been delivered to him.

Appeal from chancery court, Hinds county; H. C. Conn, Chancellor.

Bill by the White Sewing-Machine Company against W. C. Chapman and others to set aside a conveyance. There was a decree for complainant, and defendants appeal. Modified.

In August, 1892, W. C. Chapman became surety on the bond of one Hawkins in favor of appellee, and in May, 1895, a judgment was rendered against him on this bond in favor of appellee, which was enrolled in the county of Hinds, where Chapman lived. In February, 1893, W. C. Chapman conveyed all his property to his wife, Annie T. Chapman, and his son, John D. Chapman, jointly. The deed conveys to them the W. ½ of the S. W. ¼ of section 14, township 7, range 2 W., and the E. ½ of the S. W. ¼ of section 15, township 7, range 2 W., in Hinds county. This deed was filed for record February 25, 1893. Appellee filed the bill in this case in the chancery court of Hinds county against W. C. Chapman, Annie T. Chapman, and John D. Chapman to set aside this deed as fraudulent and void as to complainant, charging that it was made to hinder and delay it in the collection of its debt. The defendants answered, denying the equities of the bill. On the trial both Mrs. Chapman and John D. Chapman testified that they knew nothing of any intention on the part of W. C. Chapman to convey his property to them for the purpose of placing it beyond the reach of his creditors. Mrs. Chapman testified that she loaned her husband, W. C. Chapman, \$900 in 1888, and other

small sums at other times, and that he owed her most of it at the time the conveyance was made, and that it was understood that the deed was made to compensate her for that money, and that he delivered the deed to her, and she put it in her trunk, but did not know what was in the deed, except W. C. Chapman told her he had deeded his property to her and John in order to secure her, and that there was no understanding as to what was to be paid for the property. The evidence also shows that Mrs. Annie T. Chapman afterwards brought suit on the note for the \$900 against her husband, and recovered a judgment on it against him. Mrs. Chapman lives on the land conveyed, but John D. Chapman does not. John D. Chapman testified that he did not know of the deed until some time after it was made and recorded, and first heard of it by some members of the family talking of it, and that it was never delivered to him, and that there was no agreement made about it, and that his father owed him, and the deed was made to secure to him the amount owed. He had never claimed the land, and his father lived on it and controlled it, and he had never asked an account for the rents. There was evidence tending to prove that it was the purpose of W. C. Chapman to convey his property to his wife and son for the purpose of defeating complainant in the collection of its debt. From a decree for complainant granting the relief sought, and setting aside the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 15, township 7, range 2 W., as a homestead, the defendants appealed.

W. Calvin Wells, for appellants. W. R. Harper and A. H. Jayne, for appellee.

WHITFIELD, J. The testimony shows clearly that, as to Mrs. Chapman, the deed to her one-half interest was delivered to and accepted by her with full knowledge of its contents, for a valuable consideration, long antedating appellee's claims. As to the son, the testimony is too uncertain to show delivery to him, or to his mother for him. He never saw the deed; says it never was delivered to him. And there is nothing to show that it was ever delivered to the mother for him. There is no fraud whatever on the part of the mother or son, and the father had the right to prefer them. He did this effectually as to the mother, but we are not willing to disturb the finding of the chancellor as to the son,—that the deed was never delivered to him, or any one for him. As the decree is erroneous as to the mother, the homestead allotment is also erroneous. We remark, in passing, how curious a fact it is that so few persons desiring to save their homestead exemptions avail themselves of the increased exemption allowed by section 1973 of the Code of 1892,—a most beneficent provision, first introduced into our law by our late Brother, Judge Cooper. In so far as the decree cancels the conveyance to the son, it is affirmed.

In so far as it cancels said conveyance to the mother, Mrs. Chapman, and as to the homestead allotment, it is reversed, and the cause remanded to be proceeded with in accordance with this opinion, a new allotment of the homestead being made. We think the equities of the case make it proper that appellee should pay all the costs of this court. So ordered.

(77 Miss. 7)

MUTUAL RESERVE FUND LIFE ASS'N v. OGLETREE.

(Supreme Court of Mississippi. April 24, 1899.)

LIFE INSURANCE—APPLICATION—INSUFFICIENT DISCLOSURES—EVIDENCE—AVOIDANCE OF POLICY.

1. It is competent to show that insured made full disclosures to the insurer's medical examiner, who wrote in the application only the substance of his answers, according to his conception thereof, and failed to include a material disclosure.

2. That insured did not disclose, as to medical treatment, when examined, that a physician had successfully prescribed for a temporary ailment while he was visiting at the physician's private residence, and that he likewise prescribed for him again a few days later, when they happened to meet on the street, is insufficient to avoid the policy.

Appeal from chancery court, Kemper county; A. M. Byrd, Chancellor.

Bill by Mrs. Amella J. Ogletree against the Mutual Reserve Fund Life Association and another. From a decree for complainant, defendant company appeals. Affirmed.

The bill alleges that on the 31st day of July, 1896, appellant issued a policy of insurance on the life of complainant's husband, B. H. Ogletree, for \$4,000, payable to her, and that she had assigned the policy to C. Rosenbaum to secure a debt that she and her husband owed him. The bill prayed for a decree against the appellant, and an accounting between herself and Rosenbaum. The answer of appellant admitted the issuance of the policy and the assignment to Rosenbaum, but denied all liability on the policy. The answer set up as a defense: That B. H. Ogletree on June 18, 1896, made a written application to appellant for said policy of insurance, which was signed by him, and that it was induced to issue the policy upon the faith that the answers to the questions contained in the application were correct and true. That by part 1 of said application it was inquired of said Ogletree as follows: "Are you now, and have you been in good health throughout the past twelve months, and free from all ailments, diseases, weakness, and infirmity?" To which he answered, "Yes." That in part 2 he was asked, "Are you now, and have you always been, in good health, free from all ailments, weakness, and infirmity?" To which he answered, "Yea." He was further asked: "Have you ever had any illness, local disease, weakness, or ailment of the head, throat, lungs, heart, stomach, liver, kidneys, bladder, or any disease

or infirmity whatever? If yes, state nature, date, duration, and severity of attack, and whether fully recovered." To which he answered: "Nothing except slight attack of biliousness. Never to extent of calling a physician." "How long since you consulted or were attended by a physician? Give date." To which he replied, "Nothing for 35 years." "Give name and address of each physician who has prescribed for you or attended you within the past five years, and for what disease or ailment, and date." To which he replied, "None." "Have you had any illness, disease, or medical attendance not stated above?" To which he replied, "No." That all these answers were false and untrue,—and averred that the health of B. H. Ogletree had not been good throughout the 12 months prior to making the application, and he was suffering with a disease of the liver, and had consulted a physician, who had found that he was suffering with a liver disease, and prescribed for him. On the hearing of the cause, Dr. T. J. Bickley testified that he had prescribed for Mr. Ogletree on June 7, 1896, for some liver trouble, and prescribed for him on several different occasions after that, during the year 1896, for the same trouble, which was an enlargement or engorgement of the liver. To meet this defense, William Ogletree testified that he was present when his father, B. H. Ogletree, made the application for the policy, and that in answer to the question, "Are you now, and have you been in good health throughout the past twelve months, and free from all ailments, disease, weakness, and infirmity?" his father stated to Dr. Mooney, the medical examiner, that Dr. Bickley had prescribed for him for an attack of biliousness. From a decree for complainant, defendant appealed.

Cochran & Bozeman and J. A. P. Campbell, for appellant. W. K. Smith and T. W. Brame, for appellee.

WOODS, C. J. If the evidence of William Ogletree was competent and credible, the decree of the court below must be affirmed. That it was competent is well settled by the adjudications of this court. We refer to one only. In the case of *Insurance Co. v. Myers*, 55 Miss. 479, the court said: "We adopt the doctrine of those cases which hold that, if the agent takes charge of the preparation of the application, or suggests or advises what shall be answered, or what will be a sufficient answer, the company shall not avoid the policy because they are false or untrue, if full disclosures were made by the applicant to him." See the opinion of the court, delivered by Simrall, C. J., and also the concurring opinion of Chalmers, J., in that case, in which he qualifies his former opinion in *Association v. Leflore*, 53 Miss. 1. The evidence of William Ogletree shows that the insured did state to the medical examiner of the insurer that Dr.

Bickley had prescribed for him for a temporary bilious ailment; and the medical examiner, in his evidence, more than once states that he has no recollection of such answer having been made at the time of the examination by the applicant for insurance. But, to put the matter beyond controversy, the medical examiner, on cross-examination, was asked this question, viz.: "When you say that you do not remember that Ogletree [the applicant] made any statement about being prescribed for by Dr. Bickley, do you mean to say positively that no such explanation was made, or do you simply mean that you do not remember?" To which he replied: "I mean to say that I do not remember any such statement." While it is true that the medical examiner afterwards testified that if such statement, as to Dr. Bickley's prescribing for the applicant, had been made, he would have written it in the application, yet he frankly admits that he did not write all that the applicant said to him in answering questions propounded to him, but only the substance of the answers,—the substance, of course, according to the conception of the examiner, and not according to the conception of the applicant. The truth is, the applicant had escaped doctors and drugs for 35 years, with the insignificant exception of the prescription given him on a social visit at Dr. Bickley's private residence for a temporary ailment, and repeated five days later, at the suggestion of Dr. Bickley, when the applicant happened to meet the doctor on the street. This temporary ailment had readily yielded to the prescription, and the applicant had been restored to his usual good health, and when Dr. Mooney, the medical examiner, made a careful examination of the applicant, he failed to find any evidence of that, or any other ailment; and Dr. Mooney declares that while it was possible that he might have failed to discover the alleged engorgement of the applicant's liver, on his careful examination, it was not probable. Indeed, so fine a risk was the applicant, that the medical examiner recommended that a policy for \$10,000 be issued, if desired by the applicant, though he only wished \$4,000. The evidence of William Ogletree was both competent and credible. All the evidence demonstrates that at the time the application was made, and for very many years anterior thereto, the applicant was a sober, energetic, active man, and possessed of good health in an eminent degree. To permit the insurer to escape liability because of a most technical objection as to the want of fullness of the answer made in the application, in not showing that Dr. Bickley had prescribed for the applicant under the circumstances referred to by us, and especially when that objection is unfounded, if William Ogletree is to be believed, would, it seems to us, sacrifice right and justice. Affirmed.

(76 Miss. 788)

NEW YORK LIFE INS. CO. v. JACK et al.

(Supreme Court of Mississippi. May 1, 1899.)

LIFE INSURANCE—ACTION ON POLICY—PARTIES—EVIDENCE.

1. A wife, who is neither executrix nor assignee of her deceased husband, is not a proper party to an action on an insurance policy, payable to the husband's executors or assigns.

2. In an action on an insurance policy, evidence of a conversation with plaintiff as to all the policies he had in defendant's company is admissible; the conversation relating to the policy in suit as embraced in all the policies.

Appeal from circuit court, Noxubee county; G. B. Huddleston, Judge.

Action by Guy Jack and Mrs. Lillie B. Stewart, the former claiming to be the assignee and the latter the widow of Charles T. Stewart, against the New York Life Insurance Company on a life policy for \$1,000, issued March 9, 1891, to Charles T. Stewart. The policy was made payable to the insured's executors, administrators, or assigns, and was assigned to Guy Jack April 18, 1891, who paid all premiums on it. Charles T. Stewart was married to Mrs. Lillie B. Stewart in 1894. The declaration alleges that Mrs. Lillie B. Stewart is the widow and only heir of Charles T. Stewart, and that Guy Jack is the assignee of the policy sued on; that the insured left no estate except policies of insurance on his life, and that he owed no debts except to Guy Jack, which debts were protected by said policies of insurance; and alleges that no administration on the estate of Charles T. Stewart was necessary. It further alleges that Mrs. Lillie B. Stewart and Guy Jack have adjusted their respective claims to the proceeds of said policy of insurance. A demurrer to the declaration was overruled, and defendant filed three pleas. The second plea set up as a defense that Guy Jack had assigned the policy to one C. Rosenbaum, and had no interest in the policy sued on. The third plea is as follows: "Defendant says that the plaintiff, Mrs. Lillie B. Stewart, ought not to have or recover anything from it on account of said policy, for that by the terms and conditions of said policy the same was made payable in case of death to the executors, administrators, or assigns of said Chas. T. Stewart; and the said Chas. T. Stewart, prior to the bringing of this suit, duly assigned said policy, and had no interest therein at the time of his alleged death,—all of which fully appears by the transfers and exhibits filed by plaintiffs with their declaration, and said plaintiff Mrs. Lillie B. Stewart has no interest in said policy or the proceeds thereof, either as executor, administrator, or assign of the said Chas. T. Stewart." Plaintiffs replied to the second plea that the policy had been reassigned to Guy Jack by Rosenbaum, and demurred to the third plea, and the demurrer was sustained. Defendant filed the general issue, and gave notice that it would prove the following affirmative matter in defense: That Guy Jack, designing to cheat

and defraud defendant, induced the deceased to make written application to defendant for a policy of insurance on his life for \$1,000 and to two other companies for \$10,000 each, and that, when all of said policies had been issued, Jack, in pursuance of said fraudulent scheme, persuaded and induced said Stewart to assign said policies to him, and that after he had fraudulently procured said Stewart to obtain said policies of insurance, and had assigned them to him, that he (the said Jack) paid the premiums thereon, and that afterwards he induced, procured, and employed one Dr. Lipscomb to kill the said Stewart, which was done when said policies had been in force less than seven months; that both said Jack and Lipscomb had been indicted by the grand jury of Kemper county for the murder of said Stewart, and that said Lipscomb had been tried twice, and convicted for the murder of Stewart. Further notice was given that it would prove that some of the answers to questions in the application were false and untrue. On the trial it was admitted that Dr. Lipscomb had been convicted of the murder of Charles T. Stewart, and that Stewart died at the time alleged in the declaration; and that proof of the death of Stewart was made, and that the policy was assigned to Guy Jack and reassigned to him by Rosenbaum, but defendant claims not to have had notice of the reassignment. On the trial J. A. Melton was asked by defendant to relate a conversation he had with Guy Jack about the insurance policies, generally, that he held in the New York Life Insurance Company by assignment. Plaintiffs' counsel objected to this evidence. The objection was sustained, and defendant excepted. The court gave a peremptory instruction for plaintiffs. There were verdict and judgment accordingly. Defendant's motion for a new trial was overruled, and it appealed. Reversed.

F. V. Braban, for appellant. T. W. Brame, for appellees.

WHITFIELD, J. By the terms of the contract—the policy of insurance—the appellant contracted to pay to "the insured's executors, administrators, or assigns." The policy was assigned, and not to Mrs. Stewart. She was not the executor, administrator, or assign of the insured, and had no standing in court, in this case, as plaintiff. She was a stranger to the contract. If she had an agreement with Jack for a division of the proceeds of the policy, that was a matter of contract between her and Jack, with which the appellant had no concern. And it is not permissible for Jack to shut out proof competent against him by the easy process of joining as co-plaintiff with himself one who has no standing to sue on the contract of insurance. The demurrer to plaintiffs' third plea should have been overruled. It was error to exclude the testimony of J. A. Melton as to the conversation had with Jack as to all the policies in appellant's company Jack had, the conver-

sation relating to all, and to this one as embraced in all, such policies. And it was, of course, error to grant the peremptory instruction for plaintiff. We do not now pass on any other assignments of error. Reversed and remanded.

SHAY v. HOLMES et al.

(Supreme Court of Mississippi. May 1, 1899.)

TAX TITLE—QUIETING TITLE—PLEADING.

Plaintiff in an action for land averred that he derived his title by patent, and that defendant claimed title under a pretended tax sale and a pretended deed to the land, under which he had been in possession for more than three years. A demurrer was sustained to the bill. *Held*, that the demurrer was ill, since an owner's title to land would not pass to a pretended purchaser at a pretended sale, although there had been three years' actual possession thereunder.

Woods, O. J., dissenting.

Appeal from chancery court, Leflore county; A. H. Longino, Chancellor.

Bill by John H. Shay against G. W. Holmes and others. There was a decree for defendants, and plaintiff appeals. Reversed.

Ward & Ward, for appellant. Coleman & McClurg, for appellees.

TERRAL, J. This suit shows a contention concerning a tax title. Shay alleges himself to be the owner in fee of certain lands described in his bill, and alleges that his title accrued to him by a patent from the state of Mississippi bearing date July 18, 1887, and immediately thereafter avers that his title papers bear date July 18, 1897. The bill also alleges that Shay paid the taxes for the year 1891, and he attaches as an exhibit to his bill what he calls a receipt of the auditor for said taxes, but the receipt is deficient in not showing in what range said land lies. The bill also alleges that the defendants claim title under "a pretended sale of said lands, made on the 8th day of March, 1892, and by a pretended deed therefor," and that under said pretended sale of said land said defendant Holmes has been in the actual possession of said land, or of a part thereof, from the 8th day of March, 1894, to the filing of the bill in this case,—a period of more than three years. The defendants demurred to the bill, the court sustained the demurrer, and Shay appeals.

The demurrer was ill. The bill, in one part of it, alleges the complainant received his patent from the state in July, 1897, and that the tax sale was made at a time when, according to other averments of the bill, the title to the land was in the state, and so the tax sale was void. The bill also alleges, and the demurrer admits, that the tax sale at which defendants bought said land was but "a pretense." Certainly the demurrer should have been overruled. The title deed exhibited to Shay's bill does not contain the 80 acres of land described as the "N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of Sec. 14, T. 20, R. 2 W.," and, if the demurrer had been to that

part of the bill only, it would have been good, for the complainant's title deed showed he had no claim to said 80 acres of land. We do not think the owner's title to his land would pass to a pretended purchaser at a pretended sale. A sale even to bar the owner's right by three years' actual possession must be an actual sale made, and bona fide at least on the part of the purchaser. Neither a sham sale, nor three years' actual possession under a sham sale, by the purchaser thereat, can confer title to the fraudulent purchaser, or upon his vendees, knowingly claiming title under such false sale. The judgment of the chancery court is reversed, and the demurrer to the bill is overruled, and the case is remanded, and the defendants have 30 days in which to answer the bill.

WOODS, C. J., dissents.

(76 Miss. 723)

SPEED et al. v. McKNIGHT.

(Supreme Court of Mississippi. April 17, 1899.)

TAX SALE—VALIDITY.

A sale as one tract, for delinquent taxes, of lots widely separated and of differing values, though owned by the same person, is void.

Appeal from chancery court, Warren county; Claude Pintard, Chancellor.

Bill by Theodore McKnight against E. A. Speed and others. From a decree for complainant, defendants appeal, and complainant brings a cross appeal. Reversed on direct appeal.

The bill in this case was filed by Theodore McKnight, in the chancery court of Warren county, against a number of persons, to confirm his tax title to lots 136, 138, 150, and 152 of Speed's addition to the city of Vicksburg, Miss., in sections 26, 34, and 29, township 16, range 3 east. The lands were sold to the state in March, 1894, for the state and county taxes for the year 1893. The defendants in their answer deny that any lots described as "lots 136, 138, 150, and 152, sections 26, 34, and 29, township 16, range 3 east," were sold by the sheriff of Warren county for the non-payment of taxes, or were ever assessed for taxes for the year 1893. They aver that the only entry upon the assessment roll that may be construed as referring to said lots is one assessment to Frederic Speed, as owner, as follows: "Lots 123 to 162, inclusive," valued at \$800. They further aver that the lots numbered 123 to 162, inclusive, in Speed's addition, are not contiguous, but are in different subdivisions, widely separated, and divided by streets and roads, and that there is a great difference in the relative value of said lots, some being worth 10 times as much as others, and in no sense a single tract. They further aver that whatever taxes were due on lot 150 had been paid before the sale for taxes in 1894. There were other defenses, but, under the view taken of the case by the court, it is not necessary to set them out. The proof showed that the lots were assessed as follows.

"F. Speed, lots 123 to 162, inclusive, value \$800, Speed's addition, sections 26, 34, and 29, T. 16, R. 3 east." It was shown that Judge Strother owned lots 123 and 124, Judge Gilland owned lots 133, 148, 150, and 153, and a Mr. Durdeyn owned lots 157, 159, and 161, and that before the sale these parties went to the sheriff's office and paid the taxes on these lots, and thereupon the sheriff changed the assessment roll by erasing the figures "123," and inserting "125," and otherwise changed it, so that, as changed, it stood: "F. Speed, lots 125 to 162, inclusive, except 133, 148, 150, 153, 157, 159, 161, valued at \$660; J. T. Strother, 123 and 124; Gilland, 133, 148, 150, 153; Durdeyn, 157, 159, and 161." And by this changed assessment the sale was made by the sheriff, and the sale was made of all the lots as one entire body or tract, and by separate lots. The proof further shows that the lots are not an entire tract, but they are separated and belong to different parties, and that there was great difference in their relative values. The cause was heard at the February, 1898, term of the chancery court of Warren county, and after the proof and argument had been heard by the court it was taken under advisement, a decree to be rendered in vacation. No decree was rendered until the 29th day of September, 1898, at the September term of the court, when there was a final decree rendered granting the relief sought by complainant, except as to lot 150. From that decree the defendants appealed, and the complainant prosecuted a cross appeal. In the supreme court a motion was made by appellee to strike out the bill of exceptions, because the record shows that the cause was tried and the testimony heard at the February, 1898, term of the chancery court, and taken under advisement, a decree to be rendered in vacation, and that the bill of exceptions was not taken nor signed until the 29th day of September, 1898, not being taken in the manner nor within the time required by law.

McWillie & Thompson and McLaurin & McKnight, for plaintiff. Magruder & Bryson, for defendants.

WHITFIELD, J. The motion to strike the bill of exceptions from the record is denied. It is not perceived what duty appellant was under to set about the preparation of a bill of exceptions to the decree until the decree had been rendered. On the merits, the assessment under which this property was sold and the sale were utterly void. The case of *Corburn v. Orlitenden*, 62 Miss. 125, is wholly unlike this case in its facts. The assessment here was the act of the sheriff, and the lots were physically widely separated and of differing values, as shown by proof, and should not have been sold as one tract. The decree on the cross appeal is affirmed. The decree on the direct appeal is reversed, and cause remanded for decree in accordance with this opinion.

(77 Miss. 117)

BASS et al. v. MAXWELL, Clerk, et al.

(Supreme Court of Mississippi. Feb. 6, 1899.)

GUARDIANS—COMPENSATION.

Code 1892, § 2189, providing that the clerk of the chancery court, when appointed guardian of a minor who has property, shall be allowed not more than 10 per cent. "on the amount of the estate," if finally settled by him, or not more than 5 per cent., if not so settled, applies to the personal estate and the income of the realty, and not to the corpus of the real estate.

Appeal from chancery court, De Soto county; J. C. Longstreet, Chancellor.

Bill by E. L. Bass, guardian, and another, against T. R. Maxwell, clerk of chancery court, and others. From a judgment entered on sustaining a demurrer to the bill, complainants appeal. Reversed.

T. R. Maxwell, the clerk of the chancery court of De Soto county, Miss., at the February term, 1892, in that court, was appointed as guardian of the person and estate of Dan Harkleroads, a minor, under section 2189 of the Code of 1892. Said minor was the owner of a large real and personal estate situated principally in the state of Mississippi, but a portion of it lay in the state of Arkansas. Maxwell, as such guardian, assumed charge and control of the estate of his said ward in both states, and continued to act as such guardian until August, 1895, when his said ward, being then over the age of 14 years, elected to select his own guardian, and did select the appellant E. L. Bass, who qualified and took charge of said minor's estates. While said Maxwell, as clerk, was acting as guardian of said minor's estates, he received and disbursed large sums of money belonging to said minor's estates, and regularly made and filed with the chancery court his annual accounts of such receipts and expenditures, filing three annual accounts and his final account after Bass was appointed guardian. In his first annual account as guardian the said Maxwell had expended the sum of \$4,970, and claimed and was allowed 10 per cent. of said expenditures. In his second annual account Maxwell showed that he had expended the sum of \$4,250, and claimed and was allowed thereon 10 per cent. commission. In his third annual account he showed that he had expended the sum of \$3,827.84, and he claimed and was allowed thereon commissions on the same at 10 per cent. In his final account he showed that he had expended \$1,245.93, and claimed and was allowed 10 per cent. commission thereon. Also, it seems by that account that Maxwell had in his hands rent notes for the year of 1896 for some of his ward's lands, which had evidently been rented out by Maxwell before Bass was appointed guardian in his place; these rent notes aggregating \$5,268.75. And in said final account Maxwell was allowed 5 per cent. commissions. These accounts were approved and allowed by the court. Under the will of the said ward's father, he was not to have the control of his Mississippi property until he

arrived at the age of 25 years; but, he having lately become 21 years of age, the said Bass, as guardian, made final settlement with him, so far as his Arkansas property was concerned, and placed him in full charge and control of same. E. L. Bass, as guardian of said Mississippi property, and the said Dan Harkleroads, in his own right as owner of his Arkansas property, exhibited their bill in the chancery court of De Soto county, Miss., against T. R. Maxwell and the sureties on his bond, as clerk, alleging that the allowance to him by said chancery court, of 10 per cent. commissions on the amounts disbursed by him, as shown by his different settlements, is illegal and erroneous, and should not have been allowed; he not having finally settled or wound up the estate of said minor, and was therefore not entitled to commissions on the estate which passed through his hands to an amount exceeding 5 per cent., and that said Maxwell, as guardian, was not entitled to any commissions whatever on the rent notes of 1896, mentioned in his final account, and pray that their bill may be taken as a bill of review to review all of the proceedings in said court in the matter of said Maxwell's guardianship, and asking for a decree against said Maxwell and the sureties on his bond, as clerk, for the difference between what his commissions were as allowed him at 10 per cent. and what he was entitled to receive at 5 per cent., with the addition of the commissions on said rents of 1896 added thereto, and that he be charged with interest at 10 per centum on the amount found to be due by him, with annual rests. To this bill defendants demurred on the grounds, among others, that the bill did not show that the said Maxwell, as guardian, had received commissions in amount exceeding 5 per cent. of the estate of his ward, and that the bill did not disclose any error of law apparent on the face of the proceedings sought to be reviewed. At the trial in the court below the demurrer was sustained, the bill dismissed, and complainants appeal.

Farley & Lauderdale and Cooper & Waddell, for appellants. Perkins & Winston, for appellees.

WHITFIELD, J. Several considerations show that the contention of appellee cannot be sound. That contention is that each chancery clerk, no matter how many, who may act as guardian of a minor, under the provisions of section 2189 of the Code of 1892, is entitled to 5 per cent. on the value, not only of all the personal estate and of the income from the real estate, but of the value of the corpus of all his real estate also. Of course, so far as the mode adopted by the chancellor of arriving at the compensation is concerned, it amounts to nothing, so long, as to amount, he keeps within the legal limit. But the argument stresses too exclusively a single word "estate." It is not so much the meaning of this word, isolated looked at, as its meaning in the phrase "amount of the estate * * *

settled by him." Looking to the whole context, all related statutes, especially section 2225, and the subject-matter dealt with, we think it is clear that a guardian is not, ordinarily, entitled to any commissions upon the value of the corpus of his ward's real estate, and that the word "estate," in the phrase "amount of the estate settled by him," means personal estate proper and the income of the realty. The court looks to the real estate, in the sense that he ascertains its income, and allows commissions on that. But it was assuredly never intended to allow commissions on the value of the corpus of the real estate. He is to be compensated for his "trouble." Ordinarily he has no "trouble" with regard to real estate, beyond paying taxes, etc., and collecting rents; and for this commissions on the amount of the income of the real estate are compensation deemed adequate. He is paid for his "trouble" in respect to the "estate settled by him,"—the estate he deals with,—and that does not ordinarily include the corpus of the real estate. We are not dealing with the case of a guardian who sells his ward's lands under the order of the court, nor with any conceivable case where he might deal with the corpus, otherwise than in the usual way. This guardian paid taxes, redeemed lands from tax sales, rented them, etc.

Section 2189 provides that he shall "not be allowed more than ten per cent. on the amount of the estate, if finally settled by him, or not more than five per cent., if not so settled." Here there was a guardian before this one,—the former chancery clerk; and one after him,—the appellant. If appellee's contention be sound, each guardian could have been allowed not only 5 per cent. on the amount of the personal estate and of the income of the real estate, but 5 per cent. also on the value of the corpus of the real estate; or, in other words, 15 per cent. on the amount of the estate, real and personal, would thus be allowed, though the statute positively limits the compensation to 10 per cent. of the "amount of the estate settled." Again, if appellee's contentions were sound, the clerk should give a bond when "the estate of the ward exceeds in value the penalty of his official bond," additional to his official bond. Nothing of the sort was done here, though the lands are estimated by the guardian himself at \$70,000. Again, the guardian asked the chancellor to allow him commissions on the value of the corpus of the estate, which he refused to do, but expressly fixed the compensation at 10 per cent, not 5 per cent., and limited it to the personal estate proper and income of the real estate. These three considerations show that the chancellor thought correctly that commissions should not be on the corpus of the real estate. Cases may readily be imagined where lands might be worth large sums, and yet rent for very small ones. Take an almost wholly uncleared farm in the Delta, worth \$20,000, but renting, on some small cleared acreage, for \$1,000.

According to appellee's theory, each chan-cery clerk guardian would be entitled to 5 per cent. on the value of the corpus, \$20,000, being \$1,000, thus absorbing the whole rent, and also to 5 per cent. on this sum of \$1,000 rent. Such folly cannot be imputed to the legislature. Statutes must receive a reasonable application, looking to their purpose, the whole context, and the subject-matter dealt with, not narrowly to isolated words.

In section 2225 the phrase "value of the estate" occurs, and yet it is plain that the basis fixed by that statute, for the computation of commissions, is the "value of the estate" passing through his hands "settled by him," as shown by the disbursements and receipts of the various annual accounts and the final account. The record leaves the matter of the rent notes, as to whether they are for 1895 or 1896, in some confusion. But it was manifest error to allow the appellee 10 per cent., as shown by the record, he not having finally settled the estate. Reversed, demurrer overruled, and remanded, with leave to answer in 30 days after mandate filed in the court below.

GRACE v. GULF & C. R. CO.

(Supreme Court of Mississippi. March 18, 1899.)

RAILROADS—CATTLE GUARDS—OPINION EVIDENCE.

1. It is the duty of a railroad company to construct its cattle guards so that they will extend across the entire width of the right of way occupied by it, at each point where it enters and leaves each side of each necessary inclosure, which are sufficient to prevent ordinary stock from entering or leaving said inclosure, under Code 1892, § 3561, which makes it the duty of every railroad company to construct and maintain all necessary or proper stock gaps and cattle guards where its track passes through inclosed land.

2. It is error to permit a witness to give an opinion as to whether cattle guards are properly constructed in an action against a railroad company for failure to erect sufficient guards.

Appeal from circuit court, Tippah county; Z. M. Stephens, Judge.

Action by Thomas J. Grace against Gulf & Chicago Railroad Company. From a judgment in favor of defendant, plaintiff appealed. Reversed.

This suit was brought to recover penalties under section 3561 of the Code of 1892, for failure to construct and maintain necessary stock gaps and cattle guards and road crossings, and also for damages for changing the natural course of a certain stream, causing plaintiff's land to overflow. There were three counts to plaintiff's declaration. In his first count he alleges that the said railroad of defendant runs through two inclosures on his land, one a field on the north side, and the other a wood lot on the south side, and that at the points where the railroad enters and leaves said inclosure on each side of each inclosure the defendant has failed to construct and maintain proper and necessary stock gaps

and cattle guards as required by law, to the damage of plaintiff \$250 for failure in each inclosure and \$500 for both. In the second count he alleges that there existed during the year 1895 three necessary plantation roads over said railroad, and that defendant failed to make and maintain suitable and convenient crossings of the track at said places, to plaintiff's damage in each case \$250, and for all three \$750; that the cattle guards on either side of the wood lot inclosure are, and have been for a great number of years, in close proximity to and very near the residence of plaintiff, and that said cattle guards are constructed by digging pits under said railroad tracks which pits are so inartfully constructed and maintained that a great quantity of water runs into said pits, and, being unable to escape, becomes stagnant and poisonous, and thereby has caused within the last four years great sickness and suffering to complainant and his family, and large expenditures of money for medical and doctor's bills, to plaintiff's damage \$500. The third count alleges that the railroad company, in the construction of its road on plaintiff's land, changed and diverted a certain stream from its natural course, thereby causing plaintiff's land to overflow, to plaintiff's damage \$250. To this declaration defendant pleaded the general issue, with notice that certain proof would be introduced at the trial. A demurrer was also filed by defendants to this declaration on the ground, among others, that there was improperly joined in the declaration a count in debt for a penalty for failure to erect and maintain cattle guards and plantation roads, with a count in trespass on the case for overflowing lands and maintaining a nuisance. The demurrer to the declaration was sustained, and the plaintiff amended his declaration by striking out the third count. The defendant demurred to the amended declaration, and the demurrer was sustained. Plaintiff amended by striking out the second plea, and issue was joined on the first count. At the trial, witnesses Harris and Simpson, for defendant, were asked to give their opinions as to whether or not the cattle guards were properly constructed. To this plaintiff objected, and the objection was overruled by the court. The ninth instruction asked by plaintiff and refused by the court is as follows: "The court charges the jury that the law requires the defendant's company to construct and maintain an appliance extending entirely across defendant's right of way occupied by it at each point where the railroad enters and leaves each side of each necessary inclosure, which are sufficient to prevent ordinary stock from entering or leaving said inclosure, and you are to determine from the evidence whether the cattle guards in dispute are sufficient as required by law. And if the jury believe from the evidence that the defendant failed during the year 1896 to construct or maintain such appliances for cattle guards as required by law as alleged by plain-

tiff, they should find for plaintiff." The trial resulted in a verdict for defendant, and plaintiff appeals.

C. Lee Crum, for appellant.

WHITEFIELD, J. The record in this case is exceedingly confused. We notice only the errors assigned as having been committed on the second trial. The case of Railroad Co. v. Spencer, 72 Miss. 491, 17 South. 168, controls the case. It was error to refuse the ninth instruction asked by plaintiff, as to the duty of making the cattle guard extend across the entire width of the right of way. There was evidence that it did not extend across the width of the right of way as actually occupied and used by the appellee. It was also error to permit witnesses Harris and Simpson to give their opinions as to whether the cattle guards were properly constructed. That was for the jury on testimony as to how the cattle guards were constructed. Reversed and remanded.

MONROE COUNTY ALLIANCE v. OWENS et al.

(Supreme Court of Mississippi. April 24, 1896.)

FARMERS' ALLIANCE—CHANGE OF ORGANIZATION—PROPERTY RIGHTS.

Defendant, a county alliance, was organized as a branch of the National Farmers' Alliance and Co-operative Union of America. The latter's plan of organization provided for national, state, county, and sub, or farmers' alliances, and that amendments of the state constitution in regard to matters affecting the county alliances should be adopted by a two-thirds majority vote of the committee on constitution and by-laws, and then be referred to the county alliances for ratification. The national, state, and county alliances were delegated bodies; the county alliances representing the farmers' alliances, which were composed of individuals. After the organization of the defendant, the committee on constitution passed an amendment to the state constitution which, in effect, made each of the individual members of the various farmers' alliances members of the county alliances of their respective counties. This amendment was ratified by the requisite number of county alliances. *Held* that, though the personnel of the defendant had changed, it remained the same organization, retaining its property rights under the new methods of administration.

Appeal from chancery court, Monroe county; Baxter McFarland, Chancellor.

Bill by T. Y. Owens and others against the Monroe County Alliance to establish a lost deed and enjoin an unlawful detainer suit. Decree for complainants. Defendant appeals, and complainants file a cross appeal. Reversed.

The National Farmers' Alliance & Co-operative Union of America was incorporated in 1887 under Supp. Rev. St. U. S. p. 425. Its plan of organization was: (1) National alliance; (2) state alliances; (3) county alliances; and (4) sub, or farmers' alliances. The national alliance issued charters to the sub and county alliances, direct, until 40 al-

liances had been organized in the state, then the state alliance was organized, and then the state alliance issued charters to sub and county alliances. An amendment of the constitution of the national alliance which affected the rights of the state alliances was made by setting out the amendment in writing, or in a report of the committee on constitution and by-laws, passing it by a two-thirds majority, and then referring the amendment to the state alliances for ratification by the suballiances in the state. The state constitution could be amended in the same way. Under this plan the state and county alliances were delegated bodies, and the local lodges were made up of individual members. Before a lodge could be chartered by the state, there had to be as many as five suballiances in the county. After a county alliance was chartered, it did not forfeit its charter by the mere fact that the number of suballiances in the county had been reduced below the number of five. The Monroe County Alliance was chartered in 1888 by the state alliance, and paid its dues and has been represented in the state alliance since up to 1896, and has held regular meetings since its charter was issued. The Mississippi State Alliance in 1895 passed a resolution changing the state constitution by adopting what was known as the "Georgia plan," which made every alliance man in good standing a member of the county alliance. The county alliances throughout the state ratified the amendment in 1896. In November, 1895, the Monroe County Alliance ratified the amendment at a called meeting. There are now only about 30 members of the Monroe County Alliance. In July, 1889, the Monroe County Alliance was quite a strong organization, and had been engaged in conducting a cotton storage and warehouse business in Aberdeen, in said county, on property they had rented, and had decided to buy property in which to carry on this business, and appointed appellees a committee to investigate the matter and get suitable property for the purpose. This committee, after some investigation, found that they could get some lots in Aberdeen, belonging to one Timberlake; but the county alliance had no money on hand to pay for the property, and they could find no one who was willing to lend the money to the alliance, but were informed by one Mrs. Mitchel that she would lend them the money with which to buy and improve the property, if they would take the deed in their names, and give their notes secured by deed of trust on the property. This arrangement was carried into effect. Timberlake executed a deed to appellees (11 in number), and they got the money from Mrs. Mitchel; executing their notes, and giving a deed of trust on the property purchased from Timberlake. This arrangement was reported to the county alliance, and on one occasion, after some discussion, the county alliance, at a regular meeting, passed a resolution donating about \$40 to the warehouse.

Some time in the year 1895 the earnings of the warehouse had about liquidated the indebtedness to Mrs. Mitchel. In 1896 the Monroe County Farmers' Alliance procured a quitclaim deed from Timberlake to the warehouse property, the deed to appellees having been destroyed by fire and not having been recorded. Appellees have been in possession of the warehouse since it was purchased, and in December, 1896, the Monroe County Farmers' Alliance brought an action of unlawful entry and detainer against them to recover it. The cause was tried in the justice of the peace court, and resulted in a verdict and judgment for plaintiffs, from which an appeal was taken to the circuit court. Thereupon appellees filed their bill in this case in the chancery court of Monroe county, praying the court to establish their lost deed made in 1889, and to perpetually enjoin the unlawful entry and detainer suit, and to cancel as a cloud on their title the deed of Timberlake to the Monroe County Alliance; claiming a fee-simple title in themselves under the deed in 1889 from Timberlake. The defendants answered, denying that complainants held the fee-simple title, but averring that they only held the legal title as trustees for the Monroe County Alliance. Much testimony was taken on both sides,—that of appellees tending to show that the Monroe County Alliance had no interest in the property, and that the committee, after doing all in their power to purchase the property for the alliance, abandoned all hope of doing anything in its behalf, and then bought the property for themselves individually. For defendants, the evidence tended to prove that the committee, until a short time before the unlawful entry and detainer suit was brought, recognized its rights, and made reports to the county alliance at its meeting each year, that appellees paid no money of their own for the property, that they were generally recognized as the agents of the Monroe County Farmers' Alliance, and that the warehouse was patronized by the members of the alliance because it was thought to be their property. On the final hearing the court below granted the prayer of appellees' bill, established their lost deed, canceled the deed from Timberlake to the Monroe County Alliance made in 1896, and perpetually enjoined the further prosecution of the unlawful entry and detainer suit. The court, however, held that appellees only held the legal title as trustees for the Monroe County Alliance as it existed at the time of the purchase, but held that the defendants were not the Monroe County Alliance, and were not entitled to the equitable interest in the property.

E. H. Bristow and W. B. Walker, for complainants. Geo. C. Paine and Clifton & Eckford, for defendant.

WOODS, C. J. We are of opinion that the equitable title to the property in controversy is in the present Monroe County Alliance. The alliance has never ceased to exist, al-

though its membership has changed, and its methods of internal administration have been altered; and the organization of to-day and that of the year 1889 is one and the same. The fact of an irregular or unauthorized ratification of what is called the "Georgia Plan" by the county alliance of Monroe county is immaterial. The county alliance of Monroe need not have taken any action on the proposed change in the constitution of the state alliance. That change became effective by the action of the state alliance, and the subsequent ratification of that action by the requisite number of county alliances, independently of what the Monroe county alliance did, or attempted or failed to do. Disagreeing with the finding of fact on this point made by the court below, the decree will be reversed, and remanded for further proceedings in accordance with this opinion.

(77 Miss. 48)

HEBRON et al. v. KELLY et al.

(Supreme Court of Mississippi. March 13, 1899.)

On rehearing. Affirmed.

For former decision, see 28 South. 641.

WOODS, C. J. We can add nothing to what was said in our original opinion on the subject of interest. It is still impossible to determine upon what basis the court below proceeded in stating the account, and in his finding of the sum due from the appellants to appellees. Hicks v. Blakeman, 74 Miss. 459, 21 South. 7, 400, is inapplicable here. That was a suit between the parties who were asserting title to the property adverse to each other. It was essentially ejectment in chancery, and the rules governing actions in ejectment were properly applied. In the case before us, by the former decision of this court (Hebron v. Kelly, 75 Miss. 74, 21 South. 799), the appellees were compelled to abandon their assertion of title to the property as bona fide purchasers, and assume that of trustee in a resulting trust. Practically, the appellees were placed by us in the position of a mortgagee out of possession, and the present case falls in that class to which Uhler v. Adams, 78 Miss. 332, 18 South. 654, belongs, and the principles announced, as governing in that case, are applicable on the present appeal. We adhere to our original opinion and decree.

(76 Miss. 907)

ALCORN et al. v. ALCORN.

(Supreme Court of Mississippi. May 1, 1899.)

INJUNCTION—DISSOLUTION.

1. Where, on motion to dissolve an injunction granted in aid of a suit to cancel a deed, it appeared that the injunction did not change the status of the parties, but preserved their rights as they had previously existed, an order continuing the injunction until final hearing was not erroneous.

2. In determining whether an injunction should be dissolved, the court may examine an

amended bill, though the amendment was not made until after the motion to dissolve was filed.

Appeal from chancery court, Coahoma county; A. H. Longino, Chancellor.

Suit by Amelia W. Alcorn against May Yates Alcorn and another. From an order overruling defendants' motion to dissolve an injunction, the defendants appeal. Affirmed.

The bill alleges: That James L. Alcorn died on the 19th of December, 1894, testate, having by will dated April 18, 1893, devised all his property, real and personal, to complainant, Amelia W. Alcorn, his wife. That by the will complainant and James Alcorn, the only son of testator, were appointed executors of the will, which was probated, and the executors qualified under it. That, as such devisee, complainant became the owner of Eagle's Nest plantation, in Coahoma county, Miss., whereon was located testator's residence, farming implements, and other personal property. That complainant's son and co-executor caused the personal property to be appraised as the property of testator's estate, but that there was a large amount of personal property and many thousand dollars of choses in action, part of the testator's estate, bequeathed to complainant, which he had failed to have appraised or inventoried, and had wrongfully converted to his own use. That on the 20th day of July, 1895, complainant and James Alcorn executed a written agreement, whereby, in consideration of the undertaking on the part of James Alcorn to pay all the debts of the testator's estate, complainant, reserving to herself a life estate in the Eagle's Nest plantation, contracted to convey to him the remainder of that place in fee, and that on the 14th of October, 1895, she did convey to him said remainder in fee. That, in order to enable her son to pay the debts so assumed, complainant allowed him to have the use of the plantation and personal property thereon for the years 1895, 1896, and 1897, free of charge, except a comfortable support for complainant. That, by the close of the year 1897, all of the debts of testator's estate having been paid, complainant rented said place, except the residence, to her son, James Alcorn, for the year 1898. That James Alcorn died November 20, 1898, owning a stock of goods in a storehouse on the plantation, crops of corn, etc., thereon, and left, as his only heirs, defendants May Yates Alcorn and her infant son, James L. Alcorn, residents of Coahoma county. That, after the death of James Alcorn, May Yates Alcorn went upon said plantation, and took charge of the property of James Alcorn, and is carrying on the business of said decedent, collecting the debts due him, controlling and managing the property and assets of his estate, as the owner, and he charges that she is an executor de son tort of James Alcorn, and liable for his debts, and that the assets belonging to his estate are ample to pay all debts owing complainant by said decedent. That the defend-

ant May Yates Alcorn now asserts that she is the sole owner of all of said property in fee, and is seeking to exercise acts of ownership and authority over it, and is seeking to interfere with the right of complainant to control and manage said property. That this claim is disquieting the tenants and laborers on said place. That the claim of defendants is based on a deed executed November 8, 1895, which deed is as follows: "In consideration of one dollar in hand paid, * * * and for the further consideration of my dependence upon my son's management to support me and pay off and discharge the obligations connected with Eagle's Nest plantation, and to enable him to mortgage and pay off mortgages, and for the further consideration of love and affection, I convey and warrant to my son, Jas. Alcorn, during my lifetime, as the property is his at my death, for the purpose herein set forth, and agree that there shall not be, in case of my death or otherwise, any accounts required of him for money received or expended, the following described lands, known as 'Eagle's Nest Plantation.'" That, in obtaining from her the execution of this deed, he represented to her that it might become necessary for him to place a mortgage on her property to enable him to raise money with which to pay debts, and, having great confidence in him, she executed the deed solely for that purpose. That the power to mortgage had never been exercised by James Alcorn to the time of his death, and that at all times during his life he openly stated that the deed had no other effect, and that he at all times recognized the right of complainant to the ownership of the property. That, if the title to the property passed at all, it passed in trust for the sole purpose set out, and no other, and that, as the trust had been discharged, the title reverted to complainant, or is held by defendants as a naked legal title in trust for complainant. That said deed casts a cloud upon complainant's title, and she is entitled to have it canceled. The bill prays for a cancellation of the deed of April 8, 1895, and for a preliminary injunction restraining defendants from interfering with the possession of property described in the bill, and from asserting any claim to the lands adverse to complainant. A bond was given, and a writ of injunction issued. Defendant May Yates Alcorn answered the bill, denying all the equities of the bill, and averred in her answer: That, after the execution of the will mentioned in the bill, James L. Alcorn, by a deed of gift dated April 28, 1894, conveyed to James Alcorn all of the property, real and personal, he then owned. A copy of this deed was made an exhibit to the answer, showing that it was acknowledged April 28, 1894, and filed for record January 28, 1897. That all the property in controversy vested in James Alcorn under that deed, except the right of complainant to have 100 acres including the residence set apart to her. That James Alcorn, notwithstanding his rights un-

der this deed, was willing for his mother to have a life estate in Eagle's Nest plantation during her life, and was willing to perform the obligations imposed in the deed of July, 1895, in consideration that he should have the title to the 100 acres after her death, and that he accordingly entered into said contract. The answer admits the execution of the deed of October 14, 1895, from complainant to James Alcorn, and denies the rent contract. The answer further sets up that James Alcorn, by his will, bequeathed all his personal estate to defendant May Yates Alcorn, and devised his real estate to her for life, with remainder to James L. Alcorn; that the will was probated, and letters testamentary issued to May Yates Alcorn; and admits that, as such executrix, she had taken possession of his property, for the purpose of preserving it until she could prove the will and qualify as executrix. The motion to dissolve came on to be heard in the term, on January 20, 1899, and, on application of the complainant, it was continued, to be heard in vacation. After the continuance, complainant, on her application, was given leave to amend her bill. The amended bill avers: That complainant is residing in the residence on Eagle's Nest plantation where all her household goods and personal effects are, and has no other home, and that during the life of her husband and son she was the undisputed mistress of her said home. That, by reason of the conduct of May Yates Alcorn in exciting discontent among the laborers and servants by asserting that since the death of James Alcorn they had become the sole owners of the property, complainant was subjected to many inconveniences and indignities upon her said estate. That, shortly prior to the filing of the original bill, defendants removed to the state of Tennessee, where they have continuously remained. That the deed of gift dated April 28, 1894, set out in the answer, had been obtained by undue influence exercised by James Alcorn over his father, at the time he had no sufficient mental capacity to execute it. On the trial of the motion to dissolve, affidavits were read in evidence by complainant tending to show that James Alcorn always, in his lifetime, recognized the right of his mother to a life interest in the Eagle's Nest plantation, and the personal property, and to show that James L. Alcorn was of unsound mind when deed of gift of April 28, 1894, was executed. The evidence for defendants tended to prove that James Alcorn had claimed as owner of the property since his father's death. On the hearing of the motion to dissolve the injunction, defendants objected to the reading of the amended bill. This objection was overruled.

Perkins & Winston, for appellants. J. W. Cutrer, for appellee.

WHITFIELD, J. This appeal was granted to settle the principles of the cause. The only point for adjudication, however, is the pro-

priety of the action of the chancellor in retaining the injunction till the final hearing, and all that we shall say will be understood as addressed solely to the solution of that question. We have given this record a most thorough consideration, and, from it, are satisfied that the appellant's counsel puts his contention too strongly when he characterizes the injunction as having for its sole object the putting the appellant out of, and the appellee into, the possession of the Eagle's Nest plantation. It is to be noted that, prior to filing the bill, appellant went to Memphis, and has not since been on the property involved. The difficulty with counsel's position is that the character and quality of possession set up by appellant now, since the death of her husband, from which she says she is being shut out, is not at all the character and quality of possession set up by her and her husband when he lived. It is clear that he never claimed under the alleged deed from his father of date April 28, 1894, which was not put to record for some three years; and it is also satisfactorily shown that her husband did not claim under the instrument of date November 8, 1895, as absolute owner of the property. We are not speaking of how these things may turn out to be on final hearing, on full proof, but, on the record as it now stands, it is clear to us that the alleged deed of April 28, 1894, was void for incapacity on the part of Governor Alcorn to execute it, and that if the instrument of November 8, 1895, had any other effect than to empower James Alcorn to mortgage the property to pay debts, etc., and passed the legal title to him, it so passed it in trust, the whole beneficial interest remaining in Amelia W. Alcorn, his mother. The facts in testimony, in connection with the instruments, giving them this character, and the only possession James ever set up being of this character and quality, in strict recognition of his mother's life estate in, not 100 acres, but the whole of that part of Eagle's Nest devised to her by her husband, it is not for the appellant, the daughter-in-law, now to change the character and quality of that possession, for the time it lasted, into an adverse holding. Because, since her husband's death, and the record of the deed of April 28, 1894, she now elects to claim all save 100 acres as hers and her son's, under the instruments referred to now for the first time, invoked to show title in her husband, it does not at all follow that this newly-asserted character of possession can, by some magic *ex post facto* operation, be imputed to a possession of a wholly different kind, held by her husband till his death. The true view of the bill is that it seeks to preserve the possession of the appellee as it was—to maintain the status as to possession as it had been between mother and son—until the chancery court, having full jurisdiction of the subject-matter, shall finally dispose of the rights of the parties. In this view, the principles of the cases of Woods v. Riley, 72 Miss. 73, 8 South. 384; Jones v. Brandon, 60 Miss.,

at pages 560, 561; *Marble Co. v. Ripley*, 10 Wall., at top page 354; *Beatty v. Kurtz*, 2 Pet. 566; and of the cases cited in *Dudley v. Hurst* (Md.) 1 Am. St. Rep., in note at page 375 (s. c. 8 Atl. 901)—are decisive of the correctness of the action of the learned chancellor. It was proper to look to the amended bill, though the amendment was made after the motion to dissolve was made. *Conover v. Ruckman*, 34 N. J. Eq., at page 297.

Many considerations are influential with the chancellor in determining his action as to dissolving an injunction, or retaining it till full proof, on final hearing, as whether the complainant will suffer more from the dissolution than the respondent from its retention (*Fulton v. Greacen*, 36 N. J. Eq., at page 221); as where the bill shows a probable right, and probable danger to that right, unless the injunction be retained; and many other considerations, addressing themselves to the sound judicial discretion of the court applied to to dissolve it. Very wide latitude, necessarily, must be allowed the trial court. The effectuation of right—the vindication of justice—is the object here, as everywhere, in judicial proceedings; and, when fraud is charged, the reasons for retaining the injunction are greatly strengthened. *Hollis v. Williams*, 43 Ga., at page 217. Once more remarking that our observations are addressed merely to the action of the chancellor in retaining this injunction, and that while it is true that mandatory injunctions are granted with great caution prior to full hearing, but are to be granted prior thereto, nevertheless, “where the exigencies of the case are great” (see note to *City of Moundsville v. Ohio River R. Co.* [W. Va.] 20 Lawy. Rep. Ann., at page 161 [s. c. 16 S. E. 514]), and, specially, that we rest our decision in this case upon its very extraordinary facts, we hold that the injunction was properly retained until final hearing. Affirmed.

(41 Fla. 303)

RICHARDSON v. STATE.

(Supreme Court of Florida. May 10, 1899.)

KEEPING GAMBLING PLACE—INDICTMENT—EVIDENCE.

1. The artificial effect given to the finding of implements, devices, or apparatus commonly used in games of chance in gambling houses, or by gamblers, by section 2648, Rev. St., is confined to the purpose for which the house, room, booth, shelter, or place where found is kept. Such finding does not, under the statute, constitute prima facie evidence that the implements found were used for gaming purposes, nor that any person had procured, suffered, or permitted another to play for money or other valuable thing at any game in the place where such implements are found.

2. An information charging that defendant “did keep a certain gaming place, and did then and there suffer and permit many persons, whose names are to the solicitor unknown, to play therein, at games of cards and other games of chance, for money and for other hire, for gain and for reward,” does not charge an offense under that clause of section 2644, Rev. St., relating to the keeping of places for the

purpose of gaming or gambling, but does charge an offense under the clause of the same section relating to one who, in any place of which he may have charge, control, or management, procures, suffers, or permits any person to play for money, etc.

3. Evidence examined, and held insufficient to support the verdict.

(Syllabus by the Court.)

Error to criminal court of record, Hillsboro county; William A. Carter, Judge.

Joseph Richardson was convicted and sentenced for keeping a gaming place, and brings error. Reversed.

G. A. Hanson (Harris & Peeples, on the brief), for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

CARTER, J. On July 7, 1898, is the criminal court of record of Hillsboro county, plaintiff in error was by the verdict of a jury found guilty as charged under an information alleging “that Joseph Richardson, late of the county of Hillsboro, in the state aforesaid, on the 31st day of May, in the year of our Lord 1898, with force and arms, at and in the county of Hillsboro aforesaid, did keep a certain gaming place, and did then and there suffer and permit many persons, whose names are to the solicitor unknown, to play therein, at games of cards and other games of chance, for money and for other hire, for gain and for reward, against the form,” etc. Defendant made a motion for a new trial, upon the ground, among others, that the verdict was contrary to law and against the weight of evidence. The motion was overruled, and from the sentence imposed he sued out this writ of error, and assigns as error the ruling upon the motion for a new trial.

From the evidence it appears that the defendant and one Payne occupied a room in a private dwelling, in which sleeping rooms were rented by the proprietor; that two officers in 1898 went to this room, opened the door and found therein a large number of dice and packs of bicycle cards, of the kind generally used in gambling. One witness estimated the number of dice at about 100, and the cards at about a dozen packs, while another estimated them at double these numbers. The officers also found in the room a small ratchet drill, with several bits for drilling holes, lying on a small bedroom table; and attached to the table was a small vise, holding one of the dice. The size of the room was about 10x12 feet, and it contained a double bedstead, and bedding made up for sleeping purposes, and a bureau, washstand, bowl and pitcher, one chair, and the table before mentioned. The room had the general appearance of an ordinary bedroom. There were found, also, a quantity of lead, shot, paint, and brushes, and the drill bits were suited for drilling holes about the size of the spots on the dice. Some of the dice were found to be loaded. The defendant was comparatively a stranger in the community. There was no evidence tending to show that

any gambling had in fact ever taken place in the room, or that the dice or cards had ever been used for gambling or other purposes, or that defendant ever suffered or permitted any persons to play at any game, for money or otherwise, in the room. The defendant denied that any gambling had ever been carried on in the room, to his knowledge; and Payne, the other occupant, testified on behalf of defendant that the room had never been used for gaming purposes, but only as a bedroom. Defendant admitted that the cards and dice were his property, and that he was loading and experimenting with and selling the dice to soldiers and others, and two witnesses on his behalf corroborated this statement.

The jury evidently rejected defendant's explanation of his possession and use of the dice, and, finding he had not accounted for his possession of the cards, applied to the fact of the finding of the cards and dice in a room occupied by him the statutory effect declared by section 2648, Rev. St., reading: "If any of the implements, devices, or apparatus commonly used in games of chance in gambling houses or by gamblers are found in any house, room, booth, shelter or other place, it shall be prima facie evidence that said house, room, booth, shelter or place where the same are found is kept for the purpose of gambling." A careful reading of this statute shows that the artificial effect given to the finding of the implements mentioned in the places mentioned is confined to the purpose for which such place is kept. Such finding does not, under the statute, constitute prima facie evidence that the implements found were used for gaming purposes, nor that any person had procured, suffered, or permitted another to play for money or other valuable things at any game in the place where such instruments are found or elsewhere. The statute has no application whatever to a trial upon any charge other than one involving the having, keeping, exercising, or maintaining a gaming room, or a house, booth, tent, shelter, or other place, for the purpose of gaming or gambling. *Wooten v. State*, 24 Fla. 335, 5 South. 89. Unless the information before us charges an offense of this nature, the jury were not justified in applying to the fact of the finding of the implements the artificial effect provided by this statute. The information is based upon section 2644, Rev. St., reading as follows: "Whoever by himself, his servant, clerk or agent, or in any other manner has, keeps, exercises, or maintains a gaming table or room, or gaming implements or apparatus, or house, booth, tent, shelter or other place for the purpose of gaming or gambling, or in any place of which he may directly or indirectly have charge, control or management, either exclusively or with others, procures, suffers, or permits any person to play for money or other valuable thing at any game whatever, whether heretofore prohibited or not, shall be punished," etc. There is no al-

legation in this information as to the unlawful character of the place, except that it was a "gaming place," and that defendant on one occasion suffered and permitted many persons to play therein for money, etc., but not that this occurred on divers days, or habitually or commonly, or that the place was kept for the purpose of gaming, or other language which we can construe as equivalent to an allegation that the place was kept by defendant "for the purpose of gaming or gambling," within that clause of the statute relating to the keeping of places for such purpose. *Doyle v. State*, 19 Tex. App. 410; *Montgomery v. State*, 40 Fla. —, 24 South. 68. The information does, however, charge an offense under the last clause of the statute, relating to one who, in any place of which he may have charge, control, or management, procures, suffers, or permits, etc., as the allegation in the information to the effect that defendant "kept" a gaming place, and "therein" suffered and permitted, etc., are equivalent to the statutory requirement that he suffered and permitted, etc., in a place of which he had "control." *State v. Middleton*, 11 Iowa, 246. As the statute giving artificial effect to the finding of gambling instruments has no application to the charge made in this information, and there was nothing whatever shown in connection with the simple fact of the finding of the implements to authorize the jury to presume that defendant suffered and permitted gaming in the room occupied by him,—the mere fact of finding the implements not constituting prima facie evidence to that effect, without the aid of a statute which we have not,—it follows that there was no evidence upon which the jury could legally have found defendant guilty of the offense charged.

The judgment is reversed, and a new trial granted.

(41 Fla. 316)

SIMMONS v. STATE.

(Supreme Court of Florida. May 2, 1899.)

ROBBERY—PUTTING IN FEAR.

1. Property obtained by trick or artifice, or by threats of illegal arrest, criminal prosecution, or insinuations against character, except they relate to sodomitical practices, is not taken by "putting in fear," within the meaning of section 2398, Rev. St.

2. Allegations in an information to the effect that Simmons, Tyre, and Jones, by putting in fear one Rebecca Jackson, by then and there falsely representing and pretending to the said Rebecca Jackson that one of them, to wit, the said Jones, was then and there an officer, to wit, a constable, and authorized to take her furniture, and by then and there threatening to arrest and take into custody the said Rebecca Jackson if she resisted them in the taking of said furniture, do not show a "putting in fear," within the meaning of section 2398, Rev. St.

(Syllabus by the Court.)

Error to criminal court of record, Duval county; John L. Doggett, Judge.

W. H. Simmons was found guilty of robbery by putting in fear, and brings error. Reversed.

W. P. Ward, for plaintiff in error. William B. Lamar, Atty. Gen., for the State.

CARTER, J. On February 24, 1898, plaintiff in error was, in the criminal court of record of Duval county, found guilty, as charged, upon a trial under an information duly filed, charging "that W. H. Simmons, H. M. Tyre, and S. S. Jones, of the county of Duval and state of Florida, on the 7th day of January, in the year of our Lord one thousand eight hundred and ninety-eight, in the county and state aforesaid, did then and there, by putting in fear one Rebecca Jackson, by then and there falsely representing and pretending to the said Rebecca Jackson that one of them, to wit, the said S. S. Jones, was then and there an officer, to wit, a constable, and authorized to take her furniture, and by then and there threatening to arrest and take into custody the said Rebecca Jackson if she resisted them in the taking of said furniture, did then and there feloniously rob, steal, and take from the person of the said Rebecca Jackson one stove, of the value of eighteen dollars; one bureau, of the value of twelve dollars; one washstand, of the value of eight dollars; one bedstead, of the value of four dollars; one child's crib, of the value of four dollars; one crib mattress, of the value of one dollar,—all of the value of forty-seven dollars,—the property, goods, and chattels of the said Rebecca Jackson, contrary to the form of the statute," etc. Before the trial plaintiff in error moved to quash the information, which was denied, and after the verdict he moved in arrest of judgment, upon the ground that the information did not allege facts sufficient to charge him with the crime of which he was convicted; but this motion was also overruled, and from the sentence imposed he sued out this writ of error.

The only error assigned, which we find it necessary to consider, relates to the ruling upon the motion in arrest of judgment. The information is based upon section 2398, Rev. St., reading as follows: "Whoever by force, violence or assault, or putting in fear, feloniously robs, steals and takes from the person of another, money or other property which may be the subject of larceny (such robber not being armed with a dangerous weapon), shall be punished by imprisonment in the state prison not exceeding fifteen years." The information does not charge any force, violence, or assault, but sets forth in detail the facts from which the conclusion that Rebecca Jackson was put in fear is drawn, and plaintiff in error argues that the facts alleged are not sufficient to show a "putting in fear," within the meaning of the statute quoted. The statute does not define what circumstances shall constitute "putting in fear," but this expression is evidently used in a technical sense, and we must ascertain its meaning by reference to the common-law definition of "robbery," from whence it is derived. *Turner v. State*, 1 Ohio St. 422; *Clary v. State*, 33

Ark. 561. At common law, robbery was "the felonious and forcible taking of the property of another from his person or in his presence, against his will, by violence or by putting in fear." 1 Whart. Cr. Law, § 846; 2 Russ. Crimes (9th Ed.) *98. The putting in fear, or intimidation, was considered the equivalent of constructive violence, and the demands of the law were met by proof of fear excited with respect to apprehended injuries to the person, property, or character. *Id.* *113. Though there need be no great degree of terror or affright for personal safety excited in the person robbed, the fact must be attended with such circumstances of terror or intimidation, such threatening by word, gesture, or manner, as, in common experience, are likely to create an apprehension of danger, and induce one to part with his property for the safety of his person. *Id.*; 1 Hawk. P. C. (8th Ed.) p. 214, § 8; *Fost. Crown Law* (2d Ed.) 128. The terror which would lead the person robbed to apprehend an injury to his character was never deemed sufficient to support an indictment for robbery, except in the particular instance of its being excited by means of insinuations against, or threats to destroy, the character by accusations of sodomitical practices. 2 Russ. Crimes (9th Ed.) *118; 1 Whart. Cr. Law, § 852; 2 Bish. New Cr. Law, § 1173.

The facts alleged in this information do not, in our opinion, sustain the alleged conclusion that Rebecca Jackson was put in fear, within the meaning of the statute. The defendants are alleged to have falsely represented to her that one of their number was a constable, and authorized to take her furniture, and to have threatened to arrest and take her into custody if she resisted them in the taking of her furniture. These representations and threats are not alleged to have been accompanied with any show of force or other circumstances calculated to produce terror. Her property was not threatened, her character was not assailed by any insinuations of sodomitical practices, nor were there any menaces against her personal safety other than a threat to arrest and take her into custody if she resisted the taking of the furniture. The means used were more in the nature of tricks or artifices, to enable the accused to obtain possession of the property with her express or implied consent, than those resorted to by the robber to intimidate his victim into submission to extortion. The rule is well settled that property obtained by trick or artifice, or by threats of illegal arrest or criminal prosecution, or insinuations against character, except they relate to sodomitical practices, is not taken by "putting in fear," within the common-law definition of robbery, and we think the same rule applies to the offense defined by our statute. *Rex v. Edwards*, 5 Car. & P. 518; *Shinn v. State*, 64 Ind. 13; *State v. Deal*, 64 N. C. 270; *Britt v. State*, 7 Humph. 45; *Long v. State*, 12 Ga. 298; *Bussey v. State*, 71 Ga. 100; *Thomas v. State*, 91 Ala. 34, 9 South. 81;

Routt v. State, 61 Ark. 594, 34 S. W. 262; *Hall v. People*, 171 Ill. 540, 49 N. E. 495.

The judgment is reversed, and the cause remanded to the court below, with directions to grant the motion in arrest.

(41 Fla. 204)

YAGER et al. v. McCORMACK.

(Supreme Court of Florida. March 16, 1899.)

APPEAL—REVIEW—ASSIGNMENTS OF ERROR—BILL OF EXCHANGE—PRESUMPTIONS.

1. Where an exception is general to the refusal to give several instructions asserting distinct propositions of law, an appellate court will examine them no further than to ascertain that some one of them was incorrect, and therefore properly refused.

2. The liability assumed by the drawing of a bill of exchange is clearly recognized by the law; the mere act of drawing such a bill importing the most certain and precise contract, for presumed adequate consideration, that the bill shall be accepted and paid, and that, if it is not, the drawer will pay it.

3. Evidence examined, and held insufficient to support the verdict.

(Syllabus by the Court.)

Error to circuit court, Lake county; John D. Broome, Judge.

Action by C. B. McCormack against Ernest and Arthur Yager, doing business as the Bank of Leesburg. Judgment for plaintiff. Defendants bring error. Reversed.

Anderson & Hecker, for plaintiffs in error. John L. Doggett, for defendant in error.

CARTER, J. On August 24, 1892, defendant in error began an action of assumpsit against plaintiffs in error in the circuit court of Lake county; the declaration, filed same day, containing only common counts for goods sold and delivered, work done and materials provided, money lent, money paid, money received, and account stated. Defendants' plea alleged that they were not indebted to plaintiff, as alleged in the declaration, in any amount whatever, but that plaintiff was indebted to defendants in the sum of \$296 for a draft cashed by defendants for plaintiff on April 1, 1891, and for the sum of \$1.65, protest fees paid thereon, and for interest on said amounts from April 1, 1891, until paid, at the legal rate, except that plaintiff was entitled to a credit thereon of \$206.10, paid April 14, 1891, leaving a balance still due defendants of \$81.55 and interest, for which latter sum they demanded judgment. Plaintiff "joined issue" on this plea, and the cause proceeded to trial, resulting in a verdict for plaintiff, upon which judgment was entered in his favor for \$239.30 and costs. Defendants moved for a new trial, alleging, among other grounds, that the verdict was contrary to the evidence. The motion being overruled, defendants excepted, and sued out the present writ of error from the judgment entered against them.

It appears from the evidence that plaintiff during the spring of 1891 was engaged in

buying and selling cabbages in Florida, as a broker, and on March 20th of that year George Davies of Cleveland, Ohio, wired him: "Will advance \$1.00 crate and brokerage, three cars week, commencing immediately,"—and on the same day wrote him quoting and confirming the telegram. On March 23d, Davies wired him: "Cabbage market improving. Have wired money to Bank of Leesburg,"—and on the same day wrote the defendants: "We had our bank wire you, 'Will honor draft on George Davies, three cars per week, dollar ten per crate, bill lading attached, through C. B. McCormack.' Please consider this good until ordered otherwise,"—and on the same day the German-American Savings Bank Company, of Cleveland, Ohio, wired defendants: "Will honor draft on George Davies, three cars cabbage per week, dollar ten per crate, bill lading attached, through C. B. McCormack." In pursuance of the arrangement between Davies and plaintiff, the defendants being aware of plaintiff's instructions, plaintiff bought and shipped several cars of cabbages, drawing on Davies through defendants in pursuance of the instructions; the drafts being cashed by defendants and proceeds placed to plaintiff's credit. The first car was shipped on March 24th, and a fourth car on March 27th; and for the last car a bill of exchange was drawn, with bill of lading attached, which was cashed by defendants, and proceeds placed to plaintiff's credit. This bill reads as follows: "On demand, pay to the order of Bank of Leesburg two hundred eighty-six and no/100 dollars, value received, and charge the same to account of C. B. McCormack. To George Davies, Cleveland, Ohio."

The bill was duly presented, and protested for nonpayment, and thereupon defendants charged the amount of same to plaintiff's account, and notified him of this action. The previous bills were duly paid, but the fourth was not paid by Davies, because, as he claimed, it was drawn for a fourth car shipped within a week, contrary to instructions. Nevertheless he received the fourth car of cabbages, sold it in the same manner as the three previous ones, and accounted to the owners for same.

Plaintiff testified that by his instructions from Davies he became the latter's agent, and was so recognized by defendants, and that the fourth bill of exchange was cashed, and proceeds credited to his account by them, on the same basis as the three previous ones; the fourth, according to his testimony, having been cashed on March 30th. The defendants' cashier testified that the fourth bill was presented, cashed, and proceeds placed to plaintiff's credit on April 1st; that when plaintiff presented it witness told him that he had exceeded his instructions; that the bill was drawn for a fourth car shipped during one week; that it would not be paid; that plaintiff stated he was sure the bill would be paid, and, if it should not be, he would make it

good to defendants; that witness then stated to plaintiff, if he would guaranty payment of the bill, and would make it good to defendants if not paid in Cleveland, he would cash it; that plaintiff agreed to do this, and then and there guarantied payment of the same. When the bill was charged back to plaintiff it left his account overdrawn \$81.55. Plaintiff denied that he ever stated to defendants' cashier that he would guaranty payment of the fourth bill, or that he would make it good to defendants if it was not paid, and stated that he had no recollection of any such conversation between himself and the cashier as testified to by the latter; and he further testified that, according to the business customs of defendants, neither he nor any other person could have secured credit for the amount of the bill on their simple personal guaranty. Defendants' cashier testified that, in cashing the first three bills, he relied upon the acceptance of the German-American Savings Bank Company, but in cashing the fourth, or last one, he relied upon the guaranty of plaintiff. It appears from the evidence that the German-American Savings Bank Company telegraphed defendants on March 31st: "Pay no more drafts on George Davies until further advices."

Defendants requested five instructions, to the refusal of which a general exception was taken. No objections are made as to the sufficiency of the replication to defendants' plea of set-off, but upon remand of the case it may be well for the parties to consider whether this replication is applicable to a plea of set-off, so as to make an issue proper to be submitted to a jury.

I. The defendants' refused instructions asserted five distinct propositions of law, and we find that some of these propositions were incorrect. The exception being general, we examine them no further than to ascertain that some one of them was incorrect, and, therefore, properly refused.

II. The court erred in overruling the motion for a new trial. The bill drawn by plaintiff, upon its face, purported to be his individual bill, and "the liability assumed by the drawing of a bill of exchange is clearly recognized by the law. The mere act of drawing a bill imports the most certain and precise contract, for presumed adequate consideration, that the bill shall be accepted and paid, and that, if it is not, the drawer will pay it." *Cummings v. Kent*, 44 Ohio St. 92, 4 N. E. 710; *Wood v. Surrells*, 89 Ill. 107; *Martin v. Lewis*, 30 Grat. 672; *Abrey v. Crux*, L. R. 5 C. P. 37. The written bill, upon its face, purporting to impose a personal liability upon plaintiff in the event it was not paid by Davies, the burden of proof was upon him to show that, in fact, he was not to be liable as drawer. He did not claim that there was any express understanding between him and the

defendants that he was not to be liable on any of the bills drawn by him, nor that there was any express understanding between him and his alleged principal, or the defendants, that the bills to be drawn by him were to be considered the bills of his principal, nor did he sign the bill as an agent, or purport thereby to bind only his principal. If we assume that plaintiff was merely an agent for Davies, he certainly did not sign the bill as agent, or otherwise indicate an intention not to bind himself personally by his signature to the same. Evidence that defendants, in cashing the first three bills, relied upon the acceptance of the Cleveland bank, and that, according to their business customs, plaintiff could not, upon his simple personal guaranty, have secured credit with them for the amount of either of the bills, does not prove an agreement or understanding between the parties that the legal liability assumed by plaintiff by the act of drawing the bill was to be released. The defendants claimed that they knew the last bill was drawn contrary to instructions, and that they cashed it, not upon the credit of the Cleveland bank, but upon plaintiff's express guaranty. If this be true, then plaintiff would clearly be liable. If it be untrue, and, as testified by plaintiff, no special guaranty was ever made by him, and no conversation between him and defendants' cashier ever took place as testified by the latter, then he is liable as drawer of the bill, because he does not pretend that there was ever any agreement to release him, or that he, though the drawer, was not to be liable. So, even though he was merely an agent for Davies, and drew the bill for a car shipped according to instructions, he had a perfect right to bind himself personally, and he did enter into an engagement which purported to so bind him, and, in order to absolve him, it devolved upon him to show that, though apparently personally bound, he, in fact, was not to be so bound. *Leadbitter v. Farrow*, 5 Maule & S. 345. He nowhere states that he was not to be personally bound, nor does he even state that he did not intend to bind himself by the drawing of the bills, and there is certainly nothing in the letters and telegrams, or in the course of dealing between the parties, to change the plain legal effect of the instrument drawn by him.

Giving full effect to all the evidence before the jury, we think it was insufficient to support the verdict. It may be that some of the testimony was inadmissible, because tending by parol to vary and contradict the terms of the written bill of exchange; but, as no objections were interposed to any evidence offered in the court below, we do not feel called upon to determine that question at this time.

The judgment of the circuit court is reversed, and a new trial granted.

(41 Fla. 210)

WALKER v. SARVEN.

(Supreme Court of Florida. March 7, 1890.)

TENANTS IN COMMON—PURCHASE OF LANDS—LIABILITIES INTER SE—VENDOR'S LIEN—ENFORCEMENT—DECREE—CONVEYANCE OF INTEREST—MARSHALING ASSETS—APPEAL—REVIEW.

1. Where tenants in common purchase land and execute their joint note for the purchase price, and the grantor reserves a lien upon the land sold to secure the note, such tenants in common, while jointly bound to the vendor for the whole debt, are, as between themselves, each equitably bound to discharge one-half of the same; and if either voluntarily or under compulsion of law pays more than his one-half thereof he is entitled to maintain a suit for contribution against his co-tenant, and can enforce his right to contribution as against his co-tenant's interest in the land.

2. Where a vendor files a bill against tenants in common to enforce his lien for purchase money due by them jointly for land sold them, but the bill contains no allegations or prayer, and the answers assert no claim, and no cross bill is filed for the purpose of settling in that suit the rights of contribution between the defendants as tenants in common, and it does not appear that one of the defendants has paid more than one-half the original purchase-money debt, it is error to decree that the interest of one of the tenants in common be first sold to pay the decree for purchase money, and, if it sells for a sum sufficient to pay the sum decreed, that the interest of the other tenant in common be not sold. In such case the decree should direct the sale of a sufficiency of the whole property and the interest of every defendant therein to pay the purchase-money debt, leaving the defendants to institute proceedings to adjust the rights of contribution, if any exist between them, as they may see proper.

3. The rule requiring that where lands are mortgaged to secure a debt, and a part of the lands are subsequently sold and conveyed by the mortgagor, the portion unsold is primarily liable under the mortgage, does not apply to the case where tenants in common jointly mortgage the joint property for a joint debt, and one of them subsequently sells and conveys his entire interest to another person, subject to the incumbrance. In such case the whole property is still liable for the entire debt, and one tenant in common cannot charge the whole joint debt primarily upon the interest of the other tenant in common by selling and conveying his own interest.

4. The fact that a decree for the sale of property has been executed by the master making the sale and executing a conveyance thereunder does not prevent an appellate court from reversing such decree upon appeal taken after the sale, but, if the purchaser's title acquired at such sale is such that a reversal of the decree will not affect it, the appellant will be left to his remedies for restitution as against the parties to the suit.

(Syllabus by the Court.)

Appeal from circuit court, Hernando county; William A. Hocker, Judge.

Bill by James D. Sarven against George N. Sarven and others. From a decree in favor of plaintiff, Charles B. Walker, one of the defendants, appealed. Reversed in part and affirmed in part.

On August 5, 1893, appellee filed his bill in equity in the circuit court of Hernando county against appellant and George N. Sarven, Willie B. Mayes, and her husband, James M. Mayes, alleging that complainant was on and before November 18, 1882, seised

in fee and possessed of certain lands situated in Hernando county, therein particularly described, and on said day bargained and sold same to defendants Walker and Sarven for the sum of \$3,579, for which sum said defendants executed a joint note, due three years after date, with interest at 6 per cent. per annum from date, payable annually, reciting therein that the consideration therefor was "a tract of land in Hernando county, state of Florida, this day purchased from said Sarven, and for which he has executed to us his deed, in which a lien is retained for the payment of this note"; that upon the execution of said note complainant made and delivered to said defendants a deed conveying said lands, in which it was declared that "it is understood and agreed that a lien is hereby retained on said land, and every part thereof, for the payment of said purchase-money note for \$3,579, and this deed is to be regarded as in operation until said note, with its interest, shall be paid"; that this deed was duly recorded in the public records of said county May 2, 1883; that on or about May 14, 1890, complainant released his lien upon 10 acres of the land, specifically described, same having been sold to one John E. Walker by said defendants with his consent; that on March 10, 1893, complainant instituted suit in the circuit court of Hernando county against said defendants to recover the balance due on said note, and on April 4, 1893, obtained final judgment therein for \$3,643.10 and costs; that execution duly issued on said judgment, and on April 10, 1893, no other property of said defendants being found, was levied on all of said land except the 10 acres; that on May 26, 1893, the defendant Willie B. Mayes filed in said circuit court her bill of complaint against complainant, alleging that she was seised in fee and possessed of an undivided one-half interest in the lands advertised to be sold under said execution; that she was so seised and possessed under and by virtue of certain deeds to her by defendant George N. Sarven and one Wiley J. Embry for the one-half interest in said lands which defendant George N. Sarven had under the deed from complainant before mentioned; that she was so seised and possessed from the 19th day of March, 1890; that she "has always recognized the facts as stated in the deed executed by James D. Sarven to said George N. Sarven and Charles B. Walker; that said James D. Sarven retained a vendor's lien on said lands for the unpaid purchase money"; that her bill prayed for an injunction to restrain the sale of her half interest in the lands, and that a temporary injunction issued in accordance with said prayer on May 26, 1893. The bill further alleged that when Willie B. Mayes purchased the half interest in said land from Embry, who had purchased from George N. Sarven, she had actual as well as constructive knowledge that complainant held a vendor's lien for the purchase money, and that the note given there-

for had not been paid, and that when she filed her said bill she well knew that the judgment under which complainant sought to sell said lands was for the remainder of said purchase money and interest, and that all of said lands were subject to its satisfaction. The bill also alleged that no payments had been made on the purchase-money note except the following: By Sarven and Walker, \$244.21, January 27, 1888; by W. J. Embry, \$300, February 28, 1890; by Willie B. Mayes, \$1,299, June 12, 1891, \$100, April 23, 1892, \$214.72, September 21, 1892; and that the judgment before mentioned represented the true and correct amount due on the purchase-money debt at the time of its rendition. The amended prayer of the bill asked that a vendor's lien be decreed in favor of complainant against said land, and every part thereof, except the 10 acres released; that the land be decreed to be sold to pay complainant's judgment, and the costs of suit; and for general relief.

The defendant George N. Sarven filed his answer, admitting the sale of the lands upon the terms stated in the bill, the execution of the note for purchase money, and the deed of conveyance containing the clause quoted, as alleged in the bill. He also stated that on July 25, 1888, he sold and conveyed his undivided half interest in said lands to W. J. Embry; that Embry knew at the time of his purchase that only \$244.20 had been paid on the note for purchase money, and that the balance remained unpaid. He further stated that, according to the best of his information and belief, the common-law judgment obtained by complainant represented the correct amount due on the purchase-money note.

The appellant, Charles B. Walker, filed his answer, admitting the sale of the land, the execution of the note for purchase money, the delivery of the deed containing the clause quoted, the institution of the suit upon the note for purchase money, the recovery of judgment therein, and that this judgment represented the correct amount due for purchase money, as alleged in the bill of complaint. He also stated that after their purchase Walker and Sarven entered into possession of the lands, improved, cultivated, and set out orange and other fruit trees thereon until some time in July, 1888, when Sarven sold his half interest to W. J. Embry, who, at the time of his purchase, had full knowledge of the unpaid purchase-money note; that Embry, on or about March 19, 1890, sold said half interest to Willie B. Mayes, who, with his (Walker's) consent, was let into joint possession of all said lands; that she had full actual notice that the purchase-money note was unpaid, and after her purchase made certain payments credited upon the note.

Willie B. Mayes and her husband demurred to the amended bill, and, upon their demurrer being overruled, filed their answer, admitting that complainant was on November 18, 1892, seised and possessed of the lands described

in the bill; that he on that day sold same to George N. Sarven and Charles B. Walker, received their note for purchase money, and executed and delivered to them a deed containing the clause quoted; that the deed was placed upon record; that complainant released his lien upon the 10 acres of land described in the bill; that complainant instituted the suit to recover balance of purchase money against George N. Sarven and Charles B. Walker, obtained judgment, procured execution, and levied same on the lands sold to Sarven and Walker; that thereupon Willie B. Mayes filed her bill containing the allegations and prayer, and that a temporary injunction issued, all as alleged in the bill. Said defendants, further answering, alleged that the temporary injunction was subsequently, on December 18, 1893, made perpetual, and admitted that when Willie B. Mayes purchased the undivided half interest in the lands from Embry, who had purchased from George N. Sarven, she had actual as well as constructive notice that the complainant had a vendor's lien for purchase money on said lands, and that the note given therefor by Walker and Sarven had never been paid in full, and alleged that the deed from Embry to Willie B. Mayes recited the fact that all of the purchase money due complainant had not been paid. Said answer also admitted that all payments ever made on complainant's purchase-money note were correctly stated in the bill, and alleged that all of said payments were made by said defendants or Embry, except the one for \$244.21, which was made by George N. Sarven and Charles B. Walker; that since the judgment against Walker and Sarven was obtained by complainant said respondents had repeatedly offered to pay it off, provided complainant would assign and transfer same to them, but that complainant had positively refused to do so; that respondents were willing to pay off said judgment then, if complainant would transfer the judgment to them, or execute to them a good and sufficient deed of conveyance to all the land.

The cause was set down for hearing upon bill and answers, and thereupon, on May 12, 1894, the court decreed in favor of complainant a vendor's lien upon all the land described in the bill for the amount of the judgment, viz. \$3,643.10, with interest from April 4, 1893; and, further, that defendants Charles B. Walker and Willie B. Mayes pay to the complainant within 30 days said amount, with interest, and the costs of suit; that upon payment of said amounts complainant execute to said defendants Charles B. Walker and Willie B. Mayes a quitclaim deed to said land, reciting therein by whom such payment was made; that in default of such payment the lands as described in the bill (except the 10 acres) be sold on a legal sale day at public auction for cash to the highest and best bidder before the court-house door in said county, by a special master therein appointed, after giving public notice of such sale in the manner

therein specified; that the one undivided half interest of defendant Charles B. Walker be first sold, and, if the proceeds of such interest be not sufficient to satisfy said judgment and interest and the costs of the suit, that said master then immediately proceed to sell the other one undivided half interest in said lands of the defendant Willie B. Mayes, the costs of suit in either event to be paid equally by Charles B. Walker and Willie B. Mayes, and that the defendants and all persons claiming by, through, or under them, or either of them, be forever barred from all equity of redemption of, in, and to said lands, and every part thereof. On August 6, 1894, the undivided interest of appellant in the lands mentioned in the decree was sold under the decree to Dr. John Bowen for \$4,130.55, the exact amount necessary to pay the amount mentioned in the decree and interest and the costs of suit. This was confirmed by the court on August 8, 1894, and on the 13th of August the proceeds of sale were applied to the payment of the amounts mentioned in the decree. Thereafter, on October 26, 1894, Charles B. Walker, in the name of all the defendants, entered an appeal from the decree of May 12, 1894, and caused to be issued and served upon George N. Sarven, Willie B. Mayes, and her husband, James M. Mayes, a summons to appear and join in the prosecution of the appeal. Said parties having failed to appear or join in the appeal, a severance was granted in this court on June 11, 1895, and an order made authorizing Charles B. Walker to prosecute the appeal as sole appellant. Charles B. Walker only assigns error in this court, and those assigned all relate to that feature of the decree only which directed that his undivided one-half interest in the land be first sold to pay the amount decreed.

Angus Paterson, for appellant. Thomas M. Shackelford and Frank M. Simonton, for appellee.

CARTER, J. (after stating the facts). We have been unable to discover any principle by which that feature of the decree appealed from can be sustained. By their joint purchase George N. Sarven and Charles B. Walker became tenants in common of the lands conveyed to them by James D. Sarven, each being entitled to an undivided one-half interest therein. The debt for purchase money was a joint debt, for the whole of which each was equally bound to James D. Sarven, and the grantor's lien reserved in the latter's deed of conveyance was a lien for the whole debt upon the whole property. As between themselves, however, George N. Sarven and Charles B. Walker were each equitably bound to discharge one-half of the joint debt, and if either voluntarily or under compulsion of law paid more than one-half he was entitled to contribution from the other for the excess. Wiley J. Embry purchased the undivided interest of George N. Sarven with knowledge

that the whole property was charged with the grantor's lien for the entire purchase price due by George N. Sarven and Charles B. Walker, and subsequently sold the same interest, subject to the same incumbrance, to Willie B. Mayes, a purchaser with like notice. By this purchase Willie B. Mayes became a tenant in common with Charles B. Walker of an estate charged with the prior incumbrance. While Mrs. Mayes may not have become personally bound for the debt due to James D. Sarven, her interest in the land was, in her hands, subject to the whole of that debt, so far as James D. Sarven was concerned, though as between her and Charles B. Walker, her co-tenant, the respective interests of each were equitably bound for one-half of the purchase-money debt. In proceedings to foreclose this prior incumbrance upon the joint estate neither co-tenant was entitled to have the decree charge the other's interest with the entire debt, nor could either insist that the decree charge the interest of each with one-half, or any other particular part, of the debt, for the simple reason that the whole estate was equally liable, so far as James D. Sarven was concerned, for the entire debt; and the decree should therefore have directed the sale of so much of the entire estate as would be sufficient to satisfy the debt and costs. *Frost v. Frost*, 3 Sandf. Ch. 188; *Schoenewald v. Dieden*, 8 Ill. App. 389; *Perre v. Castro*, 14 Cal. 519; *Hubbard v. Dam Co.*, 20 Vt. 402; *Southworth v. Parker*, 41 Mich. 198, 1 N. W. 944. If either party had paid more than his just share of the joint debt, he could have maintained a suit for contribution against his co-tenant, and enforced his right to contribution as against his co-tenant's interest in the land. *Gee v. Gee*, 2 Sneed, 305; *Furman v. McMillian*, 2 Lea, 121; *Newbold v. Smart*, 67 Ala. 326. It may be questioned whether, under any circumstances, a suit to foreclose the joint lien can be converted into a proceeding for settling the equities between tenants in common growing out of their right to contribution, and for securing an adjustment of these rights by molding the decree of foreclosure so as to protect them. These are matters of no concern to the lienholder, and it would seem unjust to require him to await the result of litigation between co-defendants, in which he is not interested, before obtaining the relief to which his lien entitles him, regardless of the result of the litigation between the co-defendants. Such equities certainly cannot be adjusted in the absence of proper allegations in the bill of foreclosure putting in issue the question of contribution, or a cross bill by the defendant claiming such equities, to which the defendant against whom they are claimed is a party. *Iglehart v. Crane*, 42 Ill. 261. In this case no cross bill was filed. The bill did not put in issue any question of contribution between the co-defendants, nor did the answer of any of the defendants claim contribution nor insist that any particular interest in the joint property be first subjected

to the appellee's debt, nor state any facts to justify any such decree. The answer of Mrs. Mayes did not even show that she or her predecessors in interest had paid one-half of the original debt, with interest; but, on the contrary, the payments so made aggregated less than one-half of the entire debt. The decree therefore charged Walker's interest not only with his one half of the joint debt, but with a portion of the other half, which, as between him and Mrs. Mayes, was equitably chargeable upon her half interest in the land exclusively.

It is suggested in a brief purporting to have been filed in this court in behalf of Mrs. Mayes that the decree can be sustained by applying the rule that where lands are mortgaged to secure a debt, and a part of the lands are subsequently sold and conveyed by the mortgagor, the portion unsold is primarily liable under the mortgage (*Ellis v. Fairbanks*, 38 Fla. 257, 21 South. 107), and that the lien reserved by James D. Sarven was a mortgage lien, bringing it within the rule. But the rule does not fit the present case. Here we have tenants in common jointly mortgaging the joint property for a joint debt. To say that one of them can, by selling and conveying his entire interest in the property, thereby charge the whole joint debt primarily on the other's interest, is to assert a proposition so clearly erroneous as to require no argument to refute it. In the language of Judge Cooley: "There are no authorities which sanction such a doctrine, and, if there were any, they could only be regarded as inadvertent departures from reason and justice." *Southworth v. Parker*, 41 Mich. 198, 1 N. W. 944. See, also, *Rathbone v. Clark*, 9 Paige, 648.

It appears from the record that before this appeal was taken the decree complained of was executed by sale of the appellant's property in accordance with its terms. This fact does not affect this appeal, nor prevent the reversal of the decree appealed from (*Commissioners v. Johnson*, 21 Fla. 577; *Burrows v. Mickler*, 22 Fla. 572; *O'Hara v. MacConnell*, 93 U. S. 150; *Peer v. Cookerow*, 14 N. J. Eq. 361), although, if the purchaser's title acquired at such sale is such that a reversal of the decree will not affect it under previous decisions of this court (*Garvin v. Watkins*, 20 Fla. 151, 10 South. 818), then the appellant will be left to his remedies for restitution. Upon remand of the cause the circuit court may, upon proper proceedings, make such orders as to restitution and to subject Mrs. Mayes' interest in the land to payment of its just proportion of the purchase-money debt as may be proper, without prejudice to the right of appellant or Mrs. Mayes to maintain any appropriate proceedings against the other to enforce contribution, or any other legal or equitable rights as between themselves.

The decree appealed from, in so far as it provides "that the one undivided half interest of the defendant Charles B. Walker be

first sold, and, if the proceeds of such interest be not sufficient to satisfy said judgment and interest and the costs of this suit, then the said master will immediately proceed, and sell the other one undivided half interest in said lands of the defendant Willie B. Mayes," is reversed, and in all other respects said decree is affirmed, without prejudice to the right of Mrs. Mayes or appellant to maintain any appropriate proceedings against the other to enforce contribution, or any other legal or equitable rights as between themselves.

(41 Fla. 188)

WESTON v. JONES.

(Supreme Court of Florida. April 18, 1899.)

ATTACHMENT—TRAVERSE OF AFFIDAVIT—PLEADING—SUBMISSION OF ISSUES—AID OF FORECLOSURE—DISSOLUTION.

1. Under section 1656, Rev. St., defendant's affidavit, to the effect that he was not at the time plaintiff's attachment affidavit was filed indebted to plaintiff in the sum demanded, or any part thereof, tenders a proper traverse of the attachment affidavit as to the debt or sum demanded.

2. Upon a traverse in attachment of the debt or sum demanded, it is the duty of the court, under section 1656, Rev. St., upon reasonable application, in all cases where the issues have not already been made up in the main suit, to require the formal pleadings in the main suit to be made up, and the issues therein settled by special order, without reference to the time fixed by the rules or statutes for pleading in regular course, in order that the issues in the main case thus made up may be submitted to the court or jury along with the issues raised by the traverse of the special ground of attachment alleged.

3. Attachments in aid of foreclosures on personal property, authorized by section 1640, Rev. St., are statutory chancery writs, issued by, returnable to, and under the control of, the chancery court foreclosing the mortgage. The court from which such writ issues has full control over it and power to discharge it, if improvidently issued, to the same extent as it has power over other equitable writs; but the proceedings for its discharge must be taken under the rules of chancery practice, and not under statutory provisions relating only to general attachments at law.

4. Section 1656, Rev. St., regulating proceedings to dissolve attachments at law, has no application to attachments in aid of foreclosures on personal property authorized by section 1640, *Id.*

(Syllabus by the Court.)

Error to circuit court, Columbia county; John F. White, Judge.

Action by Harold Weston against Calhoun Jones to foreclose a chattel mortgage. Defendant obtained a judgment, and plaintiff brings error. Reversed.

A. J. Henry, for plaintiff in error.

CARTER, J. Plaintiff in error, on February 25, 1898, filed his bill in equity in the circuit court of Columbia county against defendant in error and one James E. Young, the purchaser of a portion of the mortgaged property, to foreclose a mortgage upon personal property executed by Jones to Weston on October 20, 1891. On the same day Weston's

attorney filed his affidavit, alleging, substantially, that Jones was justly indebted to his client in the sum of \$2,000, which was actually due; that the debt was evidenced by four promissory notes dated October 20, 1891, and secured by a mortgage of same date upon certain personal property, describing it; that a bill had been filed to foreclose said mortgage; that said property had remained in possession of Jones; and that affiant had reason to believe, and did believe, that the mortgaged property would be concealed, so that it would not be forthcoming to answer a demand in foreclosure. A bond on behalf of Weston was filed, payable to Jones, in the sum of \$4,000, which, after reciting that Weston had filed a bill to foreclose the mortgage described in the affidavit, and had applied for an attachment in aid of foreclosure, was conditioned to pay all costs and damages the defendant Jones might sustain in consequence of improperly suing out said attachment. A writ of attachment was issued by the clerk, commanding the sheriff to attach and take into custody the property embraced in the mortgage, and hold same or so much thereof as could be found sufficient to satisfy Weston in the sum of \$2,000 and costs, which was levied upon a portion of the mortgaged property. On March 13, 1893, Jones filed his affidavit, to the effect that Weston's attorney did not believe, or have reason to believe, that the mortgaged property would be concealed, so that it would not be forthcoming to answer a demand in foreclosure, and that affiant is not, and was not at the time of the filing of the attachment affidavit, indebted to Weston in the sum of \$2,000, the amount demanded, or any part thereof. Weston moved to strike the latter clause of this affidavit, upon the ground that it was, in effect, a plea of nil debit, and therefore not a proper traverse of the attachment affidavit. The court denied this motion, and Weston then applied to the court for an order requiring formal pleadings to be filed as to the debt or sum demanded by him, which application the court also denied, and set the motion to dissolve for hearing on March 28, 1893. On the last-named date Jones made a formal demand for a jury to try the issues joined on the motion to dissolve, and the court directed the sheriff to summon a jury from the body of the county for that purpose. Upon the return of the sheriff, a jury was impaneled, and a trial entered upon, resulting in a verdict for Jones, as well upon his denial of the debt claimed as upon his denial of the special ground of attachment alleged. Weston moved for a new trial, upon the ground that the verdict was contrary to the evidence, the weight of the evidence, the law, and the charge of the court. This motion was overruled, and judgment upon the verdict was entered dissolving the attachment and adjudging costs against Weston, from which he sued out this writ of error.

The evidence introduced and proceedings had upon the trial before the jury are em-

braced in a bill of exceptions incorporated into the transcript of record. Errors are assigned upon the rulings denying the motion to require formal pleadings, refusing to strike the second clause of the traverse affidavit, denying the motion for a new trial, and admitting in evidence certain documents and parol testimony objected to.

The proceeding by attachment was regarded by the court below and by the parties as a legal proceeding, subject to the rules prescribed by the Revised Statutes for general attachments at law, and the proceedings adopted for its dissolution were those prescribed by section 1856 of those statutes. As this was the theory upon which the case was tried below, we shall first consider if there be error in the proceeding from that standpoint. The section referred to (Rev. St. § 1856) reads as follows: "Proceedings to Dissolve. The court to which such attachment is returnable shall always be open for the purpose of hearing and deciding motions to dissolve such attachments, and in any case upon oath in writing made by the defendant and tendered to the court that any allegation in the plaintiff's affidavit is untrue, a trial of such traverse shall be had, and if the allegation in the plaintiff's affidavit which is traversed is not sustained and proved to be true, the attachment shall be dissolved. If such affidavit shall traverse the debt or sum demanded, the judge may, upon application of either party, require formal pleadings as to the debt or sum demanded to be filed in such time as he may fix, and the issue of fact, if any raised by such pleadings shall be tried as hereinbefore provided and at the same time as the issue, if any, made by the affidavit as to the special cause assigned in plaintiff's affidavit. Issues of law raised by such pleadings shall be determined and given effect to by the judge as in other controversies at law. Upon the demand of either party, a jury to be summoned from the body of the county upon the order of the judge, shall be empaneled to try the issue joined as aforesaid; but a circuit judge shall not be required in vacation to go to any county in which he does not reside, to try any such motion to dissolve." Assuming that this section applies to the present proceeding, we hold:

I. That the motion to strike the latter clause of the traverse affidavit was correctly decided by the court below. The statute expressly authorizes a defendant in attachment to deny the truth of any allegation in plaintiff's affidavit, and this clause of defendant's affidavit was strictly a denial of the plaintiff's allegation as to the debt due, and was therefore entirely sufficient.

II. That the court should have granted plaintiff's motion to require formal pleadings to be filed as to the debt or sum demanded. The original act (section 5, c. 741, approved February 15, 1834), authorizing motions of this character to dissolve attachments by traverse, gave the courts no authority to re-

quire pleadings to determine the issues to be tried under a traverse of plaintiff's affidavit as to the debt due. It simply authorized the defendant to make oath, in writing, that the allegations of the plaintiff's affidavit were untrue, either as to the debt or sum demanded, or as to the special cause assigned for granting such attachment; and, upon tender of such oath, required the court, or a jury if demanded by defendant, to hear evidence upon the issue so presented, and, if the allegations of plaintiff's affidavit were not sustained and proved to be true, the attachment was required to be dissolved. This section of the act of 1834, with a subsequent modification authorizing either party to demand a jury upon trial of such motions, remained in force, controlling motions of this character, until the adoption of our Revised Statutes, in 1892. As, in ordinary attachments at law, the plaintiff's affidavit was and still is not required to state in detail the nature or character of the debt sued for, but simply in a general way that defendant is indebted to plaintiff in a certain sum of money, and the defendant's affidavit was and still is a simple denial of that general and very indefinite allegation of plaintiff's affidavit, it is quite evident that the real issue arising upon such a traverse, in cases where the issues had not been made up in the suit in which the attachment was sued out, could never be ascertained until defendant had closed his evidence; neither could it be known what particular debt or cause of action the defendant was expected to meet until plaintiff's evidence was all in, and the spectacle was presented of a common-law court, trying cases, in which neither the court, parties, nor jury could know what particular cause of action or defense was in issue between the parties until developed by the evidence on the trial. The plaintiff could, under the broad allegations of his affidavit, prove any debt due him by defendant upon any cause of action for which attachment would lie; and the defendant, in opposition, could prove that he never owed such a debt, that it had been paid, or any fact which would show that at the time plaintiff brought suit or sued out the attachment the defendant did not owe the particular debt proven. To remedy these very grave objections, the legislature, by adopting the Revised Statutes, amended this section of the act of 1834 to read as above quoted. This quoted section of the Revised Statutes is essentially remedial in respect to the points suggested, and should be liberally construed to advance the remedy and suppress the mischief. The obvious purpose and meaning of the section are to grant power to require the formal pleadings in the suit begun by the attachment, or in which it issued, to be made up and the issues therein settled, by special order, without reference to the time fixed by rules or statutes for pleading in regular course, in order that the issues in the main case thus made up may be submitted to the court or jury along with the issue raised by the denial

of the special ground of attachment traversed. By this means the parties are not taken by surprise upon the trial, and the verdict of one and the same jury settles the merits of the main suit, as well as the propriety of the attachment. The judge of the court below refused the motion in this case, evidently believing that the use of the word "may" invested him with a discretion as to whether he should require the filing of pleadings in such cases; but we entertain a contrary opinion. It is a familiar rule that, when a statute directs the doing of a thing for the sake of justice, the word "may" means the same as "shall." *Mitchell v. Duncan*, 7 Fla. 14. Again, permissive words in a statute respecting courts or officers are imperative in those cases where individuals have a right that the power conferred be exercised. *Suth. St. Const.* §§ 461, 462. Viewed in this light, we think the word "may" in this section is not used in the sense of giving the courts or judges a discretion to refuse an application of this character, seasonably made, in cases where the issues have not already been made up in the main suit, but to confer authority upon the court to require such pleadings when duly applied for. *Macdougall v. Paterson*, 11 C. B. 755. In this case the defendant had filed no answer to the bill of complaint, and no issues had been made up in the foreclosure suit, as to the debt or sum demanded. Either party was therefore, under the statute, entitled to an order requiring formal pleadings upon demand therefor seasonably made.

III. But we are of opinion that the section referred to has no application to attachments in aid of foreclosure, and that the proceedings at law, submitting to a jury the issues arising upon the traverse of the attachment affidavit, and the entry of a judgment at law upon their verdict dissolving the attachment, were irregular. In the Revised Statutes of 1892 (sections 1635-1665) the statutes intended to remain in force, relating to attachments, with some amendments and additions, are consolidated in chapter 1, tit. 7, under the head "Of Special Statutory Proceedings at Law." Section 1635 provides that any creditor may have an attachment at law against the goods, chattels, lands, and tenements of his debtor, under the circumstances and in the manner thereafter provided; section 1636, that such attachment shall issue from the court having jurisdiction of the amount claimed, or, in certain cases, by justices of the peace or the county judge, returnable to the circuit or county court; section 1637 prescribes the grounds for attachment upon debts actually due; section 1638, upon debts not actually due; section 1639, against executors and administrators; and section 1640 reads as follows: "In Aid of Foreclosures on Personal Property. Any creditor who may be commencing or who may have commenced a suit to foreclose a mortgage on personal property the possession of which has remained in the debtor, may have an attachment against such

property whenever: 1. The said property will be concealed so that it will not be forthcoming to answer a demand on foreclosure, or 2. The said property will be removed beyond the jurisdiction of the court foreclosing the mortgage." Section 1641 requires an affidavit to be filed "before any attachment shall issue in any of the foregoing cases." Section 1642 states the requirements of the affidavit when the debt is actually due; section 1643, when the debt is not actually due; section 1644, against executors and administrators; and section 1645 reads as follows: "Attachment in Aid of Foreclosure. In cases of attachments in aid of foreclosure of mortgages on personal property such affidavit shall describe specifically the property upon which the mortgage exists and shall state that a bill has been filed to foreclose said mortgage, the amount of the debt or demand secured by such mortgage, that the same is actually due, and that affiant has reason to believe in the existence of one or more of the special grounds enumerated in section 1640. The original mortgage or a certified copy thereof, shall be attached to the affidavit." Section 1646 requires a bond on behalf of plaintiff in attachment; section 1647 prescribes the effect upon debts not due of the existence of grounds assigned for attachment; and section 1648, relating to the form of the writ, provides, in subdivision 1, for the form of such writ generally, and by subdivision 2 as follows: "In Aid of Suits to Foreclose. In suits to foreclose mortgages the writ shall describe the property and command the officer to take and hold such property or so much thereof as can be found sufficient to satisfy the debt to be foreclosed." Section 1649 provides that the writ shall be returnable when fully executed, or when the officer shall be convinced that no property can be found, and that, if property be seized under the writ, it shall be returned when the property seized shall have finally passed from the lien of the writ and the control of the officer. Section 1650 makes provision for cases where the property is removed from the county pending levy of the writ, and where property to be attached is situated in a county other than the one in which suit is brought. Section 1651 prescribes the effect of the levy of the writ upon real and personal property. Section 1652 provides for restoring attached property to defendant or some person for him upon giving bond conditioned for the forthcoming of such property, and to abide the final order of the court. Section 1653 is as follows: "Upon Bond to Pay the Debt. Or it may be restored to the defendant (or in case of foreclosure of mortgage, to any person who shall make affidavit that he is the owner of the equity of redemption), on his entering into bond with two good and sufficient sureties to be approved by the officer, conditioned for the payment to the plaintiff in attachment of the debt or demand and all costs of suit, when the same shall be adjudicated to be payable to such plaintiff." Section 1654

provides that, if the property be not subject to attachment, it may be retaken by defendant by a replevin proceeding; section 1655, that all personal property levied on by attachment, unless it be restored to defendant, or some person for him, as provided in sections 1652 to 1655, or be claimed by a third person, as provided by section 1655, shall remain in custody of the officer until disposed of according to law, but that when the property attached shall be of a perishable nature, or liable to great deterioration in value, or the cost of keeping same shall be greatly disproportionate to the value thereof, the officer who issued the writ may in vacation or term time grant an order for the sale of such property after such notice as to him shall seem expedient; the proceeds to be paid into court to abide the judgment thereof. Section 1656 has already been quoted. Subsequent sections prescribe the effect which a dissolution of the attachment shall have upon a suit begun by attachment, and upon writs of garnishment issued in the attachment suit; require notice of the institution of suits by attachment to be personally served or published in cases commenced by attachment, where property has been attached and not retaken by defendant; regulate the filing of the declaration, entry of defendant's appearance, and subsequent proceedings, the entry of defaults and final judgments; authorize amendments of pleadings and proceedings in attachment; and regulate the entry of judgments against defendants and sureties upon forthcoming bonds and bonds to pay the debt. Sections 1656-1664. Section 1665 provides that, if any attachment shall be levied upon property claimed by any person, other than defendant in attachment, such person may at his option replevy the same, or interpose a claim in the manner provided in case of execution.

Owing to the manner in which all the statutes relating to general attachments are thus compiled, consolidated, and enacted as law, some confusion arises as to the precise nature and exact status of attachments in aid of foreclosure. Those sections specifically relating to this class of attachments (sections 1640, 1645) purport to have been compiled from section 6 of the act of December 11, 1824, entitled "An act to regulate the foreclosure of mortgages by the courts of common law of this territory, and for other purposes." This act provided a special method of foreclosing mortgages of real and personal property in courts of common law; but, because of the anomalous character of the proceeding and the crude provisions of the statute, the courts experienced great difficulty in enforcing it, and, under the construction placed upon it by this court in *Manley v. Bank*, 1 Fla. 160, *Wilson v. Hayward*, 2 Fla. 27, and *Daniels v. Henderson*, 5 Fla. 452, the remedy afforded was applicable to only a limited number of cases, in consequence of which the statute gradually fell into disuse, and at the time of the adoption of the Revised Stat-

utes was practically obsolete. This statutory remedy, except certain features of the attachment provisions, was not only not retained in the Revised Statutes, but a provision was therein inserted as section 1987, requiring that "all mortgages shall be foreclosed in chancery."

By section 6 of the act of 1824 it was provided that, upon application of any person entitled to the foreclosure of a mortgage upon personal property remaining in possession of the mortgagor for an attachment against the property mortgaged, it shall be the duty of the judge of the court to which application for the foreclosure of the mortgage shall be made to direct the issuing of a writ of attachment by the clerk, directed to the executive officer of the court, commanding him to attach, levy upon, and take into possession and custody the mortgaged property, or so much thereof as will be sufficient to satisfy the debt or demand of petitioner and the costs and charges of the proceedings, and that the officer execute the writ without delay, and retain the attached property in his custody until the judgment of foreclosure be obtained, when he shall dispose of it according to law, or until the further order of the court in the premises, unless replevied in the manner thereafter pointed out; but that no such writ shall issue unless petitioner in foreclosure or his agent or attorney shall make oath of the sum really and truly due upon the mortgage to be foreclosed, and that he has reason to fear that the property mortgaged will be concealed, so that the ordinary process of law cannot reach it, or that it will be removed beyond the jurisdiction of the court, and shall exhibit to the judge the original mortgage, or any other evidence, or an acknowledgment of the debt or demand secured by it which shall appear to have been given by the mortgagor at the time the application for such writ shall be made, and that the demand of said attachment, if made at the time of filing the petition for foreclosure, must be contained in the petition; but that the attachment may be applied for by petition and obtained on compliance with aforesaid requisitions at any time before the judgment of foreclosure. No bond was required to be given by the applicant for such attachment; nor were there any provisions authorizing a dissolution of an attachment improperly issued; but by the seventh section the mortgagor, or any person having an interest in the equity of redemption of any property levied on under such attachment, was authorized to replevy same by giving bond, with two sureties, in a sum sufficient to cover the amount of the debt sworn to be due upon the mortgage, payable to the officer, conditioned to return to him or his successor said property whenever the mortgage of it shall be foreclosed by the judgment of the court, or to pay such sum of money as shall by said judgment be adjudged to be due the petitioner for foreclosure and all the costs and charges of the proceedings, whenever same shall be demand-

ed; which bond was to have the force and effect of a judgment, but no replevy was allowed but upon payment of all costs of issuing the attachment and of the proceedings consequent thereon. It is perfectly clear that the writ in aid of foreclosure authorized by this statute was a writ at law, issued by the court of law in the identical proceeding in which the mortgage was being foreclosed, as process to bring the mortgaged property within the control of the court so foreclosing it. The attachment was not an independent proceeding at law to aid foreclosure in another suit, but was, when issued, essentially a part of the foreclosure proceedings. The writ in aid of foreclosure is continued in force by the Revised Statutes, but as those statutes abrogated all remedies for foreclosure at law, and provided for the foreclosure of all mortgages in chancery, the attachment so continued in force became a statutory chancery writ, to be issued in suits of foreclosure in chancery, and it is the writ of, returnable to, and under the control of, the chancery court foreclosing the mortgage. While in the Revised Statutes the statutes authorizing and regulating this writ are placed among those authorizing and regulating general attachments at law, it cannot be assumed that the legislature intended to continue this writ in its legal aspect, as there are no foreclosures at law for it to aid as formerly. Nor can it be assumed that the legislature intended to create a new writ, to be issued by a law court in aid of a foreclosure in equity, and subject it to the statutory provisions for dissolution by the law court upon traverse of the debt claimed; for, if so, and the law court can require pleadings, and try with a jury the question of indebtedness, which goes to the merits of the controversy in the foreclosure suit, it can thereby withdraw from the court of equity its authority to adjudicate the merits of the foreclosure suit, and, instead of aiding that court to foreclose the mortgage, it would exercise a jurisdiction properly belonging to that court, and bring about conflicts between the two courts not easy to reconcile, and not contemplated by the statutes. Other consequences would flow from regarding the writ in this light, as, for instance, claims might be interposed to the property, and the question of superiority of such claims adjudicated between the claimant and the mortgagee in the law court, thereby withdrawing from the court of equity these questions which rightfully belong to it. Nor do we think the attachment, as an equitable writ, is subject to dissolution, under the provisions of section 1656, Rev. St. This section, as already stated, purports to have been compiled from section 5 of the act of February 15, 1834, with some additions and amendments, and it is certain that prior to the adoption of the Revised Statutes the acts referred to did not apply to proceedings in equity or embrace attachments in aid of foreclosures at law, but applied only to general attachments at law. This section, as it reads in the Re-

vised Statutes, does not, in terms, purport to embrace attachments in aid of foreclosure, although its language is perhaps broad enough to authorize a construction including them. But such a construction would effect such an important and unprecedented change in equity jurisdiction and practice as to render it certain that the legislature did not intend that section to apply to such writs. According to the constitution of courts of equity, all questions of fact are decided by the chancellor without the aid of a jury, except in those cases where, according to equity practice, issues in chancery may be submitted to a jury, and in those cases the chancellor is not bound by their verdict to the same extent as judges of courts of law are bound by verdicts in common-law cases. The amount of the debt secured by, or whether anything is due upon, the mortgage, where the foreclosure is being had in equity, is a question of fact to be decided by the chancellor, unless a trial of that question by a jury be directed according to chancery practice. The section referred to, if applicable to attachments issued in foreclosure cases, would make it the duty of the chancellor to order a jury for the trial of the issue raised by a traverse of the debt, upon the simple demand of either party, and thereby divest the chancellor of his power to try and decide the question without the aid of a jury, according to the usual and long-established practice of that court. While it may be competent for the legislature to do this, the legislative will to that effect must be clearly expressed and the legislative intent clearly manifest. The language of the section under consideration is more applicable to proceedings in courts of law than to those in courts of chancery; and, as the statutes from which it was compiled never applied to attachments in aid of foreclosure, or to proceedings in equity, we think it has no application to equitable attachments in aid of foreclosure. The court of equity from which the attachment issues has full control over it, and has power to discharge or dissolve it, if improperly issued, to the same extent as it has power over other equitable writs improvidently issued; but the proceedings for such discharge must be taken under the rules of chancery practice, and not under statutory provisions relating only to general attachments at law. The judgment dissolving the attachment is reversed.

(41 Fla. 151)

ADAMS et al. v. SNEED et al.

(Supreme Court of Florida. April 18, 1896.)

SLAVE MARRIAGES — EFFECTS OF EMANCIPATION —
RIGHT TO INHERIT — STATUTES — REPEAL —
CONSTITUTIONAL LAW.

1. In the absence of enabling statutes, the issue of customary slave marriages, which terminated before, or were never ratified by the parties thereto after, emancipation, possess no inheritable blood, under our statutes of descent.

2. General emancipation was not retroactive, so as to infuse inheritable blood into those who did not possess it before emancipation; nor did

it render valid customary slave marriages contracted before, but not ratified or confirmed after, emancipation; nor does general emancipation authorize the courts to place the children of customary slave marriages, which terminated before, or were never ratified by the parties after, emancipation, upon the plane of the legitimate issue of legal marriages, within the meaning of statutes of descent.

3. Children of customary slave marriages, which terminated before, or were never ratified by the parties thereto after, emancipation, are neither legitimates nor bastards, within the meaning of our statutes of descent; they simply have no status one way or the other. The case of *Williams v. Kimball*, 16 South. 783, 35 Fla. 49, in so far as it holds that such children are placed in the same category as bastards, and that it is proper to give them the benefit of any legislation adding to the inheritable capacity of bastards, overruled.

4. Chapter 1566 (act approved December 12, 1866) was repealed by sections 4, 6, art. 8, and section 1, art. 15, Const. 1868, and the re-enactment of said chapter as section 1829, Rev. St. is in conflict with article 12, Const. 1885, and therefore void.

Taylor, C. J., dissenting.
(Syllabus by the Court.)

Error to circuit court, Duval county; William B. Young, Referee.

Action by Page Sneed and others against Louis Adams and others. Plaintiffs recovered a judgment below, and defendants bring error. Reversed.

W. B. Owen, for plaintiffs in error. A. W. Cockrell & Son, for defendants in error.

CARTER, J. On August 23, 1894, Page Sneed instituted in the circuit court of Duval county an action of ejectment against Louis Adams, seeking to recover title to, and possession of, a certain parcel of land, 105 feet square, in block 11 of Brooklyn, in the city of Jacksonville. J. C. Greeley and Samuel Gauze were subsequently made parties defendant upon their application, and the cause was, by consent of parties, referred to W. B. Young, Esq., referee. Subsequently Nancy Ross Allen, Lucien Ross, Margaret Ross Bronson, and Violet Ross, a minor, by her next friend, Lucien Ross, were made parties plaintiff. Greeley and Adams pleaded not guilty, and a trial before the referee was had, resulting in a finding and judgment for plaintiffs, from which the defendants sued out this writ of error.

It seems that Gauze and Adams were tenants of Greeley, and claimed no rights in the property other than as such tenants. The record shows that this property formerly belonged to one Miles Price, who conveyed same to August Buesing September 2, 1867. Buesing conveyed to George W. Mitchell March 8, 1869, and Mitchell conveyed to Benjamin Jenkins January, 24, 1877. There is evidence tending to show that Jenkins went into possession of the property after his purchase; that he died a bachelor and intestate about May, 1892; that his mother and the mother of Page Sneed were sisters; and that Nancy Ross Allen, Lucien Ross, Margaret Ross Bronson, and Violet Ross were the children and

heirs at law of one Henry Ross, deceased, a brother of Page Sneed. It was agreed between the parties at the trial that "the mother of Page Sneed, the mother of Ben Jenkins, and also the mother of these two women were born and lived and died in slavery, and were not married other than according to the customs of slavery times in middle Florida." Greeley claimed title to the land through conveyances from grantees of the heirs of Miles Price. The referee found that the mother of Page Sneed and Henry Ross and the mother of Ben Jenkins were sisters and slaves, and died in slavery, without ever having been married other than according to the customs of slavery in middle Florida; that plaintiffs were the next of kin of Ben Jenkins, and were in being at the time of his death; that Jenkins having died without issue or lawful heirs, the title to the lot in question vested in the state; and that by virtue of the act of December 12, 1866, plaintiffs were entitled to recover it. The referee also found that plaintiffs could not inherit the land in dispute by virtue of the provisions of section 17, Act Nov. 17, 1829, relating to inheritance by and from bastards.

The defendants moved for a new trial upon the ground that the findings and judgment of the referee were contrary to the law and the evidence, and the overruling of this motion constitutes one of the assignments of error relied upon in this court.

As the mother of Page Sneed and Henry Ross and the mother of Benjamin Jenkins were born and lived and died in slavery, it follows that Sneed, Ross, and Jenkins were born slaves, as their condition or status followed that of their mothers. Section 1, p. 216, Duval's Comp. St.; section 1, p. 531, Thomp. Dig. And as these two women and their mother were never married other than according to the customs of slavery in middle Florida, it becomes necessary to determine whether the offspring of customary slave marriages, not confirmed after emancipation, possess inheritable blood. This question was before the court in *Daniel v. Sams*, 17 Fla. 487, and it was held that, while there was a moral obligation which natural law imposed in the relation of husband and wife among slaves, still its legal consequences were regulated by the municipal law, and that the issue of a slave marriage, under that law, in the absence of enabling statutes, possess no inheritable blood. And this statement of the law accords with all the decisions upon this subject, with exceptions presently to be mentioned. In addition to authorities cited by the court, see *Jackson v. Lurvey*, 5 Cow. 397; *Hall v. U. S.*, 92 U. S. 27; *McDowell v. Sapp*, 39 Ohio St. 558; *Scott v. Raub*, 88 Va. 721, 14 S. E. 178; *Butler v. Butler*, 161 Ill. 451, 44 N. E. 203. In Tennessee, contrary to the uniform rulings in other states, customary slave marriages with the master's consent, though never authorized or regulated by statute, were recognized as valid by the courts,

and the issue are regarded as legitimate. *Brown v. Cheatham*, 91 Tenn. 97, 17 S. W. 1033. In *Stikes v. Swanson*, 44 Ala. 633, it was held that emancipation and elevation to citizenship gave to children of slave marriages inheritable blood; but this decision was overruled in *Cantelou v. Doe*, 56 Ala. 519, where it is held that the issue of customary slave marriages, which terminated prior to emancipation, do not possess inheritable blood, in the absence of enabling statutes. See, also, *Washington v. Washington*, 69 Ala. 281. In 1 Bish. Mar., Div. & Sep. § 670 et seq., the author contends that children of customary slave marriages were not regarded as illegitimates or bastards in slavery, but occupied a status peculiar to that institution; that the abolition of slavery destroyed this peculiar status, and it could never again be occupied by any person, white or black; that if the children of slave marriages could not choose a new status upon the abolition of slavery, the law ought to do so for them, and, electing for them, it ought to choose that which is most to their advantage, and therefore select the legitimacy of freedom, rather than thrust them back and downward to the degradation of bastardy, which was not theirs in slavery. The Tennessee decisions have not been followed by any other court so far as we have been able to find, and are based upon the status of slaves as persons as established by previous decisions in that state, peculiar to the slave in Tennessee, and contrary to his status in any other slave state; and those decisions are not applicable to slave marriages in Florida. Nor has the doctrine contended for by Mr. Bishop been accepted as the law; for, while every person will readily accede to his argument that the issue of slave marriages were not illegitimate in the sense of being bastards, that they were the innocent offspring of a relation morally, and, to a very limited extent, legally, regarded as marriage, that with the abolition of slavery all impediments to future legal marriages and to the acquisition of inheritable blood by the issue of such future marriages were swept away, yet in law the children of these marriages did not possess inheritable blood. Emancipation was not retroactive; nor could it infuse inheritable blood into those who did not possess it before emancipation; nor render valid slave marriages contracted before, but not confirmed after, emancipation. It is the province of the legislature to validate void or voidable marriages, to legitimate children, to designate heirs, and to infuse inheritable blood into those who are to inherit the property of decedents; and common-law courts have no power to choose the status of legitimacy for, or infuse inheritable blood into, any person, because he may be innocent and deserving, and we find no warrant in the common law which authorizes us to declare that general emancipation requires or authorizes us to place the children of slave marriages which terminated before emancipation upon the

plane of the legitimate issue of legal marriages, within the meaning of statutes of descent then in force. *Pierre v. Fontenette*, 25 La. Ann. 617; *Andrews v. Simmons*, 68 Miss. 732, 10 South. 65; *Hereford v. Rabb* (Miss.) 19 South. 201; *Tucker v. Bellamy*, 98 N. C. 31, 4 S. E. 34; *Gregley v. Jackson*, 38 Ark. 487. These views are in accordance with the decision in *Daniel v. Sams*, supra, where it was held that there was no law in this state, statutory or otherwise, which gave inheritable blood to the children of customary slave marriages not ratified by the parties thereto after emancipation, and that the legislation of 1866 (chapters 1469, 1552, 1566, Laws 1866) did not give to such children inheritable blood. There has been no additional legislation upon this subject applicable to the present case, and it is clear that the plaintiffs cannot trace their relationship to Benjamin Jenkins through slave marriages for the purpose of inheriting his estate, under our statutes of descent. In *Williams v. Kimball*, 35 Fla. 49, 16 South. 783, the plaintiff, Williams, claimed to inherit certain real estate owned by Dianna Landsbury, who was born a slave, and died in 1885. Williams claimed to be a brother of Polly Page, the mother of Dianna, and Williams and Polly Page were born slaves of the same slave father and mother. The opinion states that the record did not show whether Williams and Polly Page were the children of a customary slave marriage or some other cohabitation, but that the marriage or cohabitation, whichever it was, terminated before emancipation. Throughout the entire opinion, however, the parties are treated as the issue of a customary slave marriage; and while it was admitted that such children were regarded as standing upon a different plane to those slave children who were bastards pure and simple, and that from a liberal point of view such children were perhaps not bastards, the court held that, so far as the want of inheritable blood was concerned, they were placed in the same category as bastards, and that it was proper to give them the benefit of any legislation adding to the inheritable capacity of bastards. The court then proceeds to construe the provisions of section 17, Act Nov. 17, 1829, referred to in the finding of the referee in this case, reading, "Bastards, also, shall be capable of inheriting or of transmitting inheritance on the part of their mother, in like manner as if they had been lawfully begotten of such mother," and concludes that this legislation only makes the bastard legitimate so far as the mother is concerned, and does not make him legitimate so far as the kindred of the mother is concerned, and that he cannot take by inheritance from collateral kindred upon his mother's side. Holding, as we do, that the children of customary slave marriages are neither legitimates nor bastards, within the meaning of our statutes of descent, it would not be proper in the present case for us to review this construction of the bastardy statute; but we may remark, in pass-

ing, that the construction adopted, while sustained by some authorities (*Allen v. Ramsey's Heirs*, 1 Metc. [Ky.] 635; *Scroggin v. Allan*, 2 Dana, 363; *Croan v. Phelps' Adm'r*, 94 Ky. 213, 21 S. W. 874; *Bent's Adm'r v. St. Vrain*, 30 Mo. 268; *Gibson v. McNeely*, 11 Ohio St. 131; *Hawkins v. Jones*, 19 Ohio St. 22; *Blair v. Adams*, 59 Fed. 243; *Flora v. Anderson*, 75 Fed. 217), is repudiated in Virginia and other states having similar provisions in their rules of descent; and the court in *Williams v. Kimball* seems to have overlooked the fact that our statute of descents embracing the provision in regard to bastards was adopted from the statutes of Virginia. *Garland v. Harrison*, 8 Leigh, 368; *Hepburn v. Dundas*, 13 Grat. 219; *Bennett v. Toler*, 15 Grat. 588; *Appeal of Dickinson*, 42 Conn. 491; *Gregley v. Jackson*, 38 Ark. 487; *Briggs v. Greene*, 10 R. I. 495; *Butler v. Land Co.*, 84 Ala. 384, 4 South. 675; *Town of Burlington v. Fosby*, 6 Vt. 83. But see *Bacon v. McBride*, 32 Vt. 535. But the proposition asserted in the *Williams-Kimball* Case, to the effect that children of customary slave marriages, so far as the want of inheritable blood is concerned, are placed in the same category as bastards, and that it is proper to give them the benefit of any legislation giving inheritable capacity to bastards, is incorrect; and we overrule the case to that extent. The true view is announced in the case of *Daniel v. Sams*, supra, in the following language: "As to these children, however, the status of bastardy, as remarked by Mr. Bishop, was as foreign to this institution [slavery] as the status of legitimacy. They had no foul or corrupt blood. The simple fact was that they had no status, as to this particular, one way or the other." If these children were not bastards when slaves, it would be giving to emancipation a remarkable result to hold that freedom reduced them to the degrading status of bastardy. There is no intimation in the *Williams-Kimball* Case that the court intended to overrule any proposition announced in *Daniel v. Sams*. On the contrary, the latter case is approvingly cited. In the desire to find some ground upon which to hold that the unfortunate issue of slave marriages could inherit property under our statutes of descent, the court inadvertently applied to them the bastardy statute, though admitting that such issue were not, properly speaking, bastards. To hold that they are bastards, not only invests them with a new status, which should properly come from the legislature, and not from the courts, but forces upon them a status which humiliates and degrades them unjustly. We think the referee was right in his conclusion that plaintiffs could not inherit the property of Benjamin Jenkins, under the bastardy statute.

The plaintiffs, however, base their right to recover upon chapter 1566 (act approved December 12, 1866), which reads as follows:

"Section 1. That whenever, upon the death of any person of color, seized or possessed of real or personal estate there are persons in

being who would inherit said property, or any part thereof under the several statutes of descent of this state, but who are prevented from so doing on account of the legal incapacity of said persons of color to contract marriage in a state of slavery, which said estate would otherwise escheat to the state, all the right, title and interest of the state of Florida is hereby vested in and waived in favor of those persons who would have inherited said estate, if said parties had been competent to contract marriage.

"Sec. 2. That the fact that the said parties shall have failed to obtain a license to marry, or shall have failed to be married according to the forms of law, shall in no case affect the operation of this act, but the same shall be held to apply to all cases wherein the parties were known as husband and wife."

While this statute is not referred to in the case of *Williams v. Kimball*, supra, the effect of that decision is to deny its validity. This act is, as its title imports, nothing more nor less than "an act in relation to escheats." A careful reading of the language will show that the legislature did not intend or attempt to validate slave marriages; nor to render legitimate the offspring of such marriages; nor to give them inheritable blood. On the contrary, it expressly recognizes the "legal incapacity of said persons of color to contract marriage in a state of slavery." The only purpose of this statute was to waive in favor of, or grant to, certain admittedly illegitimate persons all the right, title, and interest which the state would acquire by escheat in specified property, as to which there should be no lawful heirs capable of inheriting same. This construction of the statute is clearly established by the decision in *Daniel v. Sams*, supra. If this act is still in force, there is plausible ground to hold that the finding of the referee in the present case was correct; but we are clearly of opinion that it was repealed by the constitution of 1868, which provided, among other things (section 4, art. 8), that "the common school fund * * * shall be derived from the following sources: * * * The proceeds of lands or other property which may accrue to the state by escheat or forfeiture"; (section 6, Id.) "the principal of the common school fund shall remain sacred and inviolable"; and (section 1, art. 15) "that * * * all acts and resolutions of the legislature conflicting or inconsistent with * * * th's constitution * * * are hereby declared null and void and of no effect." These provisions of the constitution directing the proceeds of property accruing to the state by escheat to be applied to the common school fund superseded the act of 1866, which undertook to waive the rights of the state in such property in favor of persons not capable of inheriting. We do not mean to intimate that these provisions of the constitution prohibited the legislature from regulating the descent of property, or from validating invalid marriages, or from legitimizing children, or

from declaring who should be capable of inheriting the property of deceased persons. The act in question did not attempt to do any of these things; but it did attempt to vest in persons, not lawful heirs of the deceased, the state's right, title, and interest in property which would properly escheat, and which, under the constitution, was required to be disposed of for the benefit of the school fund. Under this statute, the parties would derive title, not by inheritance from a deceased person, but by grant from the state of its right of escheat. The constitution, by prescribing a different course for the disposition of such property, repealed the statute. If we concede that this statute was re-enacted by the adoption of the Revised Statutes (section 1829), it may be answered that article 12 of the present constitution of 1885 contains provisions inconsistent with the provisions of the re-enactment, to the effect that "the school fund * * * shall be derived from the following sources: * * * The proceeds of escheated property or forfeitures; * * * the principal of the state school fund shall remain sacred and inviolate"; and that the re-enactment would therefore be void. *Harvey v. Harvey*, 25 S. C. 283; *State v. Reader*, 5 Neb. 203.

We think the referee erred in finding for the plaintiffs below for reasons stated. The judgment is therefore reversed, and a new trial granted.

TAYLOR, C. J. (dissenting). I cannot agree with the majority of the court in the conclusion reached in this case as to the purpose, intent, and legal effect of chapter 1568, Laws approved December 12, 1866; nor in the view that said act is in conflict with, or is inconsistent with, section 4, art. 8, of the constitution of 1868, which assigns to the common school fund the proceeds of all property that may accrue to the state by escheat; and was therefore repealed thereby. By the constitution of 1885, the proceeds of all escheated property are also assigned to the common school fund; but, as is admitted in the opinion of the court, I am clearly satisfied that neither of these provisions in the constitution of 1868, nor in that of 1885, can ever be construed to be a limitation upon the power of the legislature to regulate the descent or succession of property. These constitutional provisions mean simply that, whatsoever property may become consummately escheat to the state, under the laws as they may exist from time to time, shall, after the state's title thereto has become complete and absolute, go into, and become a part of, the common school fund; but the legislature is left free and untrammelled to so shape the laws of descent, heirship, and inheritance as that it would be almost impossible for any property ever to accrue to the state by escheat. These constitutional provisions were never designed to unalterably fix the status of facts and circumstances by which property should become es-

cheat, but were intended merely to give direction as to what public fund the proceeds of escheated property should go, howsoever and whensoever the state's title thereto has become consummated and absolute through the medium of escheat, under the laws upon that subject as they may from time to time be enacted by the legislature, leaving the law-making body free to so alter and change the status of facts and circumstances that will bring property to the condition of being escheat, as that property that would become escheat to-day, under one law, would not become escheat to-morrow, under an amended law.

The title of the act under discussion is "An act in relation to escheats," but no significance can be attached to its title as an index to the purpose of the legislature in its enactment, for the reason that at the time of its passage the legislative department was not under any such constitutional injunction as now exists requiring all bills to be confined to one subject, to be expressed in their titles; and to my mind this title is altogether a misnomer, and does not at all express the real leading subject-matter of the act. The act makes use of the word "escheat." It is true, in the body thereof, but nowhere in the act is any provision made whereby any property shall ever become escheat. There is nothing in it that can add a centime to the bulk of property that could or would accrue to the state, under the laws that really deal with, relate to, and provide for escheats; neither does it pretend to prescribe the time when, or the circumstances under which, any property shall ever become escheat. In other words, instead of being an act "relating to escheats," it is an act whose every provision shows plainly that its purpose was, not to swell the bulk of the state's gains through escheats, but to give a new direction to property that would, under independent existing law, become escheat but for its enactment, by supplying persons to succeed to its ownership. Instead of providing for escheats, its provisions were all designed to prevent escheats, by designating blood kin of the deceased owner of property who should succeed to its ownership, instead of the state. It is a settled canon of construction that, where the terms of a statute are left doubtful by its language, the judicial interpreter must, if possible, so construe it as to make it effect the purposes for which it was intended; and, in order to determine the scope and object of the enactment, must ascertain what was the mischief or defect for which the law had not provided; and for this purpose he must call to his aid all of those external or contemporaneously historical facts that are necessary for this purpose, and that led to the enactment. *End. Interp. St. § 29 et seq.*, and citations. Another canon of construction, equally well settled, is that a legislative intent to violate the constitution is never to be assumed, if the language of the statute can be satisfied by a contrary construc-

tion. The application of this rule requires that wherever a statute is susceptible of two constructions, of which the one would make it unconstitutional, and the other constitutional, the latter must be adopted, where it can be without doing violence to the language employed in the act. *Id. § 178 et seq.*, and citations. In the light of these settled rules of construction, my view is that this statute, without any violence to its language, may well be construed to be nothing more than a limited statute of descent, particularly designating certain blood relations of certain decedents who should succeed to the inheritance and ownership of their property, in the absence of otherwise legitimate heirs. Resorting to the contemporaneous history of the time, we find that a large percentage of our population had just emerged from a state of servitude that made them chattel property into that of freemen. In their former state, while the institution of marriage between them was recognized as proper from the moral and religious standpoint, yet it was not recognized by the municipal law, and their offspring took no other status than that of property. The law, for the purposes of descent and inheritance between them, did not recognize the relationships that govern the course of descents. From their recently acquired status as freemen it was fair to assume that in future, instead of being owned as property themselves, they would, in the natural course of events, acquire property. The legislature of 1866 found that, although the same natural blood relationships existed between them as did between those who had always been freemen, yet no municipal law had been adopted to apply to them the same rights of succession to property by descent that applied to other citizens. The same legislature enacted another statute, giving legal recognition to such slave marriages as continued the marital relationship subsequent to emancipation and up to the adoption of that statute (chapter 1552, approved December 14, 1866), and legalizing the issue of such marriages. This left a large number of ex-slaves unprovided for who were not legalized by the statute just cited, because the condition of subsequent ratification of the slave marriages from which they sprang, made necessary to their legalization by this statute, could not, in the nature of things, ever be complied with, and this for various reasons. The parties to such slave marriages had many of them long since died; and others, prior and subsequent to emancipation, had abandoned such relationships, and contracted the same relationships with other parties. This statute, misnamed one "relating to escheats," was adopted to provide for that, by no means small, class who were morally as much entitled to the rights of heirship as were the offspring of those who, subsequent to emancipation, continued the marital relationships assumed during slavery.

It cannot, I think, be successfully denied

that the evident purpose of the legislature in adopting this statute was to give such direction to property that might in future be left by ex-slaves and their descendants who might die intestate, and without other legalized heirs at law, as that such property should vest absolutely in fee in such of their blood relations as would have been their lawful heirs, according to the laws of descent, had it not been for the disabilities incident to their former state of slavery. This being true, whether there are present in the statute any apt words to legitimize the blood of such beneficiaries or not, would not the clear practical operation and effect of the act, if it could have any effect at all, be to make the beneficiaries thereof the successors of their deceased ancestry in the absolute ownership of property by them left; and, if so, does this not make them, under the conditions of the act, for all practical purposes, the heirs at law of such deceased ancestry? The clear attempt of the act is to make them, according to the rules and directions of the general statute of descents, succeed to the absolute ownership of their deceased ancestry's property. Can anything more be done, practically, by any enactment towards clothing the descendants of deceased ancestry with the character of legalized heirship, regardless of the verbiage adopted in an act so clearly designed to effect such a result? In my view, the act is clumsily worded and as inappropriately titled. Instead of being termed "An act in relation to escheats," a far more appropriate title would have been "An act in relation to descents." By its terms it describes a state of facts with reference to property of certain decedents that, but for the enactment of its provisions into law, would, in future, bring about the escheat of such property to the state, and then, notwithstanding its enacted provisions, in advance, prevent an escheat by furnishing blood relations to succeed to the ownership instantly upon the future death of the ancestor, it awkwardly employs language suitable to give expression to the waiver of some vested right and to a grant in present of property already vested in the state. I am unable to comprehend how this statute, though it employs language appropriate to a grant by the state in favor of the class of persons named in it, can properly be construed into an unlawful diversion or misappropriation of funds assigned by the constitution of 1868 and that of 1885 to the common schools. If the title of the state to any property should ever become consummate and vested through the operation of any existing law providing for the escheating of property, then, but only until then, do I admit that any law would be unconstitutional that undertook to give or grant it away to or for any other purpose than that of the common schools; but, until the state's title thereto becomes absolute, the state can constitutionally so legislate as to prevent escheats in future by the widest exercise of its powers over the succession and

descent of property. This statute cannot, I think, be accurately considered as having any of the features of a gift or grant by the state. Before the state or any other donor can even undertake to give or grant anything, it must have some title to, or interest in, the subject of the grant, inchoate at the least. In the property of the living citizen the state has no such inchoate title or interest, even, as that it can make such property the subject of a gift or grant in present by any law prospective in its operation and contingent upon the happening of some future event, or the concurrence of a set of uncertain and unforeseen circumstances. My judgment is that this statute is in full force, and that it can be properly construed in the manner indicated, so that it shall not conflict with our organic law. I am now satisfied that the attempted application, in *Williams v. Kimball*, 35 Fla. 49, 16 South. 783, of our statute of descents affecting bastards to the issue of slave marriages, was altogether erroneous; and, had my attention been called, in the consideration of that case, to the case of *Garland v. Harrison*, 8 Leigh, 368, I should never have given my consent to the construction put in the *Williams-Kimball* Case upon such bastardy statute of descents, as I am now clearly convinced that the construction put upon the statute by the Virginia courts is the correct one.

(21 Ala. 539)

PARKER v. BOND.

(Supreme Court of Alabama. May 18, 1899.)

LIFE INSURANCE—CONTRACTS—VALIDITY—ACTIONS—DEFENSES—AGENCY—DECLARATIONS OF AGENT—RATIFICATION—INSTRUCTIONS—NEW TRIAL.

1. A stipulation in a contract for life insurance that, if the policy is not satisfactory to insured, it will be taken back, and a note executed by insured therefor returned, does not render the contract invalid. It is analogous to a sale subject to approval of the article sold.

2. Where the payee of a note procured by a life insurance agent accepts it, and sues thereon, the defense of want of consideration is available to defendant, whether or not such person was in fact plaintiff's agent in taking the note.

3. In such a case it is immaterial that defendant does not allege that such agent had no interest in the note.

4. In an action by a payee on a note given for life insurance it is of no consequence that it contains a stipulation waiving all defenses against it, where there is no consideration therefor.

5. In an action on a note given for a life insurance policy which defendant was to return if not satisfactory, the overruling of a demurrer to defendant's plea, because it failed to show that he reasonably made known his dissatisfaction with the policy, is not prejudicial to plaintiff, where the evidence shows that, if defendant acted at all, he did so in a reasonable time.

6. A plea in an action on a note given for a life insurance policy, averring that the note was given in consideration of an undertaking of plaintiff to issue a policy containing a certain stipulation, which undertaking induced the execution of the note; that the policy did not contain the stipulation; and that defendant seasonably repudiated the transaction, and offered to return the policy,—constitutes a good defense to the action.

7. In an action on a note executed for a life insurance policy, and procured by an agent, under a plea that such person held himself out as agent, it is competent to prove the declaration of such person that he was such agent, not to show the agency, but to show that he held himself out as such.

8. Where at the time of the execution of a note for a life insurance policy it was agreed that the policy should contain a stipulation providing for a loan of a part of the face value after three annual payments, the admission of evidence of such agreement is not precluded by the contemporaneous execution of the note, when it is offered in support of a plea relying on the non-compliance of such agreement as a failure of consideration.

9. While agency may not be proved by the declaration of an agent, it may be established by his testimony, and such testimony may involve only a statement of the fact of agency without going into details as to how the relation was brought about, or as to particular facts on which it rests.

10. An insured's acceptance of a life insurance policy was conditioned on its being satisfactory. After its receipt, he wrote the company that he could not keep the policy because he was not able to make the payments. *Held*, that in an action on a note given for the policy an instruction that the letter should be considered by the jury as evidence of a ratification was properly refused, since there was no question of ratification in issue.

11. Although such letter was some evidence of the ratification of the note, it was not conclusive.

12. In an action on a note executed for a life insurance policy which defendant was to accept if satisfactory, it appeared that, after the policy was delivered to him, defendant wrote plaintiff that he could not keep it, as he was not able to make the payments. *Held*, that an instruction that the jury should consider the letter in determining whether there was any understanding that defendant was to have the right to return the policy, if not satisfactory when received, was proper.

13. If such instruction was not sufficiently complete, a special instruction should have been requested.

14. A motion for a new trial complaining of the court's ruling in refusing and giving certain instructions, and because the verdict was contrary to the law and the evidence, is properly overruled; the special errors of law complained of not being specified.

Appeal from circuit court, Hale county; John Moore, Judge.

Action by John Alley Parker against William Bond on a note. There was a judgment for defendant, and plaintiff appeals. Affirmed.

The defendant filed five pleas. The substance of the first, second, and fifth pleas is sufficiently stated in the opinion. The third was the plea of the general issue, and the fourth plea set up that the note sued on was without consideration. To each of the first, second, and fifth pleas the plaintiff separately demurred upon the following grounds: (1) Said pleas fail to aver that Edwards was the agent of the plaintiff at the time of the execution of the note sued on. (2) Said pleas show upon their face that said note was given in consideration of a life insurance policy to be issued on the life of the defendant, and that said insurance policy was issued and accepted by the defendant. (3) Said pleas fail to aver the facts constituting the alleged deception

and misrepresentation. (4) They do not show in what respects the policy issued to the defendant differs from the policy agreed to be issued him. (5) They fail to aver or show that Edwards had authority to receive said policy back from the defendant, or return the defendant's note to him. (6) Said pleas fail to aver that said agreement and provision as to said policy alleged to have been entered into by the defendant and Edwards before the execution of said note was not in writing or incorporated in said note. (7) Because said pleas show upon their face that said note was given for a valuable consideration, and they fail to aver the facts which could relieve the defendant of the obligation to pay said note. (8) Said pleas show that the note sued on was made payable to the plaintiff at the time of its execution, and that it contains no allegation of any waiver of the plaintiff's right to enforce the collection of said note according to its terms, and of no provision or agreement made by the plaintiff or any one authorized to bind him in the premises, whereby the defendant was relieved of liability on said note. (9) Because said pleas fail to aver that the plaintiff knew of or sanctioned the agreement alleged to have been made by said Edwards with the defendant, in order to induce the defendant to execute said note. (10) Because said pleas fail to show that Edwards had any interest in the note sued on. To the second and fifth pleas the plaintiff demurred upon the following additional grounds: (1) Said pleas do not show when the defendant read and examined said policy, and when he offered to return the same and demand his note, and how long he retained the policy in his possession before offering to return the same. (2) Said pleas fail to aver that said defendant offered to surrender and cancel the policy of insurance delivered to him under said alleged agreement at the time of making the demand for the return of the note. (3) Said pleas fail to show wherein said defendant was not satisfied with the terms and conditions of the policy delivered to him. (4) Because the agreement set up in said plea as to the kind of policy the defendant was to receive in consideration of said note is void for uncertainty and indefiniteness. To the fifth plea the plaintiff demurred upon the following additional grounds: (1) Said plea fails to aver any facts constituting fraud or deception on the part of Edwards. (2) Because the plea shows that the defendant, at the time he executed the note, had the means at hand to discover the fraud that he alleged was perpetrated upon him. (3) Because in said plea the defendant failed to aver that, upon discovering the fact that he executed the note to the plaintiff for the life insurance policy, he repudiated the transaction, and then and there offered to surrender the policy. The demurrers to plea No. 1 were sustained, and the demurrers to the second and fifth pleas were overruled. Thereupon the plaintiff filed a replication to plea numbered 2 and plea

numbered 5, in which he averred as follows: "That defendant, after the policy of insurance had been delivered to him, he, the defendant, with full knowledge of all the facts, ratified the contract now sued on." The trial was had upon issue joined upon pleas numbered 2, 3, 4, and 5, and upon the plaintiff's replication. The plaintiff proved the execution of the note sued on, and introduced the same in evidence. The testimony of the defendant as a witness in his own behalf tended to prove the facts averred in the respective pleas. He also testified that within two or three days after receiving the policy he wrote to Edwards, and told him that it was not satisfactory to him, and he offered to return it. The policy, which included the application made by the defendant, was introduced in evidence. The plaintiff testified, in response to several questions asked him, to the fact of Edwards telling him that if, after receiving the policy, he was not satisfied with it, he could return the policy, and he (Edwards) would return to the defendant his said note. To the questions invoking this testimony, and to the answers of said witness to such questions, the plaintiff separately objected, upon the ground that the note was the evidence of the contract sued on, and such answers were irrelevant, impertinent, and inadmissible. All of these objections were severally overruled, and the defendant separately excepted to each of such rulings of the court. The defendant as a witness was asked the following question: "At the time and just before you signed this note did S. H. Edwards make any statement to you about the policy you were to receive or about the note?" The plaintiff objected to this question, upon the ground that the note was the evidence of the contract sued on, and that it was not shown that said conversation was pertinent to the issue, and that it called for illegal, irrelevant, and immaterial evidence. The court overruled this objection, and the defendant duly excepted. The witness answered: "Edwards said he would give me a policy to mature in 20 years, and after I had made three annual payments I could borrow 90 per cent. of the face value at 4 per cent. This was to be in the policy." On the cross-examination of the plaintiff, he identified the letter of date March 26, 1897, which he (defendant) had written to Edwards in reference to said policy, and this letter was introduced in evidence. He stated in the letter that he could not keep the policy, that he was not able to make the payments. The defendant further testified in his rebuttal examination that the letter introduced in evidence was the second letter he had written to Edwards, having previously told him in a letter written shortly after the receipt of the policy that it was unsatisfactory to him. During the examination of the defendant as a witness he was asked the following question: "Did he [Edwards] tell you he was the agent of the Washington Life Insurance Company?" The plaintiff objected to this question, upon

the grounds (1) that it was incompetent to prove agency by the declaration of the alleged agent, and (2) because it called for irrelevant evidence, and the question was leading. The court overruled this objection, and the plaintiff duly excepted. The witness answered that Edwards told him he was the agent of the Washington Life Insurance Company. Edwards as a witness testified that the defendant came to him, and asked him about the insurance policy; that he explained to him the different policies, and, upon his telling him what character of policy he issued, he made out his application; that he read to him every question contained in the application, and wrote down the answers as he made them, and then the defendant signed said application; that at the time of making the application the defendant executed the note here sued on, making it payable to the plaintiff, John Alley Parker; and that the application was then forwarded to said Parker, and in a short time thereafter the defendant received the policy of insurance, which was of the character that the defendant had said he issued. The witness Edwards further testified that he told the defendant at the time of making out the application that the Washington Life Insurance Company was loaning 90 per cent. of the cash surrender value of the policy, but that the company could not promise to loan a certain amount three years hence. During the cross-examination of the defendant Edwards he was asked the following question: "When you received the note, were you the agent of John Alley Parker?" To this question the plaintiff objected, upon the ground that agency can be proven only by the statement of facts, and not by a general statement that one is the agent of another. The court overruled this objection, and the plaintiff duly excepted. The witness answered that he was the agent of John Alley Parker at the time he received the note from the defendant.

The court in its general charge, among other things, instructed the jury as follows: (b) "If you are reasonably satisfied from the evidence that, at the time the application was made, Edwards represented to the defendant that he was to receive in the way of a loan ninety per cent. of the face value of the policy, then the defendant is entitled to a verdict on plea No. 5, provided you further believe that at the time of making the representation Edwards was acting as agent of Parker, and provided further that you believe from the evidence that within a reasonable time thereafter defendant did return or offer to return the said policy, and to rescind the said contract." (c) "That if after looking at all the evidence they believe the agreement was that the defendant was not to take the policy when received, if it was not satisfactory to defendant, then defendant is not liable in this action, provided that you further believe that at the time of making the representation Edwards was acting as agent of Parker, and provided further that you believe

from the evidence that within a reasonable time thereafter defendant returned or offered to return the said policy, and to rescind said contract." (d) "The court charged the jury that the letter of defendant to Edwards, introduced in evidence, goes to the jury as evidence, in connection with the other evidence in the case, to be considered by them in determining the question as to whether there was any understanding that the defendant should have the right to return the policy when received if not satisfactory, and as to whether or not the contract was as contended by the defendant in his pleas." To the giving of each of these portions of the court's general charge the plaintiff separately excepted, and also separately excepted to the court's refusal to give, at his request, the following written charges: (1) "The court charges the jury that, if they believe the evidence in this case, they must find the issue in favor of the plaintiff." (2) "The court charges the jury that, if they believe the evidence in this case, the defendant ratified the contract sued on, and the plaintiff is entitled to recover." (3) "That the letter of defendant under date of March 26, 1897, goes to the jury, and is to be considered by them in determining the question of ratification as set up in plaintiff's replication." (4) "The court charges the jury that, if they believe from the evidence that after the policy was delivered and its terms understood by defendant, the defendant then stated that plaintiff could keep the note, then that was a ratification of the contract of insurance, and plaintiff is entitled to recover in this action." At the request of the defendant, the court gave to the jury the following written charge, to the giving of which the plaintiff separately excepted: "If the jury believe from the evidence in this case that the defendant executed the note sued on in this case as the first premium on a policy of life insurance to be afterwards procured for him by one S. H. Edwards, and if they further believe from the evidence that to induce the defendant to sign the said note the said S. H. Edwards told the defendant that when the policy was delivered to him, the said defendant, the said defendant should have the right, if the said policy did not suit the defendant, to return the policy to the said Edwards, and the said Edwards would return the said note to the defendant, and if the jury further believe from the evidence that at the time said note was made the said Edwards was the agent of the plaintiff, and acted as the plaintiff's agent in said transaction, and if they further believe from the evidence that about two weeks afterwards the said defendant received the said policy by mail from the plaintiff, and that within a reasonable time after receipt of said policy the defendant notified the said Edwards that he was dissatisfied with the said policy, and offered to deliver to the said Edwards the said policy, and demanded of the said Edwards the said note, and that the said Edwards refused to accept

the said policy, and refused to deliver to the defendant the said note, then the jury must find for the defendant."

There were verdict and judgment for the defendant. Thereupon the plaintiff filed a motion for a new trial, upon the grounds that the court erred in refusing to give the several charges requested by the plaintiff, and in giving those portions of the general charge to which exceptions were reserved, and the charge requested by the defendant, and, further, because the verdict of the jury was contrary to the law and the evidence. This motion was overruled, and the plaintiff duly excepted. The plaintiff appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Thomas E. Knight, for appellant. Ed De Graffenried, for appellee.

McCLELLAN, C. J. This action is prosecuted by Parker against Bond on a promissory note executed by the latter to the former. Defendant's first plea sets up that one Edwards, who was acting and holding himself out as the agent and representative of the Washington Life Insurance Company, persuaded and induced defendant to sign the note; that in consideration thereof he was to receive a policy of insurance on his life in the sum of \$5,000 from said company; that he did receive a policy of insurance from said company some weeks after he signed the note; that Edwards, in order to induce him to sign said note, stated to him that after the policy of insurance was received by defendant, if he was not perfectly satisfied with its provisions, he, the said Edwards, would take back the policy, and return the note to the defendant; that defendant, when he received the policy and examined its contents, was dissatisfied with it, and offered to return it to said Edwards, and at the same time requested and demanded that the said note be returned to him; and that Edwards refused to return the note to him. This plea goes to the consideration of the note sued on. It shows that it was given in consideration of a policy of life insurance to be issued to the maker, which should be satisfactory to him; that no such policy was issued to or received by him; and that he seasonably offered to surrender and return an unsatisfactory policy which was sent him, and thereupon demanded the surrender of his note. It may be that the stipulation relied upon in the plea that the policy should be entirely satisfactory to defendant is an unusual one, but it is none the less valid on that account. It is analogous to a sale subject to inspection and approval of the article sold, and when, as in this instance, the approval is unhampered, no grounds of dissatisfaction or disapproval need be stated. The question is left to the discretion of the buyer, if not indeed to his caprice, and it is the fact of dissatisfaction, not the grounds of it, which authorizes a repudiation of the transaction. The action being prosecuted by the payee of the note, the de-

fense of a want of consideration is, of course, available to the defendant, whether Edwards was in point of fact the payee's agent or not in making the contract and taking the note; but, whether so or not originally, he is to be taken as such agent, since the plaintiff has adopted his acts by accepting and suing on the note which resulted from them. It is equally immaterial that Edwards has no interest in the note sued on and never had; nor is it of any consequence that the note itself contains a stipulation, in effect, waiving all defenses against it, and attempting to put the payee on the same footing as purchasers, for value, without notice. If such stipulation were otherwise unobjectionable, it falls in this case, because it is itself, like the main undertaking, unsupported by a consideration. The demurrer to this plea, raising these and other objections thereto, should have been overruled. The error in sustaining the demurrer is, however, without prejudice to appellant; said erroneous ruling having been in his favor.

Plea No. 2 filed by the defendant sets up, in substance, the same defense interposed by plea 1, varying the language somewhat,—as, for instance, by averring that the policy to be issued to defendant should "suit him in every particular; that he should have the right to accept or refuse the same; and that, in the event of his refusing it, the policy should be canceled, and the note should be returned to defendant," etc.; and averring that Edwards was the agent of the plaintiff. One objection taken by the demurrer to this plea which was not made to plea 1 was that it failed to show that defendant seasonably made known his dissatisfaction with the policy and his election to refuse it, and seasonably offered to return it. We think the plea does show this; but, even if it does not, the error in overruling the demurrer was not of prejudice to plaintiff, since the evidence, without conflict, shows that if defendant acted in the matter at all he did so within a reasonable time, and thus supports the plea, as it was construed by the lower court, to aver due diligence in electing not to accept the policy and offering to return it. This, with what we have said in respect of the first plea, will serve to indicate the grounds of our opinion that there was no error—or, at least, none of which appellant can complain—in overruling the demurrer to the second plea.

The fifth plea avers that the note sued on was procured by plaintiff's fraudulent representations, in that plaintiff, through his agent, Edwards, applied to defendant to have the Washington Life Insurance Company write a policy on defendant's life, and agreed that if defendant would execute the contract sued on a policy would be issued to him containing a guaranty that said company would lend defendant 90 per cent. of the face value of the policy after three annual premiums had been paid, the loan to bear 4 per cent. interest; that if the policy did not contain this agree-

ment defendant could return the same to Edwards, and the note sued on should in that event be surrendered to defendant; that defendant upon the receipt of the policy by mail examined it promptly, and promptly offered it to said Edwards; and that he declined to cancel the same, and declined to surrender the note. The policy itself is incorporated in this plea, and it does not contain the stipulation, above set out, as to the loan to the defendant. The plea is not open to any of the objections taken by the demurrer. It is, like pleas 1 and 2, a plea going to the consideration of the note sued on rather than of misrepresentation and fraud. It avers that the note was given in consideration of an undertaking on the part of Parker to have issued to the maker a policy containing a certain material and important stipulation; that the undertaking to this effect induced the execution of the note; that the policy issued to him did not contain this stipulation, and hence that the consideration for the note failed; and that the defendant seasonably repudiated the transaction, offered to return the policy, as by the contract he had a right to do, and demanded the surrender of his note. These facts constituted a complete defense to the action, and the circuit court properly so held.

Plea 1 alleged that Edwards held himself out as the agent of the Washington Life Insurance Company. Under this averment, it was obviously competent to prove the declarations of Edwards that he was such agent, not for the purpose of showing the fact of agency, but for the purpose of showing that Edwards held himself out as agent. The defendant was properly allowed to testify that at the time of and just before the signing of the note "Edwards said he would give me a policy to mature in twenty years, and after I had made three annual payments I could borrow ninety per cent. of the face value at four per cent.," and agreed that this stipulation should be in the policy. This testimony went directly to support the fifth plea, and going, as it did, to show a want or failure of consideration, its admissibility was not precluded by the contemporaneous or subsequent execution of the note. And the same is true in respect of the further testimony of this witness as to his right to return the policy if it should prove to be unsatisfactory to him. While agency may not be proved by the declarations of the agent, it may unquestionably be established by the testimony of the agent; and such testimony may involve only a statement of the fact of agency without going into the details as to how the relation was brought about, or as to the particular facts upon which it rests. Edwards testified that he was the agent of Parker in taking the note sued on; that he did take the note payable to Parker is in no wise controverted; and that Parker adopted his act in this regard is demonstrated by the institution of this suit. On this state of case the fact of Edwards' agency for Parker is removed from the field of controversy.

There was no question of ratification by the defendant in the case. There was a question whether he accepted the policy which was issued to and received by him as the policy for which he had contracted. The letter of March 26, 1897, written by him to Edwards, may have been some evidence of such acceptance; but it was not evidence of any ratification. The charge requested by plaintiff, to the effect or upon the assumption that this letter should be considered by the jury on the question of ratification was, therefore, to say the least inapt and confusing, abstract, indeed, in a sense, and properly refused. Moreover, conceding the letter was some evidence of ratification of the note, it was not conclusive, as is assumed in charges 2 and 4 refused to plaintiff. The charge given by the court of its own motion as to this letter, as far as it went, correctly submitted its evidential capacity to the jury. If plaintiff was entitled to have the jury consider it as evidence upon the further question whether the defendant accepted the policy sent to him as a consideration for his note, a special instruction to that effect should have been requested. The remaining instructions given by the court *ex mero motu* and at defendant's request are in consonance with the views we have expressed. Guided by the rule laid down in *Cobb v. Malone*, 92 Ala. 630, 9 South. 738, we find no error in the overruling of plaintiff's motion for a new trial. Affirmed.

(121 Ala. 197)

LOUISVILLE & N. R. CO. v. BOULDIN.

(Supreme Court of Alabama. May 16, 1899.)

RAILROADS—ACTION FOR CAUSING DEATH—SWITCHMEN—NEGLIGENCE—QUESTIONS FOR JURY—OBSTRUCTIONS NEAR TRACK—ASSUMPTION OF RISK.

1. Where a switchman was known to have crossed from one end of the switchboard of a moving engine to the other, and to have fallen under the wheels, where he was killed, near an obstruction on which was subsequently found a mark that might have been made by a man's shoe, whether the accident was caused by his falling from the switchboard through his own negligence while trying to climb over the bumpers and couplers between the ends of the switchboard, or whether his foot struck the obstruction which was negligently placed near the track, is a question for the jury.

2. The jury should also determine whether it was contributory negligence for him to stand on the footboard, with his foot protruding beyond it so as to strike against the obstruction.

3. The position of an oil box that was so near a railroad track as to catch a switchman's foot, allowed to alighty protrude beyond the end of a footboard of a moving engine, on which he was standing, and to throw him under the wheels of the engine, may be counted on, in an action for causing his death, as the result of the yardmaster's negligence, as of a person to whom superintendence had been intrusted to keep the tracks free from obstructions.

4. A switchman may assume that a yardmaster has done his duty in removing obstructions, though the rules of his employment require him to see to it that the premises on which he is working are in proper condition for the services required; and his failure to observe an obstruction near the track, which caused him to fall

from the footboard of a moving engine, causing his death, is not, as a matter of law, contributory negligence, precluding a recovery.

5. An obstruction placed so near a track that a switchman on the footboard of a moving engine is liable to come into fatal collision with it by throwing out his foot in a natural way is not a risk incident to his employment.

6. A switchman at the end of the footboard of a moving engine struck his foot against a nearby obstruction, which he could have seen easily if he had been looking, and was thrown under the wheels of the engine and killed. The engineer knew of the obstruction, and had a short time previously passed by it while another person was at the same end of the footboard. *Held*, that the engineer was not negligent in failing to warn the switchman of the danger.

Appeal from circuit court, Morgan county; H. C. Speake, Judge.

Action by Sallie M. Bouldin, as administratrix, against the Louisville & Nashville Railroad Company for damages for the killing of Richard M. Bouldin. From a judgment in favor of plaintiff, defendant appeals. Reversed.

The complaint contained five counts, and the trial was had upon the third, fourth, and fifth counts. The third and fourth counts were as follows: "Third. The plaintiff claims of the defendant the further sum of fifteen thousand dollars (\$15,000) as damages, for that, while the plaintiff's said intestate was engaged in the service of the defendant as aforesaid on or about the 30th day of August, 1892, and while he was standing upon the footboard of a moving engine, in the discharge of his duty as such servant or employé, he was struck by an obstruction which had been negligently permitted to be and remain upon the defendant's track, or near thereto, and was thrown to the ground and injured so that he died on or about the same day. And the plaintiff shows that said injuries to the plaintiff's intestate were caused by reason of the negligence of one W. E. Oakley, a person in the employment of the defendant, who had superintendence intrusted to him, while in the exercise of such superintendence, in this: that said W. E. Oakley was then and there the yardmaster of the defendant, and as such was intrusted by the defendant with superintendence of its said track at the point where plaintiff's intestate received said injuries from which he died, and said W. E. Oakley, while in the exercise of said superintendence, was negligent in permitting said obstruction to be and remain upon or near to said track. Fourth. The plaintiff claims of the defendant the further sum of fifteen thousand dollars (\$15,000) as damages, for that, while the plaintiff's said intestate was engaged in the service or employment of the defendant as aforesaid on or about the 30th day of August, 1892, and while he was upon a moving engine then and there engaged in the business of the defendant, on one of its tracks in the said county of Morgan, he was struck by an obstruction which had been negligently permitted to be and remain upon or near to said track, and in consequence of being so struck he received injuries from which

he died. At the time of said injuries plaintiff's said intestate was so serving upon said engine in obedience to the orders or direction of the defendant's yardmaster, to whose orders or directions plaintiff's said intestate was bound to conform and did conform; and said injuries were caused by reason of the negligence of said yardmaster in requiring plaintiff's said intestate to perform said service while said obstruction was negligently permitted to be and remain upon or near to said track, and resulted from his having so conformed to said orders and directions." The fifth count, as amended, was as follows: "Fifth. The plaintiff claims of the defendant the further sum of fifteen thousand dollars (\$15,000) as damages, for that, while the plaintiff's said intestate was engaged in the service or employment of the defendant as aforesaid, and while he was upon a moving engine upon one of the defendant's tracks, in or near to said city of Decatur, in said Morgan county, in the discharge of his duty as such servant or employé, he was struck by an obstruction upon or near to defendant's said track, and was thereby thrown to the ground, and injured so that he died on or about the same day. And said injuries to the plaintiff's said intestate were caused by reason of the negligence of the defendant's engineer, who had charge or control of said engine, in running said engine past or by said obstruction while plaintiff's intestate was in such a position upon said engine as to be exposed to peril by reason of said obstruction, whereby plaintiff's said intestate was injured and killed. At the time said engine was so run past or by said obstruction, the said engineer knew or had reason to believe that plaintiff's said intestate was in such a position on said engine as that he might be injured in passing said obstruction." To the third count the defendant demurred upon the following ground: "Said count does not aver that obstruction was left in the place where it was in said count alleged, by any one for whose action defendant is or would be responsible." To the fourth count the defendant demurred upon the following grounds: (1) "Said count does not aver that said oil box or obstruction was left in the place where it was in said count alleged, by any one for whose action defendant is or would be responsible." (2) "Because count does not state the name of the yardmaster or person to whose orders or directions plaintiff's intestate was bound to conform and did conform." To the fifth count, as amended, the defendant demurred upon the following grounds: "First. Said amendment avers matters which are clearly conclusions of the pleader, and not statements of fact, in its averment of the position of the intestate. Second. It is vague, uncertain, and indefinite in its averment that intestate 'might' be injured, and does not aver that said position was such that injury would result therefrom. Third. Said count, as amended, does not aver that the intestate

did not also know of said alleged danger. Fourth. Said count, as amended, is uncertain and indefinite in its averments that the intestate 'might' be injured, and does not aver that said position was such that injury would result therefrom, and that the probability of injury was not known to the intestate." These demurrers were overruled, to which ruling the defendant duly excepted. Thereupon the defendant filed the plea of the general issue, and several special pleas, by which it set up, respectively, contributory negligence on the part of plaintiff's intestate. In some of the special pleas it was averred that the injury resulting in the death of the plaintiff's intestate was occasioned by said intestate trying to cross from one side of the footboard on which he was standing to the other side, and that in making the attempt he fell between the engine and car to which it was coupled, sustaining the injuries resulting in his death. To the fifth count of the complaint the following special pleas were interposed: (1) "The position of Bouldin on said engine was such that he saw, or could have seen by the exercise of his senses, the oil box mentioned, and he knew, or was in a position to know, the proximity of the same to the track, and knew that it was a dangerous position to be in to stand on the footboard, with his foot protruding beyond the edge of the same; and, if the injury to plaintiff's intestate occurred by reason of the projecting of his foot beyond said footboard, he was thereby guilty of negligence which proximately contributed to the injury complained of." (2) "Answering the whole complaint, defendant says that plaintiff's intestate did not come in contact at all with said oil box, but that the injury complained of occurred by the said Bouldin negligently and carelessly attempting to jump from one end of the footboard of the engine over the bumpers, and in so doing fell, whereby he was guilty of negligence which proximately contributed to the injury complained of." Upon plaintiff's demurrers to this plea being overruled, issue was joined upon them.

The evidence shows that the plaintiff's intestate was killed on August 3, 1892, about 9:30 o'clock, in the shop yard of the defendant in New Decatur, and that he was a switchman of long experience; that at the time he was killed the engine on which he was switchman was engaged in placing cars in and taking them out of the yard; that the engine, without any cars, backed up from the main track on track No. 5 for the purpose of getting a car and placing it on track No. 7; that Bouldin, the plaintiff's intestate, and one Robertson, who was fireman of the engine, were standing upon the footboard, just to the rear of the tender, when the engine backed in upon track No. 5; that this track was straight; and that obstructions along the track could be easily seen. On the left-hand side of track No. 5, and nearly midway between the main track and the freight-car re-

pair shop, was an oil box. An oil box is a box that belongs to the car axle, in which they keep packing and oil to preserve the axles and keep them from getting hot, and the weight of the car rests on this box and axle. At the time of the accident there was a great deal of work being done in the yard, and Bouldin had been cautioned about the dangers incident to his employment when switching in the yard when there was much work going on; and it was shown that Bouldin knew rule 130 of the defendant, which especially cautions employes against taking any risks which, by the exercise of their own judgment and proper care, they could protect themselves against. The uncontroverted evidence shows that, when the engine backed in, Bouldin was on the left-hand side of the switchboard on the end of the tender, which was in front, in the direction in which the engine was moving as it backed up to the freight-car repair shops to couple on some cars there. After this coupling was made, the engine and cars started, the engine moving forward, to the main track over track No. 5, in order to transfer the cars to track No. 7; and Bouldin was standing on the left-hand side of the switch board at the end of the tender as the engine moved forward. He was found on the right-hand side of the track, near the oil box, and, in order to have passed from the left to the right-hand side of the switchboard, must have climbed or passed over the coupling which connected the tender with the cars. It was a matter of dispute whether the accident was caused by his falling off the switchboard when attempting to cross over, or whether his foot struck the oil box. The evidence is uncontradicted that the oil box did not appear to have been moved. There was no trace of its having been moved in the cinders which were spread in between and along the tracks. There were, however, impressions on the oil box which might have been made by a man's shoe coming in contact with it, or it might have been caused by the wreck or handling of the oil box afterwards.

The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "If the jury believe the evidence, they will find for the defendant." (2) "Under the fifth count in plaintiff's complaint, she charges that the injuries of her intestate, Richard Bouldin, were caused by reason of the negligence of the defendant's engineer who had charge and control of said engine. I charge you, gentlemen of the jury, that under the evidence in this case, if you believe said evidence, said engineer was not guilty of any negligence on his part, and your verdict, under the fifth count, should be for the defendant, and against the plaintiff." (3) "Under the rule of the company, it was Bouldin's duty to see that the premises on which he was at work were in proper condition. If he violated said rule,

and if you believe from the evidence that he knew of the existence of said rule, he was guilty of contributory negligence, and your verdict should be for the defendant." (4) "The evidence is uncontradicted that Bouldin jumped over the bumpers at a time when the footboard on which he was standing was opposite or past the oil box, and went down between the car and engine. If you believe this evidence, in connection with the other evidence in this case, your verdict should be for the defendant." (6) "If you believe from the evidence that plaintiff's intestate, Richard Bouldin, encountered a place of danger he could have avoided completely by ordinary prudence, the alleged negligence of the defendant ceases to be a factor, and the overshadowing imprudence of Bouldin is deemed the cause of the injury he sustained from the peril he incurred, which he should have shunned, and therefore your verdict should be for the defendant." (7) "It was not negligence on the part of defendant to place the oil box where it was, in the repair yards of the defendant." (12) "I charge you, gentlemen of the jury, that on the undisputed testimony in this case the plaintiff is not entitled to recover under the fifth count of plaintiff's complaint, and your verdict under that count must be in favor of the defendant." (13) "If you believe from the evidence that the injury resulted to Bouldin by reason of his foot protruding beyond the end of the footboard, and thereby coming in contact with the oil box, your verdict should be for the defendant." (14) "I charge you that Bouldin had no duty to perform on the right-hand side, or west side, of engine, where the oil box was, near the track." (16) "If you believe from the evidence that Bouldin violated rule 130 of defendant, and thereby produced the injury, your verdict should be for the defendant." (17) "If you believe from the evidence that Bouldin went down between the car and tender in getting over the bumpers, then your verdict should be for the defendant." (18) "Under the evidence in this case, I charge you that, if you believe the same, you will find that Bouldin knew of rule No. 121 of defendant, and violated the same, and I charge you that said violation was negligence on his part." (19) "Under the evidence in this case, I charge you, gentlemen of the jury, if you believe the same, you will find that Bouldin violated rule No. 130 of defendant." (21) "As there was room for the safe moving of the engine and car past the oil box, I charge you that the engineer was not guilty of negligence in respect to Bouldin unless said engineer knew that said Bouldin was in such a position on the engine or car as that he might be injured in passing the oil box." (22) "Under the evidence in this case, I charge you, gentlemen of the jury, that at the time of the accident the engineer did not know that Bouldin was in such a position on the engine as that he might be injured in passing the oil box, or had reason to believe that Bouldin was in such a po-

sition. Therefore, if you believe the evidence, your verdict should be for the defendant under the fifth count in complainant's complaint." (23) "I charge you, gentlemen of the jury, upon the evidence in this case, Bouldin violated rule No. 180 of defendant, and that he knew of the existence of this rule, and that said violation of said rule was negligence on his part which proximately contributed to the injury complained of." (24) "If the jury find from the evidence that plaintiff's intestate had been warned of the danger of switching in the yard of defendant's repair shop on account of material being constantly unloaded along the switch tracks contained therein for the purpose of building and repairing cars, and had the opportunity of ascertaining the dangerous condition of the surface at that place, then I charge you that he had the danger in contemplation at the time of the service, and to have assumed the risk, and your verdict should be for the defendant." (25) "As there was room for the safe moving of the engine and car past the oil box, I charge you that the engineer was not guilty of negligence in respect to Bouldin unless said engineer knew that Bouldin was in such a position on the engine or car as that he might be injured in passing the oil box, and, if you believe the evidence, you will find for defendant under the fifth count in plaintiff's complaint." (26) "If you believe the evidence, you will find that Bouldin was warned by the rules to look out for obstructions, that Bouldin knew of this rule, and that it was his duty thereunder to look out for obstructions, and that, if the injury resulted from his failure to observe said rules, then plaintiff is not entitled to recover, and your verdict should be for the defendant." (27) "If the jury believe from the evidence that Richard Bouldin was acquainted with the track where the injury occurred, and its liability to obstruction by material used by the workmen employed within said yard, and with such knowledge, and without looking for obstructions or material, protruded his foot beyond the end of said footboard, whereby it came in contact with said oil box, when by looking he could have seen said oil box, then he was guilty of such contributory negligence as precludes a recovery by his administratrix, and your verdict should be for the defendant." (28) "If the jury believe from the evidence that plaintiff's intestate, Richard Bouldin, was acquainted with the tracks, yards, and operation of defendant's engine over the tracks where the injury occurred; and with such knowledge, and without looking for obstructions or objects calculated to produce injury, protruded his foot beyond the end of the footboard, whereby it came in contact with said oil box, when by looking he could have discovered said oil box before protruding his foot beyond the end of the footboard, then Bouldin was guilty of such contributory negligence as would preclude a recovery, and your verdict should be for the defendant." (29) "I charge you, gen-

tlemen of the jury, that the evidence shows, without conflict, that Richard Bouldin was warned by the rule for the government of yardmen to look after his own safety, and to exercise the utmost caution to avoid injury, and to see that the premises upon which he was at work were in the proper condition for the service which he was performing, and, if not in such condition, to put them in proper condition, or see that they were so put. And if you believe from the evidence that he failed to do so, and thereby injury resulted to him, which produced his death, his administratrix is not entitled to recover, and your verdict should be for the defendant." (30) "If you believe from the evidence that the position of Bouldin on the footboard, as the engineer approached the freight-car repair shops, was such that he saw, or could have seen, the oil box in passing, and that he continued on said footboard until the engine coupled on said car and the engine headed out from said building, and that he protruded his foot beyond the end of the footboard, whereby it came in contact with said oil box and threw him under the wheels, and that he did so without looking for said oil box, or without thinking of its location, then I charge you he was guilty of such contributory negligence as would preclude a recovery, and your verdict should therefore be for the defendant." (31) "If you believe from the evidence that plaintiff's intestate, Richard Bouldin, was standing on the footboard at the rear of the engine as it approached the freight-car repair shop, and there was nothing to obstruct his view, then I charge you, as a matter of law, that he had ample opportunity of knowing the danger of the proximity of said oil box, which only required usual and ordinary observation. Under these circumstances, I charge you, further, that the law in this state is that it was not the duty of the defendant's engineer, Harbin, to give said Bouldin express warning of said danger of said oil box." (32) "If you believe from the evidence that Bouldin left a safe position on the left-hand side of the footboard, and got over the bumper to the right-hand side, projecting his foot beyond the end of the footboard, and thereby it came in contact with the oil box, which produced the injury resulting in his death, and he knew that his position on the left-hand side was a safe position, the law charges him with the knowledge of the danger of the proximity of said oil box, and with the duty of knowing it was there and liable to produce injury; and, whether he saw it or not, if his death resulted by his foot coming in contact with it, he was guilty of contributory negligence, and your verdict should be for the defendant." (33) "I charge you, gentlemen of the jury, that the evidence in this case is uncontradicted that the plaintiff's intestate, Richard Bouldin, could have seen the oil box mentioned as they approached the freight house on track No. 5; and that it was a part of his duty to so see said oil box, and that if you

believe from the evidence that the said Richard Bouldin protruded his foot beyond the footboard of the engine as said engine was pulling out from said freight house, so that his foot came in contact with said oil box, then this act on the part of Bouldin was such contributory negligence on his part as would prevent a recovery by his administratrix, and, if you believe said evidence, your verdict should be for the defendant." (34) "Under the law in this state, gentlemen of the jury, if the character of any particular damage is so simple that it could be as well ascertained at a single view as to many, and that it was the duty of said Bouldin to ascertain whether or not he could safely protrude his foot beyond the edge of the footboard of the engine in passing by where said oil box was, by his passing along said track to enter said building to obtain said car, and that he afterwards, on coming away from said building, protruding his foot beyond the edge of the footboard, and it thereby came in contact with the oil box mentioned, and thereby he received injuries which produced his death, then I charge you, as a matter of law, that his administratrix is not entitled to recover, and your verdict should be for the defendant." (36) "If the jury believe from the evidence that plaintiff's intestate, Richard Bouldin, was standing on the rear footboard of the engine, which was in motion; that his foot projected beyond the end thereof; that his foot came in contact with the oil box, which was the cause of his being thrown off, producing the injuries resulting in his death, and at the same time there was room for him to stand on said footboard without his foot projecting beyond to the end thereof, and that the latter position was a safe position; that he was thereby thrown to the ground by reason of the failure of the engineer to inform him of the proximity of such oil box, if he had been standing on said footboard without his foot projecting beyond the end thereof,—then you must find your verdict for the defendant." (37) "If the jury believe from the evidence that the shop yards of the Louisville & Nashville Railroad Company at New Decatur, Alabama, where plaintiff's intestate, Richard Bouldin, received the injuries from which he died, were used for the purpose of building and repairing cars, and for this purpose it was necessary to keep material for building and repairing cars between the tracks of said yards, which rendered it a dangerous place for switchmen in the performance of their duties, and this was known to plaintiff's intestate, and he had been warned of the dangers, and he continued in the service of defendant as a switchman in the said yards for months after he had been so warned, and received the injuries complained of in plaintiff's complaint while so in the service of defendants, then I charge you that plaintiff's intestate assumed the risk incident to his employment; and if you further believe he received the injuries from which he died, by his foot

coming in contact with the oil box which had been placed between the trucks of a car belonging to the Pennsylvania Railroad, then your verdict should be for the defendant."

There were verdict and judgment for the plaintiff, assessing her damages at \$5,000. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Thos. G. Jones, for appellant. S. T. Wert and R. W. Walker, for appellee.

MCCLELLAN, C. J. We are not at all inclined to depart from the conclusions reached on the former appeal in this case, that whether the intestate, Bouldin, fell under the tender, where he was run over and killed, in an effort to climb over the couplings and bumpers from one to the other end of the footboard, or came in contact with the oil box after he had safely passed over the couplings, etc., and was by such contact thrown or caused to fall under the wheels, and, in this latter case, whether he was guilty of such negligence in standing on the end of the runningboard, with his foot so protruding beyond it as to strike against the oil box, as would bar this action to recover damages for his death resulting from his foot having come in contact with the box, were each questions of fact for the jury; and further that, if the presence so near to the track of the oil box was the cause of his death, the fact that he reached the position next to it on that end of the footboard by climbing over the bumpers, etc., from the other end, is immaterial in the case. We also adhere to the view we then had, that the position of this oil box so dangerously near to the track as to come in contact with the foot of a switchman, casually allowed to slightly protrude beyond the end of the footboard, if the jury found it was so near, might be counted upon as the result of the negligence of Oakley, the yardmaster, as of a person to whom superintendence had been intrusted in respect of keeping the tracks in the yard free from obstructions, and that there was evidence, which is also in the present record, on the issue of his said alleged negligence *vel non*. Railroad Co. v. Bouldin, 110 Ala. 185, 20 South. 325. It follows that, in our opinion, the affirmative charge upon the whole complaint, and upon the count alleging Oakley's negligence, and all of that great number of other charges which declare or assume that Bouldin was killed in his attempt to pass over the bumpers, or that he was guilty of contributory negligence in allowing his foot to extend over the end of the footboard, or that Oakley was not negligent, etc., were each and all properly refused to the defendant.

Defendant's rule No. 130, which was put in evidence by it, is as follows: "All persons entering or remaining in the service of the company are warned, in accepting or retaining employment, they must assume the ordi-

nary risks attending it. Each employé is required to look after and be responsible for his own safety, as well as to exercise the utmost caution to avoid injury to his fellows, especially in the switching of cars and in all movements of trains. Stepping upon the front of approaching engines, jumping on or off trains or engines moving at a high rate of speed, getting between the rails to couple or uncouple cars while in motion, and all similar imprudences, are dangerous and in violation of duty. Employés of every grade are warned to see for themselves, before handling or using them, that the cars, machinery, and tools which they are expected to use or handle, and the premises upon which they are expected to work, are in proper condition for the service required, and, if not, to put them in proper condition, or see that they are so put, before using them. The company does not wish or expect its employés to incur any risks whatever, from which, by the exercise of their own judgment and by personal care, they can protect themselves, but enjoins them to take time in all cases to do their duty in safety, whether they may at the time be acting under the orders of their superiors, or otherwise." It is insisted for appellant that under this rule it was the duty of Bouldin to discover and remove the obstruction which, under one phase of the evidence, caused his death, and that his failure in this regard was negligence, as matter of law, proximately contributing to the disaster, and therefore barring recovery. We do not concur in this view. Granting that under the rule, or apart from it, indeed, there is a general duty of watchfulness and care upon all persons working in a dangerous place or with dangerous machinery, it is not, and cannot reasonably be, in all cases, such an absolute requirement as that its casual pretermission will entail the consequences stated. For instance, there is such general duty upon an engineer operating on the main line of a railroad; and yet he cannot be held responsible for the condition of the track over which he is required to run his engine at a speed, it may be, of a mile a minute. There are other employés specially charged with keeping the track in proper condition, and he has the right to assume that they have performed their duty, and that the track is in proper condition. So, here, Bouldin's duties were those of a switchman. These it was incumbent upon him to discharge with care and diligence. Others were specially charged with the keeping of the tracks where his work was to be done free from dangerous obstructions; and while, in a general way, the law as well as the rule required watchfulness and care on his part to the conservation of his own safety, he had to rely in large measure upon the assumption that employés charged to keep the tracks in a safe condition had not placed an obstruction in dangerous proximity thereto, or had not allowed it to remain there. Having another line of duties to perform, and

being specially charged therewith, it cannot be said, as matter of law, that he was negligent in not removing this obstruction, not having seen it, or in not seeing it. Neither the law nor the rule imposed upon him the imperative and absolute duty of discovering and removing this obstruction, or of conducting himself with reference to its presence. The trial court properly so ruled on requests for instructions.

Nor can we concur with counsel that the risk of being killed by an obstruction of this sort, left in perilous proximity to the track,—so near, indeed, that a switchman, in the casual, incidental, and natural movements and position of his person when in place for the discharge of his duties, was liable to come in fatal collision with it,—was an ordinary risk of the service, and accepted by Bouldin upon entering and while remaining therein. And this, though this yard was used in building and repairing cars, and material therefor, as well as débris from injured cars, was often placed between these switch tracks; for it might as well be said that the switchmen assumed the risk of Oakley's directing or allowing an obstruction sufficient to wreck the engine to be placed immediately in front of it while in rapid motion. It is not an ordinary risk, or one assumed by trainmen, that is involved in placing an obstruction so near to the track that they are liable to be killed by it while in the customary and careful performance of their duties, as the jury might have found Bouldin was on this occasion. *Peirce v. Clavin*, 27 C. C. A. 227, 82 Fed. 550; *Dorsey v. Construction Co.*, 42 Wis. 583. Bouldin had the same, or better, opportunities as had the engineer, to see this obstruction. There was, as we had said, a general duty of watchfulness upon Bouldin in respect of all such obstructions,—not such as that a failure to discover could be said; as matter of law, to be negligence; still, such as was calculated to give the engineer some assurance that he had seen this one. Then, while the engineer knew or had reason to believe that Bouldin was on that end of the footboard, did he have reason to believe that Bouldin was in such particular position thereon as that the oil box would strike him? The engine had just passed there with a man on that end of the board, as the engineer knew; and that man had not come in contact with the box, as the engineer also knew. There were, of course, any number of precise positions on that end of the board which could have been occupied without exposing the person of the switchman to collision with the box. From the point of view of the engineer, there was no more, we feel safe in saying, than a bare possibility that Bouldin's person would strike against the obstruction, even if Bouldin was not aware of its presence; and, when is added to this the probability that Bouldin was aware of it, can it be said that the engineer was lacking in ordinary care and prudence in failing to warn Bouldin of the

obstruction? Would a man of ordinary care and prudence have felt called upon, under all the circumstances, to have warned him? And it is the rule of ordinary care which obtains in this connection, not of strict or of the utmost care and diligence. Upon a very careful consideration of the evidence, we have reached the conclusion that it shows beyond controversy a state of facts upon which arose no duty on the part of the engineer to give Bouldin notice of the presence of this oil box, and that negligence cannot be affirmed of his failure to do so. Many rulings of the court on charges requested, etc., are in conflict with this view, and on account of them the judgment must be reversed.

We do not think there is any merit in the exceptions reserved to the rulings of the court on the competency of testimony, and we deem it unnecessary to discuss any charges or other matters not embraced in what we have said above. Reversed and remanded.

(121 Ala. 314)

ROGERS v. BAILEY et al.

(Supreme Court of Alabama. May 17, 1899.)

ASSIGNMENT FOR CREDITORS—RECORDING—PROPERTY IN DIFFERENT COUNTIES—ATTACHMENT CLAIMS BY THIRD PERSON—ESTABLISHMENT—JUDGMENT.

1. An assignment, for the benefit of creditors, of property situate in two counties, recorded in only one of the counties, does not become operative, as against the creditors of the assignor, as to property in the other county, until recorded in that county, under Code, § 1004, requiring deeds of assignment to be recorded in the county where the property is situate.

2. Where attached property is claimed by a third person, who gives the required claim bond, and thereafter the attaching creditor prevails on a trial of the right of property between him and the claimant, it is error to direct the issuance of an execution before the return of the claim bond forfeited.

3. On the entry of judgment in favor of an attaching creditor on a trial of the right of property between him and a third person claiming the attached property, judgment of condemnation of the property in suit may be entered, where the attaching creditor has already recovered judgment in the attachment suit.

Appeal from circuit court, Marengo county; John C. Anderson, Judge.

Attachment by W. E. Bailey & Bro. against W. D. Harkness. From a judgment awarding the property to plaintiffs, John A. Rogers, claimant, appeals. Modified.

This was a statutory trial of the right of property, and arose in the following manner: W. E. Bailey & Bro. brought an attachment suit against W. D. Harkness, and the attachment was levied upon a stock of goods in the possession of the defendant in Marengo county. Upon the levy of this attachment, the appellant, John A. Rogers, as assignee of the defendant in attachment, interposed a claim to said goods, and made affidavit and executed a claim bond as required by statute. The undisputed facts of the case disclosed on the trial of the claim suit are sufficiently stated in the opinion. The court, at the re-

quest of the plaintiffs, gave the general affirmative charge in their behalf, to the giving of which charge the claimant duly excepted. The judgment, as originally rendered by the court, was as follows: "That the plaintiffs do have and recover of the claimant the property sued for, or its alternate value, \$830.64, with their costs of suit in this behalf expended, for which damages and costs let execution issue." On motion of the plaintiffs, the judgment entry in said cause was amended *nunc pro tunc*, making the plaintiffs recover of the claimant the property levied on, instead of that sued for, and inserting in the judgment entry a description of said property, and then causing the judgment to read as follows: "Wherefore it is ordered, adjudged, and decreed that the property above described be condemned to the satisfaction of plaintiffs' judgment in the attachment suit against W. B. Harkness, if and when said judgment should be rendered, for which judgment and costs let execution issue."

McEachin & Smith, for appellant. R. M. Douglas, for appellees.

DOWDELL, J. This is a case known under our practice as a "statutory claim suit,"—a trial of the right of property levied on, between the plaintiff in attachment and the claimant, as assignee of the defendant in attachment. The issue, as made up under the direction of the court, is whether the property in dispute was subject to the levy. The material question in the case turns upon the construction of the act of February 18, 1895 (Sess. Acts 1894-95, p. 814), and which now forms section 1004 of the Code. The undisputed facts are that the defendant in attachment carried on a merchandise business in Gainesville, Sumter county, and at Faunsdale, Marengo county; having a store and stock of goods at each place. On December 26, 1897, he executed a deed of assignment to the claimant, Rogers, embracing in the assignment both stocks of goods. The deed of assignment was filed with the probate judge of Sumter county on December 28, 1897, but was not filed with the probate judge of Marengo county until some time in February, 1898. The plaintiffs' attachment was sued out and levied on the stock of goods at Faunsdale, in Marengo county, on December 28, 1897,—the day on which the deed of assignment was filed with the probate judge of Sumter. The statute provides that deeds of this character shall, as soon as executed, be filed and recorded in the office of the judge of probate of the county in which the property is situated, and are operative from the day of the delivery to the judge. The fair and reasonable interpretation of the statute is that such deeds are not operative until delivery to the probate judge for the purpose of filing and record, and then only as to the property, included in the deed, which is situate within the county where the delivery for the filing and record

of the deed is made. If the deed embraces property situate in two or more counties, then it is essential to file and record the deed in each of said counties, to make it operative as to the property in the respective counties; otherwise, it would only be operative in the county or counties where filed. And it does not become operative upon the property in the county until delivery to the probate judge of that county. This being our construction of the statute, the lien acquired by the levy of the attachment was prior to the title acquired by the claimant under the deed of assignment. With this view of the case, it is unnecessary to consider the other assignments of error as to rulings upon evidence; for, if there was error, it was error without injury, the undisputed facts being as above stated.

The judgment of the court, as amended *nunc pro tunc*, was in all respects regular, except in that it ordered the issuance of an execution in advance of the return of the claim bond forfeited. The record shows that judgment had already been rendered in the original attachment suit, and therefore the judgment of condemnation of the property in this suit was not improper. *Roberts v. Burgess*, 85 Ala. 192, 4 South. 733. The judgment will be here corrected in respect to the ordering of the execution to issue before the return of the claim bond forfeited, and, as corrected, affirmed.

(121 Ala. 519)

HARRIS v. WESTERN UNION TEL. CO.

(Supreme Court of Alabama. May 9, 1899.)

TELEGRAPHS — DELAY IN TRANSMISSION — CLAIM FOR DAMAGES — PRINTED REGULATION — NOTICE TO SENDER — PLEADING — EVIDENCE.

1. The sender of a message is bound by the printed regulations on the back of the company's blank, limiting the time for the presentment of claims for damages to 60 days after the receipt of the message by the company.

2. In an action for delay in transmitting a message, a plea that plaintiff did not give written notice of her claim of damage within 60 days, as required by the regulations printed on the company's blank, sufficiently alleges that plaintiff had notice of the regulation.

3. Plaintiff wrote a message on plain paper, and delivered it to defendant's agent for transmission, but the agent, without authority from plaintiff, pasted the message on one of defendant's blanks, on which was a printed regulation requiring claims for damages to be filed in 60 days. *Held*, that plaintiff, who had no knowledge of the regulation, was not bound thereby.

Appeal from city court of Montgomery; John G. Winter, Judge.

Action by Mary Harris against the Western Union Telegraph Company. There was judgment for defendant, from which plaintiff appeals. Reversed.

To the special plea, the plaintiff demurred upon the following grounds: "(1) That this is an action to recover damages for the breach of a public duty of defendant, which was caused by its inexcusable carelessness and negli-

gence, and no rule or regulation of defendant can limit its liability for such inexcusable carelessness and negligence, but any attempt to make such limitation is against public policy and void. (2) That this case is an action for damages, brought by plaintiff against the defendant, for the violation of a duty growing out of a contract made by it with plaintiff, and also incumbent upon it to perform as a duty to the public, and such duty is charged to have been violated in an inexcusably careless and negligent manner; and the fact that defendant attempted, by any stipulation, to limit its liability for any such negligence and carelessness, is no defense to plaintiff's claim. (3) That there is nothing in the defendant's said plea to show that plaintiff, at the time of sending such message, was aware of the said limitation set out in said plea, if any such existed." This demurrer was overruled, and the trial was had upon issue joined upon the pleas. The facts of the case are sufficiently stated in the opinion. Upon the court's giving the general affirmative charge in favor of the defendant, at its request, the plaintiff duly excepted. There were verdict and judgment for the defendant. The plaintiff appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Gordon Macdonald, for appellant. Geo. H. Fearons, J. M. Falkner, and Ray Rushton, for appellee.

McCLELLAN, C. J. This action is prosecuted by Mary Harris against the Western Union Telegraph Company, and sounds in damages for the negligent failure of the defendant to promptly transmit and deliver to plaintiff's brother at Milton, Fla., a telegram sent by her from Montgomery, Ala., and for the transmission and delivery of which she paid defendant's agent. Defendant pleaded the general issue, and the following special plea: "(2) Defendant avers that at the time said alleged telegram was received by it for transmission, and for a long time prior thereto, it had in force a rule that all messages received by it should be sent on one of its blanks, and subject to a contract on the back of said blanks, which said rule was a reasonable one. That the alleged message was written on one of the defendant's blanks, and subject to the contract expressed on said blank, and that part of said contract was in the following language: 'The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission.' And defendant avers that no claim for damages was presented to it within sixty days after said alleged message was filed with the company for transmission."

The rule here set out is a reasonable one. It does not limit the defendant's liability for negligence, as the demurrer to the plea assumes, but only requires reasonable notice to

the defendant of claims for damages. Nor is the plea open to the further objection, taken by the demurrer, that it does not show that plaintiff was aware of the rule at the time the message was sent. The averment that the message was written on one of defendant's blanks, upon which the requirement for notice of damages within 60 days was printed, and was sent subject to the contract expressed thereon, of which this requirement was a part, is the equivalent of an averment of notice of the rule on plaintiff's part. The demurrer to the plea was therefore properly overruled.

The evidence, without conflict, supported the complaint. But the court gave the affirmative charge for the defendant, upon the theory that it had proved this special plea; and whether the evidence, without controversy, does support the plea, is the only question for our consideration. We do not think it does. Our conclusion is that there was a failure of proof that the message was written upon one of the blanks of the defendant, and hence a failure to show that plaintiff made the special contract set up in the plea. The uncontroverted evidence was that plaintiff had the message written on a plain piece of white paper, not upon a blank of the company at all; that she then gave the message, thus written and signed by her, and also money to pay for its transmission, to one Johnson, to carry and deliver it to the office of the defendant for transmission, and to pay for the same; that Johnson did carry the message to defendant's office, and there delivered it to one of defendant's agents, in its original form and condition, and paid to such agent the charges for its transmission; that said agent received the message from Johnson, and also the charges, and thereupon, of his own motion, pasted the plain white paper on which the message was written onto one of defendant's telegraph blanks. Neither the plaintiff nor said Johnson knew anything about the company's requirement that messages should be written on its blanks, nor of the stipulation printed on said blanks that notice of claims should be given within 60 days, etc., either at the time the message was delivered to defendant nor at any other time prior to the trial of the case, nor was there any evidence tending to show that they had any knowledge or notice of the rule or of the stipulation on the blanks. But it is insisted for appellee that the defendant's employé who received the message and the charges therefor from Johnson, or from the plaintiff through Johnson, acted as the agent for Johnson, and for the plaintiff, in pasting the original message onto one of defendant's blanks, and thereby bound the plaintiff, by the stipulation expressed on the blank, and this, we suppose, is the view adopted by the trial court. We cannot admit this contention or adopt this view. The business of this employé was to receive the message from Johnson and the charges for its transmission. If the mes-

sage was not in the form required by the defendant, he should have declined to receive it until put in that form, or until, having called Johnson's attention to the requirement, the latter had authorized him, impliedly or otherwise, to make it conform to the rule. When he accepted the message, written, as it was, on a piece of plain paper, unaccompanied by any stipulations or words, save those only of the message itself, and accepted payment of the toll for its transmission, then there was upon that instant a contract on the part of the company to send that message promptly to the plaintiff's brother, and for a breach of that contract, or for a breach of duty arising from the contract, the plaintiff had the remedies which the law gave her, unimpaired and unaffected by the rule and stipulation now pleaded against her, since she had neither notice of the rule nor of the stipulation, and therefore cannot be held to have impliedly authorized defendant's employé to conform her message to the rule, nor to have incorporated the terms of the stipulation expressed on the blank, of the existence of which she was entirely ignorant, into the contract which she in fact made. It is not for us to say, nor was it for the jury to say, but that had she been apprised of all the stipulations, or of this stipulation, expressed on defendant's blanks, she might have declined to enter into the contract at all; but we may at least say that she had a right to decline, and that she cannot be holden to a stipulation which was not embraced in the contract she did make merely because it was defendant's rule, unknown to her, to require persons in her attitude to enter into the stipulation, or because the defendant, after making a contract with her that did not embrace the stipulation, pasted her message, which in itself was not clogged by any special conditions whatever, onto a printed blank, which contained special limitations and requirements. This does not fall within that class of cases where the agent of a telegraph company performs some service for the sender of a message, and in respect of which he is held to be the agent of the sender. Here the message, as originally prepared, was received by the company, as also the charges for its transmission. There was nothing further to be done by or for the sender. Upon this the duty of transmission was on the defendant, and it had been paid for its performance. Whatever else was done with or about the message was the act of the defendant's employé, and whether, in respect of such, he is to be considered the agent of the defendant, he was certainly not the agent of the plaintiff. The complaint having been proved without conflict in the testimony, and the defendant having failed to adduce any evidence supporting a material averment of the special plea, the affirmative charge should have been given for plaintiff, and not, as it was, for the defendant. The question of the damages recoverable under the complaint does not arise on this appeal. Reversed and remanded.

(121 Ala. 258)

HANOVER FIRE INS. CO. v. CRAWFORD.
CRAWFORD v. HANOVER FIRE INS. CO.
(Supreme Court of Alabama. May 16, 1899.)

INSURANCE—DIVISIBILITY OF CONTRACT—
IRON-SAFE CLAUSE.

Where a policy recites a gross premium paid for insurance in the sum of \$1,750 "on the following described property": \$700 on building, \$1,000 on stock of goods therein, and \$50 on fixtures therein, a breach of the iron-safe clause does not preclude a recovery for the building and fixtures.

Appeals from circuit court, Montgomery county; John R. Tyson, Judge.

This action was brought by W. H. Crawford against the Hanover Fire Insurance Company, and counted upon a policy of fire insurance which had been issued by the defendant to the plaintiff. The policy stated that the insurance was \$700 on the building occupied as a store, \$1,000 on the stock of goods while contained in said described building, and \$50 on the furniture and fixtures. The said policy contained the conditions usual to fire insurance policies, including what is known as the "iron-safe clause." There was much pleading in the case; but, under the opinion on this appeal, it is unnecessary to set out the pleading in detail. It was admitted that there was a breach of the condition of the policy designated as the "iron-safe clause." Upon the introduction of all the evidence, the court, at the request of the plaintiff, gave to the jury the following written charges: (1) "If the jury believe the evidence, they will find for the plaintiff to the extent of the insurance on the building, if the jury are further satisfied from the evidence that said building was worth as much as \$1,000, and will find for the plaintiff to the extent of the insurance on the fixtures, if the jury is satisfied from the evidence that the said fixtures were worth as much as \$100." (2) "If the jury believe the evidence, they will find for the plaintiff to the extent of the insurance on the building and fixtures, if the evidence further shows that said building was worth, after deducting one-fourth of its value, as much as it was insured for. If the evidence further shows that said fixtures were worth, after deducting one-fourth of their value, as much as they were insured for, their verdict should be for the amount of insurance on said building and fixtures, with interest thereon from April 27, 1895." (3) "If the jury believe the evidence, they will find for the plaintiff to the extent of three-fourths of the value of the building and fixtures insured to the extent of the insurance on them, and interest thereon from April 27, 1895." To the giving of each of these charges the defendant separately excepted. The court, at the request of the defendant, gave to the jury the following written charges, to the giving of each of which the plaintiff separately excepted: (a) "If the jury believe the evidence in this case, they must find for the defendant as to the value of the stock of goods." (b) "Al-

though the jury may believe from the evidence that three-fourths of the value of the storehouse was \$700, yet, if they further believe from the evidence that three-fourths of the value of the fixtures was less than \$50, then they cannot find for the plaintiff for the amount for which both the storehouse and fixtures were insured, with interest from April 27, 1895." The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (c) "If the jury believe the evidence in this case, they will find for the defendant." (d) "If the jury believe the evidence in this case, they must find for the defendant as to the value of the storehouse." (e) "If the jury believe the evidence in this case, they must find for the defendant as to the value of the fixtures." There was judgment for the plaintiff, allowing him to recover the value of the storehouse and the fixtures therein, and the judgment entered in favor of the defendant as to the value of the stock of goods. The plaintiff and the defendant each prosecute the present appeal, and assign as error the rulings of the trial court to which they each, respectively, reserved exceptions. Affirmed.

Thos. H. Watts, for plaintiff. Tompkins & Troy, for defendant.

MCCLELLAN, C. J. The plaintiff in the court below brought suit against the defendant upon a policy of insurance, in which he was allowed to recover the value of the storehouse and fixtures therein, two of the subjects covered by the policy, and not permitted to recover the value of the stock of goods kept in the house on account of his failure to comply with that provision of the policy known as the "iron-safe clause." Both plaintiff and defendant prosecute appeals to this court from the judgment.

The defendant's assignments of error are determinable upon the decision of the question as to whether the policy with respect to the three subjects of insurance, to wit, the house, the fixtures, and the goods, is divisible, so as to allow the plaintiff to recover the value of the house and fixtures, notwithstanding his admitted breach of that condition of the policy above referred to and designated as the "iron-safe clause." The policy is one contract, containing many conditions, warranties, and representations. It recites a gross premium paid for the consideration of indemnifying the plaintiff against loss or damage by fire to an amount not exceeding \$1,750 to the following described property: \$700 on two-story shingle-roof building, etc., while occupied as a general store, etc.; \$1,000 on his stock of merchandise, consisting of dry goods, groceries, hardware, etc., while contained in said building; \$50 on store and office furniture and fixtures, etc., contained in said building. It does not necessarily follow that because all the items insured are cov-

ered by one policy a breach of a condition subsequent in the policy will avoid it as to all the items or subjects covered, and, indeed, it does not necessarily follow that because there are many items or subjects insured by the policy it may not be avoided as to all of them. Whether either of these results flows from a breach of a condition in a policy must depend upon the nature and character of the condition and the purpose to be accomplished. They are usually adopted by insurance companies to protect themselves against fraud, and they have been recognized and enforced by the courts as valid stipulations whenever they are reasonable. Whenever nothing but injustice will be accomplished by the enforcement of a condition, the courts cannot presume that it was the intention of the parties to have so contracted as to that particular item of property insured. The law will be guided by a respect to general convenience and equity, and by the good sense and reasonableness of the particular case, for it must be supposed that it was the intention of the parties that such construction should take place. In the case of *Insurance Co. v. Allen* (Ala.) 24 South. 399, this court held the iron-safe clause to be a condition subsequent. This covenant and promissory warranty imposed upon the insured the duty to take a complete itemized inventory of his stock of goods within 30 days of the issuance of the policy, unless such inventory had been taken within 12 months prior to the date of its issuance, and, at all events, to take this inventory at least every 12 months from the time of the taking of the last one. It also exacted of him that he keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales, and shipments, both for cash and credit, from date of inventory, and during the continuance of the policy. He was required to keep these books and inventory, and also the last preceding inventory if such has been taken, securely locked in a fireproof safe at night, and at all times when the building mentioned in the policy is not actually open for business, or, failing in this, the assured will keep his books and inventories in some place not exposed to a fire which will destroy the storehouse. It is further provided that, in the event of his failure to produce his books and inventories for the inspection of the defendant company, the policy shall become null and void, etc. The purpose of incorporating this condition in the policy is patent from its language. That it was never within the contemplation of the parties that the books or inventory were to contain any item with reference to the building or fixtures is beyond cavil. The preservation of them was solely and exclusively for the purpose of ascertaining the value of the stock of goods covered by the policy in case of fire. They were the best evidence of this fact, and, if correctly kept, would furnish an unerring guide by which

the amount of defendant's liability as to the goods destroyed could have been ascertained. Besides, they stood as a barrier to the perpetration of any fraud by the assured with respect to the quantum and value of the goods destroyed. No such considerations could be invoked as to the application of this condition to the other subjects of insurance in the policy. Nor can it be fairly said that this condition entered into the inducement on the part of the defendant to issue the policy. It was not shown that the rate of insurance upon the house and fixtures would have been greater had the assured not included his stock of goods in the policy, or that a different rate was charged upon the separate valuation of each subject. Furthermore, we are unable to see how a failure to comply with the condition could possibly affect the risk upon the building and fixtures. If broken by the assured, and a loss occurs by fire, the assured loses the value of his goods, and this, too, whether the fire is occasioned by his willfulness, neglect, accident, or the incendiarism of another. There could then be no inducement for him to destroy the building, or the building and its contents. Unlike the case, in this respect, where there is a misrepresentation as to ownership of a building containing machinery more or less attached to the building, and both the building and machinery are the subjects of insurance in the same policy. Here we can well see how the hazard or risk upon the machinery would be increased if there was a false warranty as to the ownership of the building. The assured might be induced, if allowed to recover for loss of machinery, notwithstanding his false warranty, which would deprive of the right to recover for the loss of the house, to destroy the house for the purpose of getting the insurance upon the machinery. We are aware that in many of the states it is held that a policy like the present one is an entire contract, and a false warranty will avoid the entire policy. In others the rule is different, and, unless the false warranty is of such a nature as to increase the hazard or risk assumed by the insurance company as to all the subjects separately valued, the assured is allowed to recover for the loss or destruction by fire of those not falling under the influence of this construction. This latter rule is declared by the courts, holding it to be the fairer one and more clearly carrying out the intention of the parties to the contract. Whatever may be the rule as to the effect of false warranties, we are clearly of the opinion that the condition under consideration, as to its application, cannot by any rule of construction consonant with justice and reason and the manifest intention of the parties be made to so apply to the building and fixtures as that a breach of it would defeat his recovery for their loss.

In the case of *Assurance Co. v. Felbelman* (Ala.) 23 South. 759, the policy of insurance contained separate valuations made of the fixtures, wines, liquors, etc., and the pool

tables of the assured. The company insisted that the assured had avoided the policy entirely by giving a mortgage upon three of the pool tables, in violation of one of the conditions contained in the policy. This court held that the insurance as to each of the subjects was divisible, and that the assured might recover for the loss of the other items, notwithstanding he had avoided the policy as to the pool tables. In support of this view, in addition to the authorities therein cited, we find that in *Clark v. Insurance Co.*, 6 Cush. 342, the supreme court of Massachusetts held that the alienation by the assured of his shop, after the issuance of the policy, did not avoid the policy upon his tavern covered by the same policy, they each being separately valued; also that in *Speagle v. Insurance Co.* (Ky.) 31 S. W. 283, the supreme court of Kentucky held that, where four dwelling houses insured were burned, the fact that two of them were unoccupied, thus vitiating the policy as to them, does not prevent recovery for the other two, which were occupied. The case of *Mitchell v. Insurance Co.* (Miss.) 18 South. 86, decided by the supreme court of Mississippi, is directly in point. The court said: "The requirement of the iron-safe clause is that the last inventory and the books of account of sales and purchases shall be kept in such safe, or in some secure place other than the premises where the insured property was kept, and that a failure to produce the inventory and books after loss shall avoid the policy; but all this has reference only to such articles of merchandise as constitute the stock in trade. The store fixtures and furniture and the restaurant furniture, including the cooking stove, were never designed to be embraced in the inventory of the stock on hand, or to be entered and carried in the books of account, showing purchases and sales of goods by the insured. As to these the policy was not avoided by appellant's failure to observe the iron-safe clause. The contract was divisible, and it may be true that appellant could be defeated of a recovery for the sum for which the stock of goods was insured, and yet might have been entitled to recover for the furniture and fixtures of the store and restaurant. The case is not to be confounded with those in which any recovery for any part of the sum insured has been denied because of misrepresentations or fraud of the insured."

The evidence was without dispute that the plaintiff allowed his books to remain in the building in which he carried on the business of general merchandise, and that they were destroyed by the fire which destroyed the building, fixtures, and stock of general merchandise. That he avoided the policy as to the stock of merchandise by so doing is not questioned by him, and he is not entitled to recover for their loss, unless the defendant waived his breach of the condition. It is insisted, however, by plaintiff that the evidence shows a waiver. The evidence relied upon

as establishing this contention is in certain letters written by the agent of defendant to the plaintiff and his principal, and letters written by defendant to this agent with reference to the loss under the policy sued upon. In none of them do we find any recognition by the defendant or its agent of any liability to the plaintiff, but, on the contrary, there is in many of them a denial of all liability. In the only two letters received by plaintiff the liability of the defendant is expressly denied, for the reason therein stated that he had failed to comply with this condition of the policy. The evidence upon this point, in our opinion, was not as forceful as it was in the case of *Insurance Co. v. Allen*, supra, in which this court held, as a matter of law, there was no waiver of the breach of the conditions and covenants of the policy. What we have said renders it unnecessary to consider the rulings upon the pleadings in the cause. The evidence being without dispute upon the two propositions discussed by us, there was no error committed by the trial court of which the plaintiff or defendant can complain. Judgment affirmed on each appeal.

(21 Ala. 179)

MARBURY LUMBER CO. v. WESTBROOK.

(Supreme Court of Alabama. May 11, 1890.)

PARENT AND CHILD—MASTER AND SERVANT—NEGLIGENCE—PLEADING—INSTRUCTIONS.

1. In an action for damages for putting plaintiff's minor son to work at a dangerous place, without her consent, whereby he was injured, the question of negligence and contributory negligence are immaterial.

2. Where a demurrer to a pleatendering an immaterial issue is overruled, and plaintiff, instead of declining to plead further, takes issue on the plea, and goes to trial, the issue is made material.

3. The general affirmative charge cannot be given when the evidence is conflicting.

4. The giving of an abstract proposition in the charge is not reversible error.

5. The head block of a log carriage in a saw-mill was set by turning a wheel at the rear end of the carriage, which pushed the log in position to be cut. This duty was properly performed by standing on the floor of the mill, but it might be performed by riding on the carriage, and turning the wheel from that position. *Held*, that it was a dangerous place in which to set a boy 14 years old to work, though it might not have been such to a person of mature years.

6. The turning of the wheel was as dangerous a position to the boy as that of carrying stacker sticks at the mill; and, furthermore, a charge that it was not a more dangerous one was properly refused.

7. Consent of the boy's parent to his being employed to carry stacker sticks was not consent to his working at the wheel.

8. The parent did not impliedly consent to the employment at the wheel because she knew that the boy worked at the mill, and made no objection, where she did not know that he was employed at the wheel, and he had previously been employed at the mill, with her consent, at other work.

9. In determining whether a place to work is dangerous to a boy 14 years of age, the jury may consider the instincts and disposition of a boy of that age.

10. In an action by a parent for damages for

setting a minor son at work in a dangerous place, where the defense was plaintiff's consent to employment, and contributory negligence of the son, a charge that, if plaintiff consented, and the son was negligent, she could not recover, was erroneous in not stating that the son's negligence must have proximately contributed to the injury.

Appeal from circuit court, Autauga county; N. D. Denson, Judge.

Action by M. C. Westbrook against the Marbury Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The complaint contained two counts, the substance of which is stated in the opinion. The defendant pleaded the general issue and several special pleas setting up contributory negligence of the plaintiff's son, Guy Westbrook. Among these pleas were the following: "Second. Defendant says plaintiff's minor son was engaged by defendant to work in and about said mill by and with the consent of plaintiff, and that said plaintiff's son, Guy Westbrook, was negligent in and about the performance of his duties, in that he was at the time riding upon the log carriage, which was a highly dangerous position, when he should have been standing upon the ground or floor of said mill, which was a safe place, and the place where his duties called him; which said negligence contributed proximately to the injury complained of. Third. The defendant further says that plaintiff consented to the employment of her minor son by the defendant, and that at the time the said Guy Westbrook was injured he negligently allowed his feet to hang down off the log carriage upon which he was riding, and get under or between the wheels on said log carriage, which said negligence contributed proximately to the injury complained of." On the trial of the cause the plaintiff introduced evidence tending to show that at the time of the accident her son, Guy Westbrook, was not quite 14 years of age, and that he was employed by the defendant in its sawmill, and that he was engaged in setting the head block of the carriage on which were held the logs to be sawed; and that it was while in the discharge of this duty, and while riding on the carriage, that he met with the accident complained of. The plaintiff testified that she knew that her son, Guy Westbrook, had been formerly employed by the defendant, but it was in the capacity of "carrying stacker sticks" at the mill, and that setting the head block of the carriage was a much more dangerous occupation, and that she did not consent to her son's employment by the defendant for the doing of this work. It was shown that when a long log was on the carriage of the sawmill Guy Westbrook had to turn the block, which was done by means of turning a wheel at the rear end of the carriage, and, the wheel being thus turned, pushed the log which was on the carriage in a position to be cut by the saw. The defendant's testimony tended to show that the

plaintiff was informed of the employment of Guy Westbrook by the defendant before the accident, and interposed no objection thereto. Some of the witnesses for the defendant testified that setting the head block of the carriage was no more dangerous occupation than carrying stacker sticks. The other facts necessary to an understanding of the decision of the present appeal are sufficiently stated in the opinion.

In its oral charge, the court, among other things, instructed the jury as follows: "The plaintiff could not recover if she knew that her son was working at the mill, and had a reasonable time to object to his working at the mill, provided that she knew the character of his engagement in which he was employed." The defendant duly excepted to the court's giving this portion of its charge, and also separately excepted to the court's giving, at the request of the plaintiff, the following written charges: (1) "A consent to employment to roll stacker sticks, if there was such consent, is not necessarily a consent to work at the carriage of the sawmill." (2) "A place or work might be dangerous to a boy under fourteen years when it might not be dangerous to a person of mature years." (3) "In considering whether or not a place of work is dangerous to a boy of fourteen years, the jury may consider the natural instincts and disposition of a boy of that age." The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "If the jury believe the evidence they must find for defendant." (2) "If the jury believe the evidence, they must find for defendant on the first count of the complaint." (3) "If the jury believe the evidence, they must find for the defendant on the second count of the complaint." (4) "If the jury believe from the evidence that the plaintiff consented to the employment of her son, then she was guilty of any negligence of which her son was guilty; and, if such consent was given, she cannot recover." (5) "If the jury believe from the evidence that the plaintiff consented or had knowledge that her son was employed at said mill, then she cannot recover." (6) "If the jury believe from the evidence that plaintiff's son had been employed about said mill at various times before, with the knowledge, consent, and at the request of plaintiff, and that the employment in which he was engaged at the time he was hurt was of the same kind and nature, and not more dangerous, than that formerly engaged in, the plaintiff not having previously notified the defendant of her objection, it may be inferred from such facts that she consented to said employment." (7) "If the plaintiff's son had been employed before in like employment with plaintiff's consent, and was employed this time without plaintiff having objected, and made her objection known to the defendant, to do work not more dangerous, she will be presumed

to have consented to his employment, and cannot recover." There was verdict for the plaintiff, assessing her damages at \$500. The defendant thereupon moved the court to set aside the verdict of the jury and to grant him a new trial upon the grounds that the verdict was contrary to the law and evidence and was contrary to the charge of the court. This motion was overruled, and the defendant duly excepted. Judgment was rendered for the plaintiff in accordance with the verdict of the jury. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Ray Rushton and J. M. Falkner, for appellant.

MCCLELLAN, C. J. This action is prosecuted by Mrs. Westbrook against the lumber company. The complaint contains two counts. The first count, as amended, is as follows: "Plaintiff claims of the defendant ten thousand dollars as damages for that heretofore, to wit, on the 16th day of September, 1896, defendant was running and operating a sawmill at or near Bozeman, Alabama, and in or about the operation or running thereof the defendant wrongfully, without the consent of plaintiff, caused plaintiff's minor son, Guy Westbrook, whose father was then dead, and who was a member of plaintiff's family, to work in or about the running or operation of said sawmill at a place or at work which was highly dangerous to a person of his youth and inexperience; and, as a proximate consequence of said wrong, plaintiff's said son had his foot partly or entirely torn off, or so badly mangled or crushed that said foot was amputated, and her said son was made a cripple, and disfigured for life, and was rendered less able to work and earn money, and plaintiff was put to great expense and trouble to heal and cure his said wounds and injuries, and plaintiff lost the services of her said son for a long time, and his services were rendered permanently less valuable to her, and she lost his society, and suffered great mental pain and anxiety, by reason of his said injury; and that her said son was so injured while engaged in or about such dangerous work or place, all to her damage," etc. The second count, as amended, is substantially the same as the first. The gravamen of the action obviously is the alleged wrong of the defendant in putting the plaintiff's minor son to work at a dangerous place, or upon dangerous work, without her consent. This is the charge, and it manifestly involves no issue of negligence. If the defendant so put the boy to work without the mother's consent, and the boy was injured in consequence, the lumber company is guilty as charged, and answerable in damages to the plaintiff, regardless of negligence vel non on its part, and also regardless of contributory negligence vel non on the part of the boy, unless this latter issue was improperly imported into the case by the tender on the part of

the defendant, and its acceptance on the part of the plaintiff of a false issue as to whether the boy contributed to the injury by his own want of care. There was such tender on the part of the defendant by the interposition of pleas of contributory negligence. The plaintiff sought to avoid its acceptance by demurring to these pleas. But the demurrer was overruled, and she was forced to join issue on the pleas. This ruling of the trial court was erroneous. The issue was false, and foreign to the case. It would have been appropriate had the employment of the boy been with the consent of the mother. In that case she could only recover for defendant's negligence, and to a charge of negligence a plea of contributory negligence would have been a defense. But this erroneous ruling was favorable to, and made at the instance of, the appellant, and hence cannot be reviewed on this appeal. Plaintiff's remedy against the ruling was to decline to plead further, suffer a judgment, and appeal to this court. Electing to take issue on the pleas, and to proceed with the trial, the case is to be considered here as if she had voluntarily joined in an immaterial issue, thereby making it a material one. And, assuming that the pleas were established, the anomaly is presented of a case being made out for the plaintiff without proof of negligence, and being met and overturned by proof of contributory negligence imputable to the plaintiff. But neither the complaint nor the pleas can be said as matter of law to have been proved. The evidence tended to establish both, but not without conflict, or beyond adverse inference. The minority of the boy, and the facts that he was the plaintiff's son, and that his father was dead, were undisputed, and so, also, that he was just under 14 years of age at the time of the injury. We will not say that the averment of his membership in plaintiff's family was proved to the exclusion of inferences to the contrary; but there was evidence from which the jury were fully justified in so finding, and it is clear that he, whether, strictly speaking, a member of plaintiff's family or not, had not been emancipated; and there was also evidence tending to show that he had been put by defendant to work at a dangerous place, or upon dangerous work, without plaintiff's consent, and was injured in consequence. On the other hand, the boy being under 14 years of age, and the jury's conclusion as to his capacity to take care of himself resting on inferences to be drawn by them from the *prima facie* presumption of incapacity in connection with the evidence as to his mental and physical development tending to rebut that presumption, the inquiry as to contributory negligence was peculiarly for their consideration and solution. It being thus for the jury to determine whether the averments of the complaint and of the pleas were true, the court very properly refused to give the affirmative instructions requested by the defendant.

The truism of the second charge given for

the plaintiff, that "a place or work might be dangerous to a boy under fourteen years when it might not be dangerous to a person of maturer years," is not questioned; but it is said to be abstract in the case. If that were so, it would furnish no ground for a reversal. But it is not abstract. It may well be that there was no danger at all involved in properly turning the wheel which pushed the logs into position to be cut by the saw, which duty this boy was set to perform, but it may further well be that that was dangerous work or a dangerous place to work for a boy under 14 years of age, because of the likelihood or liability that such a boy would not perform this work properly by standing, as he should, on the ground or floor of the mill, but would indulge "the natural instincts and disposition" incident to his age, and ride up and down on the log carriage, and turn the wheel from that position, which was a dangerous place for him to be, and which work was dangerous to be done in that way. The fact that there are instincts and dispositions incident to adolescence, not counterbalanced by developed judgment and unrestrained by lessons of experience, is one of the main grounds upon which is rested the presumption of incapacity. The opportunity offered this boy of riding up and down on the log carriage was one to naturally appeal to him, leading him on to danger, and putting him to work in a place offering this opportunity was, in view of his youth and its natural inclinations, putting him to work in a dangerous place or at dangerous work, though the place and the work may have been safe enough for a man without such inclinations, or for one who, having them, also has experience and judgment to forego their indulgence, or to indulge them with safety conserving prudence and care. These considerations go to show that this second charge was not abstract, and also that the third charge given for the plaintiff is a correct exposition of the law. They further serve to demonstrate the infirmity of defendant's contention that the turning of this wheel was a less dangerous occupation than the carrying of stacker sticks, the work upon which plaintiff had consented for her son to be employed. It may be that the proper performance of the former service was not more, or even less, dangerous than the latter; but we have no right to assume careful, prudent, and proper performance of either by this boy. The danger in either is not to be measured with reference to a person of mature disposition, experience, and judgment, but with reference to this boy of presumed incapacity and childish instincts, disposition, and inclinations. The carrying of the sticks afforded him no opportunity or temptation to indulge his inclinations to his own undoing, but the work of turning the wheel offered him easy opportunity and alluring temptation to give rein to his innate inclinations, unconstrained by any sense of the danger incident to yielding to them. Hence, so far from it being possible to

affirm that the carrying of stacker sticks was more dangerous than work at the log carriage, there is every reason for affirming just the reverse in relation to this boy. Charges 5, 6, and 7 refused to defendant were each bad either in assuming or declaring that the work upon which the boy was engaged when injured was of the same kind, or less dangerous, or not more dangerous as or than that upon which he had previously been engaged with plaintiff's consent. Charge 4 refused to defendant is inaccurate in declaring that plaintiff was guilty of any negligence of which her son was guilty, assuming she had consented to his employment. His negligence would, in a proper case, be imputable to her, or, rather, be a defense against a claim for damages on her part; but it is not correct to say that she, in such case, would be guilty of his negligence. This charge is faulty in not postulating that the son's negligence proximately contributed to his injury, and it involves a direct tendency to mislead the jury to find that she consented to the boy's employment at the log carriage solely upon the fact that she consented to his employment to carry stacker sticks, or rather, to the conclusion that her consent to the latter employment was the equivalent of consent to the former, which it clearly was not, as the court properly declared in the first instruction given for the plaintiff.

There is no merit in the exception reserved to a certain part of the court's oral charge. The plaintiff could not be held to have consented to the employment of her son upon dangerous work, or in a dangerous place, because of her knowledge that he was employed at the mill, and failure within a reasonable time to object, when she had no knowledge that he was upon this particular work, and, to the contrary, had a right to assume that he was employed upon the less dangerous work upon which he had been previously engaged with her consent.

We do not find the verdict to be so unsupported by the evidence in any particular as to justify us in reversing the order of the lower court overruling and denying the motion for a new trial. Affirmed.

(121 Ala. 26)

BENJAMIN v. STATE.

(Supreme Court of Alabama. May 11, 1890.)
MANSLAUGHTER—INDICTMENT—NEGLIGENCE.

1. An objection fatal on demurrer to an indictment will prevail on motion in arrest.

2. Negligence is an element of manslaughter in the second degree only when the act causing death is not per se unlawful, but is negligently done. Hence it does not enter into the offense of shooting another with a pistol without malice or intent to kill.

Appeal from city court of Mobile; O. J. Semmes, Judge.

George Benjamin was indicted, tried, and convicted for manslaughter in the second degree, and sentenced to hard labor for the county of Mobile for one year. After the re-

turn of the verdict by the jury in said cause, the defendant moved the court in arrest of judgment upon the following grounds: (1) The indictment fails to allege that said killing was negligently done by defendant; (2) the indictment fails to show that the killing was carelessly done; (3) that the indictment fails to allege that the killing was the result of negligence or carelessness on the part of defendant; (4) that the indictment in said case fails to allege or charge any offense. The indictment is copied in the opinion. This motion was overruled, and to this ruling of the court the defendant duly excepted; and this is the only question presented for review on the present appeal. Affirmed.

Saml. B. Browne and Winfield S. Lewis, for appellant. Chas. G. Brown, Atty. Gen., for the State.

DOWDELL, J. The defendant was tried and convicted in the city court of Mobile for manslaughter in the second degree. The indictment charged that the defendant "unlawfully, but without malice or the intention to kill, killed Walter Phillips by shooting him with a pistol," etc. The form of indictment for manslaughter in the second degree is given in 2 Code, p. 332, and is as follows: "# 61. A. B. unlawfully but without malice, or the intention to kill, killed C. D. by negligently throwing a brick from the top of a house, etc. (or by negligently running over him with a horse, or by striking him with a stick, etc., as the case may be)." After verdict, motion was made in arrest of judgment in the court below, and was overruled. It is insisted by appellant that the indictment is defective and open to demurrer, and, being demurrable, the motion in arrest of judgment should have been sustained. There can be no doubt of the proposition that an objection fatal on demurrer to an indictment will prevail on motion in arrest of judgment. 1 Brick. Dig. p. 517, § 962. The present indictment is in strict compliance with the last clause in the form prescribed. It is too evident to admit of question that the form prescribed in the Code was intended to cover manslaughter in the second degree, whether death was negligently caused or otherwise. Negligence is not necessarily a constituent element of manslaughter in the second degree, as contended by counsel; for death produced by an intentional blow, but without malice or the intention to kill, would constitute that offense, and yet the element of negligence would be wholly absent. Negligence becomes a constituent element of the offense or crime where the act from which death results is not per se unlawful, but is negligently done, whereby the death of another is occasioned, and in such case the averment of negligence is essential to the validity of the indictment. If the act which produces death is in itself unlawful, negligence, as a constituent element of the offense, does not obtain.

Neither the throwing of a brick from a house-top nor the driving of a horse is per se unlawful; but when negligently done, whereby the death of another results, it would be manslaughter in the second degree. The striking of another with a stick, if the striking be intentional, negatives the idea of negligence, but involves the charge of an assault and battery,—the doing of an unlawful act. So the shooting of another with a pistol, where the shooting is intentional; the act being unlawful, no averment of negligence is required. Where killing results from the use of a deadly weapon, upon the principle that a person is presumed to intend the reasonable and natural consequences of his act, the presumption ordinarily would arise that the killing was intentional; but it is not a conclusive presumption, and may be rebutted by proof of facts showing an absence of intention to kill; and, where there is an absence of intention to kill, such want of intention may be averred in the indictment.

The indictment in this case, following the form prescribed in the Code, is sufficient, and not subject to demurrer. The motion in arrest of judgment was properly overruled. The judgment of the city court is affirmed.

(121 Ala. 425)

REESE v. McCURDY.

(Supreme Court of Alabama. May 9, 1899.)

PARTNERSHIP—ACCOUNTING—DISSOLUTION—LIENS—READING.

1. Where a partnership has ceased to do business, and no settlement of its affairs has been had, and one partner has all the funds, and has appropriated part of them, and has purchased property in his own name with them, and refuses to account, the other is entitled in equity to an accounting, and to have a lien on the property so purchased, and a dissolution of the firm.

2. A bill to obtain a partnership accounting, and to have a lien decreed on property purchased by defendant in his own name with partnership funds, must describe the property so purchased.

Appeal from chancery court, Lowndes county; Jere N. Williams, Chancellor.

The bill in this case was filed by the appellee, W. D. McCurdy, against the appellant, Charles E. Reese, Jr., for the settlement of a partnership between the complainant and the defendant. The averments and prayer of the bill are substantially stated in the opinion. The averment of the bill with reference to the purchase of property by Charles E. Reese, Jr., was that "with a large part of said moneys so appropriated he [Reese] has purchased property, and has taken the title to such property in his own name." To this bill the defendant demurred upon the following grounds: "(1) That said bill is without equity. (2) That said bill is vague and indefinite, in this: that it is sought therein to fix a lien upon property alleged to have been purchased with partnership funds, and said property is not described, and no reason is given why the same should not be described in said bill. (3) That said bill is vague, indefinite, and uncertain, in

this: that it is alleged therein that this defendant has appropriated to his own use the sum of five thousand dollars, and with a large part so appropriated has purchased property, and has taken the title to such property in his own name; but it is not averred or shown whether the said property is real or personal, and the same is not described, or attempted to be described, in the said bill. (4) That the said bill is defective in this: that it is sought by the same to have a lien fixed upon all property alleged to have been purchased by this defendant with partnership funds, and no facts are shown in said bill that entitle said complainant to any claim to or lien upon the said property in excess of one-half thereof. Wherefore the defendant prays the judgment of this honorable court whether he shall be required further to answer the said bill of complaint." Upon the submission of the cause upon the demurrers the chancellor rendered a decree overruling them. From this decree the defendant appeals, and assigns the rendition thereof as error. Reversed.

Watts, Tray & Caffey, for appellant.

DOWDELL, J. The bill in this case avers, in substance, that in the month of January, 1888, Reese and McCurdy, by written agreement, entered into a partnership to commence January 2, 1888, and to continue three years, unless sooner dissolved by death or by mutual consent; that the partnership was carried on under a written agreement and a verbal renewal of the same until January 1, 1897, when it ceased to do business, but there has been no settlement of its affairs. Reese had charge of all property, and received all money of the partnership, and has appropriated to his own use \$5,000 to which complainant is entitled, and with a large part of said money has purchased property, and taken the title in his own name. McCurdy has performed his part of the contract, but Reese has refused to balance the books of the firm, and has refused to pay over to McCurdy his share of the assets. The prayer is for an accounting by Reese, and that he be decreed to pay over what may be found to be due complainant; that a lien be declared upon all property purchased by him with money of the firm; that the partnership be dissolved; and a prayer for general relief.

The bill is not without equity, as contended by appellant, but we do think it is defective in some of its averments. One of the material purposes of the bill is to have a lien decreed on the property purchased with partnership funds, but it fails to point out or describe the property. "It is a principle of universal application in pleading, founded on reason and good sense, that the title of the plaintiff should be stated with sufficient certainty and clearness to enable the court to see clearly that he has such a right as warrants its interference, and the defendant to be distinctly

informed of the nature of the cause he is called upon to defend." "So complete must be the averments of fact that on demurrer, or decree pro confesso, the court can, without evidence, be able to perceive and affirm that complainant is entitled to the relief prayed." McDonald v. Insurance Co., 56 Ala. 468; Goldsby v. Goldsby, 67 Ala. 560; Cockrell v. Gurley, 26 Ala. 405. "The matters essential to complainant's right to relief must appear, not by inference, but by clear and unambiguous averment." Railroad Co. v. Lancaster, 62 Ala. 555; Duckworth v. Duckworth's Adm'r, 85 Ala. 70. "Relief can only be granted on allegations and proof, and the latter will never be allowed to supply omissions or defects in the former." McDonald v. Insurance Co., supra. Take the bill as confessed with its present allegations, upon what property would or could the court decree a lien in favor of complainant? It is plain that the question itself demonstrates the insufficiency of the averment in the bill. Besides, the defendant has a right to know, and should be informed by the pleading, what property is sought to be charged with a lien, to enable him to answer and make his defense. This feature of the bill is, in effect, a bill to declare a resulting trust in property. In such a bill it is essential that the defendant should know what property the complainant claims a trust in, and what he is called upon to answer. The bill is vague and indefinite in its averments, in not describing the property which it alleges was purchased with partnership funds, or assigning a reason for not so doing, and on that account was open to demurrer. The second, third, and fourth grounds of demurrer should have been sustained. For the error in overruling the demurrer, the decree of the chancery court is reversed, and the cause remanded.

(121 Ala. 609.)

CITY COUNCIL OF MONTGOMERY v. LEMLE.

(Supreme Court of Alabama. May 9, 1899.)

EMINENT DOMAIN—RIGHT TO COMPENSATION—INJUNCTION.

Under Const. art. 14, § 7, providing that an owner of property shall be compensated before it is taken by eminent domain, the owner may enjoin the taking of his property before compensation, regardless of any remedy at law by way of compensatory damages.

Appeal from city court of Montgomery; A. D. Sayre, Judge.

Bill by L. Lemle against the city council of Montgomery. From a decree for complainant, defendant appeals. Affirmed.

It was averred in the bill that the complainant was the owner of a lot on which was a brick building, situated at the corner of Washington and Court streets, in the city of Montgomery; that the city council of Montgomery, against the objection of the complainant, and without first proceeding to con-

demn said property for the purpose of grading the streets on which it abuts, as required by the charter of the city of Montgomery and the constitution of Alabama, was proceeding to change the grade of Washington street at the point on said street whereon the building abuts; that in pursuance of this intention the city council of Montgomery had, at the time of filing the bill, partially filled up the sidewalk on the side of the complainant's building on Washington street; that the change in said grade would result in great injury to the complainant's property, and would put the complainant to great trouble and expense in changing his building, so as to adjust the building for habitation, in accordance with the changed grade of the street. It was further averred that the said city council of Montgomery was insolvent, and not able to answer to the complainant for the injury done his property by changing the grade of the street, and that there was no adequate remedy at law for the complainant. The prayer of the bill was that the city council of Montgomery be restrained, pending the litigation, from attempting to raise or change the grade of the sidewalk on Washington street in the city of Montgomery, against and along which the property of complainant abuts, as set out in the bill, without first legally condemning the same for the purpose and paying the complainant such damages as may be assessed on proper *ad quod damnum* proceedings provided by law for the purpose; that upon the final hearing the defendant be perpetually enjoined from changing such grade and raising said sidewalk until it would have proceeded to such lawful condemnation, and the payment of the damages assessed for such lawful proceeding. Upon the filing of the bill a temporary injunction was issued restraining the city council of Montgomery from making any attempt to raise or change the grade of the sidewalk described in the complainant's bill without first legally condemning the same, and paying the damages assessed in such lawful proceeding. The defendant filed its answer, in which it admitted that it was about to change or raise the grade of the street as averred in the bill, but it was further averred that, after a conversation which the mayor of the city of Montgomery had with the complainant, it was believed that the complainant would consent to the change of the grade. The answer then denied the other material averments of the bill, and averred that the proposed change would have been beneficial to the complainant. The defendant then moved to dismiss the bill for the want of equity, and to dissolve the injunction upon the denials of the answer. Upon the submission of the cause upon these motions the court overruled each of them. From this decree the defendant appeals, and assigns the rendition thereof as error.

Graham & Steiner, for appellant. Gordon Macdonald, for appellee.

McCLELLAN, C. J. Under constitutional guaranties the property owner has an absolute right to compensation for property proposed to be taken and for injuries proposed to be done to property in the exercise by a municipal corporation of the right of eminent domain before the property is taken or the injury to the property is done; and to the effectuation of this right he has a remedy in equity by invoking the injunctive aid of a court of chancery, wholly regardless of the solvency or insolvency of such corporation, and of the inquiry whether he could recover and realize compensatory damages in an action at law or not. It is the expressed intent of the organic law that no property shall be taken or injured until the owner is compensated therefor, and every consideration of public policy and of abstract right requires that this intent should be strictly conserved by the courts, whether in a given case the owner would have a remedy at law for the damages resulting to him from the contemplated taking or injury or not. Const. art. 14, § 7; *East & West R. Co. v. East Tennessee V. & G. R. Co.*, 75 Ala. 275. The case of *Winter v. City Council* (Ala.) 14 South. 659, is not on the point involved in the case at bar. The bill makes a case for the injunctive relief prayed on the principle above stated, the answer does not deny any fact material to complainant's right to that relief, and the decree overruling respondent's motion to dismiss the bill for want of equity and to dissolve the injunction must be affirmed. Affirmed.

(121 Ala. 191)

RAINEY et al. v. McQUEEN.

(Supreme Court of Alabama. May 11, 1899.)

MORTGAGES—FORECLOSURE SALE—PURCHASE BY MORTGAGEE—REDEMPTION—PLEADING—EXECUTORS AND ADMINISTRATORS—SALE OF DECEDENT'S LAND.

1. Where a suit to redeem from a mortgage is brought by the mortgagor's heir within a year after she has reached her majority, she is not guilty of laches precluding her from maintaining the action.

2. A bill to redeem from a mortgage which alleges "that there was never any due foreclosure of the mortgage under the powers therein contained" does not thereby impliedly admit that there was a foreclosure.

3. Where a bill brought by the heir of a mortgagor to redeem from a mortgage alleges certain fraudulent acts by the mortgagee in connection with the sale of the equity of redemption by the administrators of the mortgagor, the bill is not demurrable on the ground that the particulars of the fraud are not alleged, as the right to redeem exists, independent of fraud in the administrator's sale.

4. An administrator's sale of a deceased mortgagor's equity of redemption is invalid if the petition to the probate court for leave to sell does not correctly describe the land.

5. An administrator's sale of the "right to redeem" from a mortgage conveys nothing to the purchaser, since it is a sale of a mere personal privilege, and not of an interest in land subject to sale for the payment of decedent's debts.

6. Land sold under a mortgage containing a power of sale was bid in by a third person, but the purchaser declined to complete the sale,

whereupon the mortgagee took the land at the price bid, and went into possession, but paid no consideration to the third person. *Held*, that the mortgagee was a purchaser at his own sale, from whom the mortgagor's heir was entitled to redeem.

Appeal from chancery court, Autauga county; J. R. Dowdell, Chancellor.

Suit by Lola McQueen against Maud Rainey and others. From a decree overruling defendants' demurrer and granting the relief prayed in complainant's bill, defendants appeal. *Affirmed*.

On September 25, 1895, Lola McQueen, the appellee, filed her bill, in which she alleged that on the 7th October, 1876, her father, J. D. McQueen, died, owning and in possession of certain land; that on the 22d February, 1876, he had executed and delivered to Mills Rogers and Jacob Faber a mortgage on said land to secure them against loss for signing certain notes, due one year thereafter, as his sureties, and to secure said Faber for advances which he might make during 1876 to enable him to make a crop; that upon his death the mortgagees took possession of the land, and have since remained in possession, through themselves or their representatives, as mortgagees, receiving the rents and profits; that the assets of the estate and the rents and profits so received by the mortgagees have fully paid the mortgage debt, and that defendants, claiming under such mortgagees, have no title to the land; that one of the mortgagees (Faber) and one Alexander were appointed administrators of her father's estate on 7th December, 1876; that, after the mortgagees had so gone into possession, they and the administrators entered into a fraudulent scheme to deprive complainant and her brothers of the property, which scheme was, in substance, that the administrators should file a petition in the probate court to sell the equity of redemption in the lands for the payment of debts which had no real existence, as all the parties concerned knew, and thus to enable Rogers to buy the land for a nominal price; that this plan was fully carried out; that early in 1877 the administrators filed a petition for the purpose of selling the said lands for the payment of the debts of the McQueen estates, the mortgagees consenting that the whole title might be sold under the order of sale prayed for; that on the 14th day of February the court entered an order of sale, in which it declared the complainant and her administrators did not proceed under this order, but on the 22d September, 1877, in pursuance of said fraudulent scheme, filed another petition to sell the equity of redemption in certain lands, which were intended to be those included in the mortgage, but which were misdescribed; that an order of sale was made on November 3, 1877, but there was no guardian ad litem appointed to act for the minors, and no depositions were taken, as in chancery cases, to prove the existence of debts and insufficiency

of personalty; that Mills Rogers was reported to have purchased said equity of redemption for \$580, and to have fully paid the purchase money, and a deed was ordered to be made to him; that the lands were worth \$4,000; that the administrators and mortgagees used the funds of the estate to pay off the debts described in the mortgage; that the rents collected by Rogers during the year 1877 were enough to pay the \$580 purchase money at the probate sale,—so, as a result of the scheme, Rogers got the land for nothing. Complainant further alleges that, on account of the irregularities, the probate proceedings were void; that there had been no regular and valid foreclosure of the mortgage, and, even if there had been, the probate proceedings were an admission of its invalidity. It was further averred in the bill that the complainant attained her majority during the year 1895, and that the facts averred in the bill were disclosed to her only a short time before the filing of the bill, and, further, that the complainant and her two brothers were the only children and heirs of the said J. D. McQueen. It was further averred that Mills Rogers died intestate on July 18, 1888, and left surviving him, as his only heirs at law, Mackey Davis and Maud Rainey, and that W. D. Whetstone was duly appointed administrator of the estate of Mills Rogers, deceased, and went into possession of the lands involved in controversy, and said administrator and the heirs of Mills Rogers have held them ever since the latter's death. It was further averred that Jacob Faber died May 13, 1895, and left surviving him three children, and that W. H. Hunt was appointed administrator. The two brothers of the complainant, W. D. Whetstone (as administrator of the estate of Mills Rogers, deceased), Mackey Davis, Maud Rainey, and the children of Jacob Faber, and his administrator, were made parties defendant to the bill. The prayer of the bill was that the complainant be decreed to be entitled to redeem the said lands, and entitled to the possession thereof upon the payment of the sum ascertained to be due under said mortgage, or under the said sale of the alleged equity of redemption, or otherwise, and that an accounting be stated between the said mortgagees and the complainant, etc.

The defendants Maud Rainey and Mackey Davis, the children and heirs of Mills Rogers, filed a joint and separate demurrer to the bill, alleging the following grounds: (1) There is no equity in the bill. (2) It appears by one of the alternative averments of said bill that the mortgage from which it is sought to redeem was foreclosed in the year 1887, and that complainant is barred by lapse of time of any right to redeem. (3) The said bill of complaint is defective in this: It alleges that there never was any due foreclosure of said mortgage under the power therein contained, but does not set up the facts on which it is claimed that the foreclosure was not legal and

proper. (4) The bill of complaint is defective in this: It avers that the alleged equity of redemption which the administrators of her father's estate petitioned to sell, on the allegations of the petition, had no existence whatever, but does not show or set out what such allegations were, but simply the conclusion of the pleader therefrom. And defendants jointly and separately moved to dismiss the bill for want of equity. There was no action on the motion, but each ground of demurrer was separately overruled. The defendant Maud Rainey, one of the two children of Mills Rogers, to whom his entire interest in the land had passed prior to the filing of the bill, on March 12, 1896, filed an answer, in which she denied that her father had ever been in possession of the land as mortgagee, and set up that he did not go into possession of it until after a foreclosure of the mortgage, and that when he went into possession he did so claiming to be the owner, and ever since, for nearly 20 years, he or his representatives had remained in possession, claiming it as their own, and adversely to complainant. She denies in toto that there was any such scheme or agreement between the administrators of McQueen and the mortgagees as that described in the bill. She also denies the conclusion of law stated in the bill, that the probate proceedings amounted to a consent that the foreclosure proceedings were invalid. She then sets up in her answer that after the law day of the mortgage, default having occurred, there was a due and regular foreclosure sale under and in accordance with the power therein, at which one T. W. Sadler purchased for his sister, Mrs. Cooke; that subsequently Mrs. Cooke became dissatisfied with her purchase, and transferred the same to said Rogers for the amount of the bid; that she believes deeds were executed by the mortgagees to Mrs. Cooke, and by Mrs. Cooke to Rogers, but that she has been unable to find the same, and that, even if none were executed, her father got a good title, and went into possession claiming the land as his own, and so remained until his death, in 1888; that subsequently, in 1892, her sister conveyed to her a half interest in the same, since which time she has been in possession, claiming to own the entire fee. The defendant Mackey Davis adopted the answer of Maud Rainey as that of hers, and the other defendants also answered the bill.

The evidence adduced showed that J. D. McQueen executed a mortgage as alleged in the bill to Mills Rogers and Jacob Faber on February 22, 1876, upon certain lands, which were described as follows: "N. $\frac{1}{2}$ of section 32, township 17, range 16." This mortgage was made an exhibit to the bill, and was proven as averred in the bill. It was further shown by the evidence that J. D. McQueen died October 7, 1877, and that regular letters of administration were granted to Jacob Faber, one of the mortgagees, and one J. L. Alexander, on December 17, 1876; that in Jan-

uary, 1877, the administrators filed a petition in the probate court asking for an order of sale of the lands of the estate of J. D. McQueen, deceased, for the payment of debts; that upon the hearing of this petition it was granted, except as to 160 acres of land, which were reserved as a homestead for the complainant and her two brothers, who were the only children and heirs at law of said McQueen; that this order was never executed by the administrators, but that on September 22, 1877, the administrators filed a petition in the probate court in which it was averred that J. D. McQueen, at the time of his death, "owned an equity of redemption, and also had the legal interest at the time of his death, in the following described lands, viz. the S. $\frac{1}{2}$ of section 32"; that prior to his death he executed a mortgage to Mills Rogers and Jacob Faber, and "that, under and by virtue of a power of sale embraced in said mortgage, said mortgagees did on Friday, the 20th day of April, A. D. 1877, offer said lands for sale to the highest bidder for cash, and Thomas W. Sadler became the purchaser thereof, and has thereby acquired the legal title to said lands"; that the right to redeem said lands is invested in the above-named heirs of James D. McQueen,—that is, the complainant and her two brothers. The prayer of this petition was for the sale of "the right to redeem said lands." It was shown that this petition was granted, and that, in pursuance of the order of the probate court, the administrators did, in December, 1877, sell the right to redeem the lands, and that Mills Rogers became the purchaser thereof for the sum of \$580, which amount was paid, and the sale confirmed. It was further shown that the lands contained in the mortgage were sold on April 20, 1877, under the power in said mortgage, and that Thomas W. Sadler bid off the lands at said sale for his sister, Mrs. A. C. Cooke; that, after the lands were bid off, Mrs. Cooke declined to take them, and thereupon Mills Rogers assumed the bid of Mrs. Cooke, and became the purchaser of said land. There was testimony for the defendants to the effect that at the sale under the mortgage a deed was made to Mrs. A. C. Cooke, and she immediately executed a deed conveying the same lands to Mills Rogers, but neither of these deeds was introduced in evidence. T. W. Sadler, in his deposition, testified in reference to this sale as follows: "That he knew that Mills Rogers and Jacob Faber held a mortgage on the lands and personal property of J. D. McQueen in Autauga county, and that said mortgage contained a power of sale, and was due on the 22d day of February, 1877, for about \$1,684. That he also knew that the lands were advertised in the Autauga Citizen, a newspaper published in Autauga county, as required by the terms of said mortgage. That on the 20th day of April, 1877, said lands were offered for sale to the highest bidder for cash, and that witness made the last bid for the lands, with the

understanding that Mrs. A. C. Cooke, who was a sister of witness, would take the lands and settle Rogers' debt unless there was a better bid. Notice of the said sale was given by three weekly insertions in the county newspaper, and the property was offered for sale at the court house, in the town of Prattville, and he [witness] bid the lands off for Mrs. Cooke, but does not remember the price, except as stated. Mrs. Cooke decided not to take the lands, and Rogers took the lands at the price bid for her. And his recollection is that Rogers went into possession under this sale. He does not know of any agreement between Rogers and any one to the effect that he should have the property at any time before the sale. * * * That he does not know that she ever paid anything to any one on account of the purchase of the McQueen lands. That she did authorize witness to bid at the sale of said lands. That the authority was all verbal. That he [witness] was the attorney for said Mills Rogers and the agent of Mrs. Cooke. That he does not remember the amount he bid at said sale. The amount was not arranged between Rogers and witness, except that he [witness] should bid the amount due. And that he [witness] proposed that Mrs. Cooke should take the property if there was no better bid. * * * That he does not know that Faber or Rogers ever had any interview with Mrs. Cooke. That he [witness] had no agreement with Rogers prior to the sale of the land as to what should be done in the event that Mrs. Cooke declined to take the land. This is a fact that Mrs. Cooke authorized witness to buy the McQueen lands at the sale made on the 20th day of April, 1877, and it is also true that, acting as her agent, he [witness] bid off said lands. That he saw Mrs. Cooke soon after this sale, and she declined to take the lands. That he [witness] insisted that she should do so, but she persisted in her refusal. That he is sure that no money passed between Rogers and Faber and Mrs. Cooke or witness in reference to this sale. That he does not know as to the credits given." The evidence for the complainant showed that the mortgagees went into possession of the lands involved in controversy in 1877, and that Mills Rogers remained in possession thereof up to the time of his death, and that the defendants Maud Rainey and Mackey Davis, and his administrator, were in possession thereof at the time of the filing of such bill. Such other facts as are necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion. Upon the final submission of the cause on the pleadings and proof, the chancellor decreed that the complainant was entitled to the relief prayed for, and adjudged that she be allowed to redeem the land, and ordered an account to be stated by the register. The defendants appeal, and assign as error the decree overruling the demurrers of the defendants, and the final decree granting the complainant the relief prayed for.

Tompkins & Troy, for appellants. Gunter & Gunter, for appellee.

SHARPE, J. The relief sought by this bill of complaint is the redemption of lands from a mortgage executed by complainant's father, James D. McQueen, on the 22d of February, 1876, in favor of Jacob Faber and Mills Rogers, to secure Faber for supplies to be furnished, and to indemnify both of them against liability as sureties for the mortgagor on certain notes, aggregating, besides interest, about \$1,598, due February 22, 1877. In the instrument power was given the mortgagees, in case of McQueen's default in payments, to sell the property at public outcry to the highest bidder, after a prescribed notice. John D. McQueen died in October, 1876. This bill was filed on the 25th of September, 1895, which, according to its averments, was just after complainant had arrived at the age of 21 years. The proof shows the suit was begun during the first year of her majority. Her rights, if any, are not affected by prescription; and, having sued within a reasonable time after becoming legally capable, she is not chargeable with laches. *Alexander v. Hill*, 88 Ala. 487, 7 South. 238; *Lindsay v. Cooper*, 94 Ala. 170, 11 South. 325.

The equitable right of redemption, upon the death of the mortgagor, passes to his heir. *Butts v. Broughton*, 72 Ala. 294; *Jones, Mortg.* § 1055. Therefore the right to redeem the land in question resides in the complainant, unless it has in some way been legally cut off. The bill alleges "that there never was any due foreclosure of the mortgage under the powers therein contained." The grounds of demurrer, assuming that the bill shows a foreclosure was had, are without merit.

The averments of the bill relating to the sale of what was termed the "equity of redemption" are directed only to showing fraud. They are not necessary to the complainant's case, since her right to redeem is not dependent upon fraud. If a valid sale was had of the equity of redemption, it might furnish a defense to her claim; but, being defensive matter, she was not bound to set out the petition for such sale. The bill contains equity, and there was no error in the failure to dismiss it, or in overruling the demurrer.

The equity of redemption in mortgaged lands, such as exists before foreclosure, is a substantial interest in the land itself, which the probate court may, under its statutory jurisdiction, order sold by the personal representative for the payment of debts. *Perkins' Ex'rs v. Winter's Adm'x*, 7 Ala. 855; *Duval's Heirs v. Bank*, 10 Ala. 636; *Bolling v. Jones*, 67 Ala. 508. By proper proceedings under such authority the heir is divested of the right to redeem, and the purchaser is invested with it. *Bolling v. Jones*, supra. Such proceedings in the probate court being in rem, the property of which a sale is sought must be named and described in the petition for sale. Code, § 158. The descrip-

tion of the property is essential to the court's jurisdiction, and its order can vest no title to or interest in land not included in the averments and prayer of the petition. *Austin v. Willis*, 90 Ala. 421, 8 South. 94; *Fleider v. Childs*, 73 Ala. 567. The petition under which a sale of the right of redemption in these lands was attempted is found in the proof. Besides the fact that its description of lands applies to only a small portion of the mortgaged lands, the interest of which it prays, the sale is clearly not the equity of redemption, but is only the statutory right to redeem from a sale alleged to have been made under the mortgage to Thomas W. Sadler. Such a right is a mere privilege personal to those in whom the statute vests it, and is not an interest in the land. *Parmer v. Parmer*, 74 Ala. 285; *Childress v. Monette*, 54 Ala. 317; *Association v. Parker*, 84 Ala. 298, 4 South. 268; *Otis v. McMillan*, 70 Ala. 46. The jurisdiction of the probate court could not attach under this petition to order the sale of any interest in the mortgaged lands, and the attempted sale under the order was invalid, without regard to the question raised as to whether proof was taken as the statute required.

But defendants insist that the mortgage was foreclosed by a sale made under the power to a third person in 1877, whereby complainant's equity was cut off; and the case of *Durden v. Whetstone*, 92 Ala. 480, 9 South. 176, is relied on as supporting that position. In that case it was found from the proof that at the mortgagee's sale third persons bid off the land; that one of them declined to complete the sale, and the other assumed the bid, and some days thereafter, by agreement between him and the mortgagee, the mortgagee took the land at the price bid. It was there held, following *Cooper v. Hornsby*, 71 Ala. 62, that, the sale being regular, and having been made in good faith to a third person, it cut off the equity of redemption, notwithstanding the absence of writings and the passing of money between the parties, and that the mortgagee, having acquired the land by purchase from a third person, did not stand in the attitude of a purchaser at his own sale. It is here shown by the proof that in April, 1877, and after due notice, the mortgaged lands were offered for sale under the power. The character of that transaction must be ascertained from the testimony of Thomas W. Sadler, which is undisputed. He states, in substance, that when the lands were offered for sale there was due on the mortgage about \$1,684; that he acted in the matter as the attorney for the mortgagees, and also as the agent of his sister, Mrs. Cooke; that by her authority he bid off the lands for her, with the understanding that she "would take the lands and settle Rogers' debt unless there was a better bid." We quote from the record that he "does not remember the price, except as stated. Mrs. Cooke decided not to take the lands, and Rog-

ers took the lands at the price bid for her, and his recollection is that Rogers went into possession under this sale. He does not know of any agreement between Rogers and any one to the effect that he should have the property at any time before the sale." He states further that he does not know that the mortgagees ever had any interview with Mrs. Cooke; that "no money passed between Rogers and Faber and Mrs. Cooke or witness in reference to this sale; that he does not know as to the credits given." The foregoing is the substance of the testimony relating to the attempted foreclosure, and it does not show that either Mrs. Cooke or Sadler bought and sold the land to Rogers. On the contrary, it appears that Mrs. Cooke, for whom the bid was made, simply declined to take the lands, whereupon Rogers took them without further negotiation with either her or Sadler. Taking through no other purchaser, Rogers' holding must have been as mortgagee in possession as such, or as a purchaser at his own sale; and, in either case, complainant, having seasonably elected to redeem, is entitled to relief. *Alexander v. Hill and Cooper v. Hornsby*, supra. The decree of the chancery court must be affirmed, at appellants' cost.

No specific assignment has been made to that part of the decree directing a reference to the register, and we will not, in this opinion, anticipate questions that may arise thereon. As to such part, the decree is interlocutory, and subject to future control of the chancery court as may be necessary to the rendition of a proper final decree.

(121 Ala. 210)

BROWN v. HUNTER.

(Supreme Court of Alabama. April 6, 1899.)

QUIETING TITLE—PARTITION—MARRIED WOMEN—HARMLESS ERROR.

1. A bill to cancel a deed for actual fraud cannot be maintained as one to quiet title, where there is no averment that complainant is in possession, and no obstacle is shown that would prevent the assertion of complainant's rights by an action of ejectment.
2. The deed of a married woman is void, where the husband did not join therein or consent thereto as required by Code 1886, § 2348.
3. Under Acts 1896-97, p. 17, giving courts of chancery jurisdiction to sell for partition property held jointly or in common, whether or not defendant denies complainant's title and sets up adverse possession, a person out of possession may sue in equity to establish a disputed interest in realty, and to have a sale for partition.
4. It was harmless error to sustain a demurrer to a bill, by reason of which complainant was obliged to make additional averments, where he failed on the hearing to prove a vital allegation in the bill as it stood originally.

Appeal from chancery court, Mobile county; W. H. Tayloe, Chancellor.

Bill by Louisa Hunter against Bettie Turner Brown and others. From a decree for complainant, Bettie Turner Brown appeals. Affirmed.

The bill in this case was filed on January 16, 1897, and averred the following facts: On

October 29, 1881, F. Laffre conveyed to Charles Jackson and Eli Brown a certain described lot in the city of Mobile. On November 1, 1881, Charles Jackson and Eli Brown conveyed said lot to Lucinda Brown, Mollie Brown, and Louisa Wilson. Lucinda Brown was the wife of Eli Brown, and died intestate November 20, 1894, leaving, surviving her, her husband, Eli Brown, and, as her only heirs at law, her three children, the complainant, John Wilson, and Louvinia Moore. There was no administration on the estate of Lucinda Brown, and no necessity for any, as there were no debts against the estate. On October 11, 1894, the complainant married John Hunter, and lived with him continuously ever since as his wife. Previous to her marriage to John Hunter, she was named Louisa Wilson. After the death of Lucinda Brown, Eli Brown married one Bettie Turner, on May 28, 1896. All of these facts averred in the bill were proved by the evidence introduced. The bill then averred that on July 29, 1896, Bettie Turner Brown went into possession of the lot above referred to, and has been in possession ever since, claiming the same as her own, under a deed purporting to be signed by Eli Brown and the complainant, Louisa Hunter, and purporting to convey to Bettie Turner Brown said lot of land; that at the time the complainant signed said deed she was a married woman, and was living with her husband, John Hunter, and that her husband did not give his consent, in writing or otherwise, to her signing said deed, and did not join with her in the execution thereof, and that the said Bettie Turner Brown fraudulently procured the complainant to sign said deed by inducing her, with false representations, to believe that it was a bill of sale for some furniture, and not allowing the complainant to read the same before signing it; and that, as a matter of fact, the complainant received no consideration whatever for signing said deed. It was then further averred in the bill that Mollie Brown, Bettie Turner Brown, John Wilson, and Louvinia Moore all owned said lot as tenants in common, but that the interest of Bettie Turner Brown is a life interest only to an undivided one-third interest, which was owned by Lucinda Brown, and which life interest accrued to Eli Brown, and which he conveyed to Bettie Turner Brown by the deed above referred to. It was then averred that said lot was too small in area to equitably divide or partition it among the tenants in common, and it was therefore necessary to sell the whole lot in order to effect an equitable division among the said owners. Bettie Turner Brown, Mollie Brown, John Wilson, and Louvinia Moore were made parties defendant, as was also one J. M. Yockers, who claimed an interest in the life interest of Bettie Turner Brown in said lands, under a mortgage made to him by said Bettie. The prayer of the bill was that the deed purporting to be signed by the complainant be declared null and void in so far as it

purported to convey any of complainant's interest, and, further, that a sale of said lands be ordered for the purpose of dividing and distributing the proceeds thereof among the several owners. The respondent Bettie Turner Brown filed her answer, which she asked to be taken as a cross bill, in which she averred that, in the purchase of the lot in controversy by Charles Jackson and Eli Brown from F. Laffre, Eli Brown paid the whole of the purchase money for said lot out of a fund which had been placed in his hands by the father of Bettie Turner Brown, to be held by said Eli Brown in trust for her and her brother; that her brother had died, leaving no children, and that the respondent was his only heir at law; and that her father had also died. It was then further averred that after the execution of said deed from Charles Jackson and Eli Brown to Lucinda Brown, Mollie Brown, and Louisa Wilson, the said Eli Brown also used a part of the trust fund to build a dwelling house on said lot; that this respondent, Bettie Turner Brown, first learned of the use of the trust fund in the purchase of the lot and the building of the house some time after May, 1896; and that, after consultation with a lawyer, the deed from Eli Brown and Louisa Hunter to her was executed with the intention to convey said lot to this respondent, in consideration of the facts as above stated. Louisa Hunter, John Wilson, Louvinia Moore, and Mollie Brown were made parties defendant to the cross bill; and its prayer was that a trust be declared in said lot in favor of the cross complainant, and that it be declared that Louisa Hunter, John Wilson, Louvinia Moore, and Mollie Brown held the legal title to said lot in trust for Bettie Turner Brown, and they be required to execute deeds conveying said lot to her. The defendants to the cross bill demurred to it upon the following grounds: "(1) Because said cross bill sets up matter which has no connection with the subject-matter of the original bill, and which is an independent and distinct subject of litigation. (2) Because said cross bill shows that whatever rights to a resulting trust Bettie Turner Brown may have had are barred by the statute of limitations. (3) Because said cross bill shows on its face that Bettie Turner Brown is barred by her laches in failing to assert her claim sooner. (4) Because said cross bill fails to excuse the laches of said Bettie Turner Brown in not asserting her claim sooner. (5) Because said cross bill shows that the deed of conveyance by Eli Brown and Charles Jackson to Lucinda Brown, Mollie Brown, and Louisa Wilson recites a valuable consideration; that this deed is dated November 1, 1881, and said cross bill shows that any right Bettie Turner Brown may have had to impeach said deed is now barred by the statute of limitations. (6) Because said cross bill does not set forth the facts on which the alleged trust is created." This demurrer was sustained, and thereupon the complainants in the cross bill amended it

by adding thereto the following averments: "That said Brown remained in possession of said lot up to the time of the execution of the conveyance by said Brown and Louisa Hunter to this cross complainant; that the names of Mollie Brown and Louisa Wilson were inserted in the deed executed by said Brown and Jackson at the direction of said Brown, and they did not for a long while know of the fact of such deed being made to them, and that neither of them have ever been in the possession of said lot; that said grantors knew all the facts at the time said deed was executed, and said deed was intended by them to convey said lot to this cross complainant because of the use of the money belonging to her, and as a recognition of her equitable rights to said property." To the cross bill, as amended, the grounds of demurrer originally interposed to it were refuted, but there was no ruling made upon these demurrers. Louisa Hunter filed her answer to the cross bill, in which she denied that she had, at the time she signed the deed, on July 29, 1895, any knowledge of the facts set forth in the cross bill, or that the deed was intended by her to convey said lot to the cross complainant, because of the alleged use of the cross complainant's money by Eli Brown, or that said conveyance was intended as a recognition by her of any equitable rights of cross complainant to said property. In her said answer to the cross bill, she further shows that said lot was conveyed to her, Mollie Brown, and Lucinda Brown on November 2, 1881, by Eli Brown and Charles Jackson, and said deed was recorded January 8, 1884, in Deed Book 49 of the record books of Mobile county, and she and her mother, Lucinda Brown, lived on said land with Eli Brown, claiming the land as their own, under said deed, until the death of said Lucinda Brown, on November 20, 1894; that, after the death of said Lucinda Brown, complainant was in possession until the premises were taken possession of by said cross complainant in July, 1895; that during said time she never heard of said Bettie Turner Brown, or of her equitable claim, nor had she heard of said claim until after the filing of the cross bill in this cause; that, if cross complainant had any such claim, she never asserted it to complainant during the time she was in possession of said lot; and that the same is now barred by the laches of said cross complainant. The other defendants to the cross bill filed answers setting up the facts substantially as stated in the original bill. The evidence introduced for the complainant proved the facts as averred in her bill and in the answer to the cross bill. It was also shown by the evidence for the complainant that, after the purchase of said lot of land by Eli Brown and Charles Jackson from F. Laffre, they executed a deed to Lucinda Brown, Louisa Hunter, and Mollie Brown, as alleged in the bill, and that Lucinda Brown, after the execution of said deed, contributed money towards the erection of a

house thereon, and she and the other grantees in said deed occupied and claimed said house and lot as their own; that, at the time of the purchase of said lot by Eli Brown, neither Bettie Turner Brown nor her father were known by Eli Brown nor any of the other parties in interest. The complainant, Louisa Hunter, as a witness, testified to facts showing that she was induced to sign the deed executed in July, 1895, by false representations, and that it was not her intention to convey her interest in said lot to Bettie Turner Brown, and that at the time she signed said deed she was a married woman, and her husband did not join with her in the execution thereof. She further testified that if she had known the paper she was signing was a deed, as it purported to be, she would not have executed it. Bettie Turner Brown and Eli Brown both testified that the land was paid for with money which Bettie Turner Brown's father had given to Eli Brown to be kept in trust for Bettie and her brother, and that her father and brother had both died, leaving Bettie Turner Brown the sole surviving heir of her brother; and they both denied making any false representations to Louisa Hunter to induce her to sign said deed. It was further shown by the testimony of Bettie Turner Brown that she came to Mobile from North Carolina, and had been living in Mobile three or four years; and she further testified that she married said Brown, under the advice of her attorney, after she had known him only three or four days. Eli Brown testified that he met Bettie Brown on Monday, and married her the next day. Such other evidence as is necessary for an understanding of the decision on the present appeal is sufficiently stated in the opinion. Upon the submission of the cause on the pleadings and proof, the chancellor decreed that the cross complainant was not entitled to the relief prayed for in her cross bill as amended, and ordered the same dismissed, and further decreed that the complainant, Louisa Hunter, was entitled to the relief prayed for, and ordered that the deed executed by her to Bettie Turner Brown on July 29, 1895, be annulled and set aside, and be declared void, in so far as it purports to convey the interest of said Louisa Hunter in the lot in controversy. He further decreed that the lot in controversy be sold for distribution. The defendant Bettie Turner Brown appeals, and assigns as error the sustaining of the demurrer to her cross bill, and the rendition of the final decree granting the relief prayed for by the complainant in the original bill.

R. T. Ervin, for appellant. L. H. & E. W. Faith, for appellee.

TYSON, J. The bill in this cause cannot be maintained as a bill to remove a cloud upon the title of complainant to the lot in controversy, as there is no averment that she was in possession of the lot at the date of its

filing, and no averment of any special equity showing some obstacle or impediment which would prevent or embarrass the assertion of her rights at law. Furthermore, the evidence is without dispute that complainant's right to possession was denied by the appellant, and she was excluded from it by the appellant, who claimed the entire property, and no special equity is shown by the testimony precluding or impeding the complainant in maintaining her action in ejectment to recover her one-third undivided interest in the lot. *Plant v. Barclay*, 56 Ala. 561; *McLean v. Presley's Adm'r*, Id. 211; *Daniel v. Stewart*, 55 Ala. 278; *Baines v. Barnes*, 64 Ala. 375; *Rea v. Longstreet*, 54 Ala. 291; *Jones v. De Graffenreid*, 60 Ala. 145. It is true, the bill contains an averment of actual fraud in the procurement of complainant's signature to the deed which she seeks to have canceled. This does not affect the principle announced above, or give a court of equity jurisdiction to maintain the bill if the evidence should be found to support the averment. If the execution of the deed was procured by fraud, it has no legal existence either in a court of equity or a court of law, and she could, having the legal title, recover in ejectment. *Thompson v. Drake*, 32 Ala. 103; *Forrest v. Camp*, 16 Ala. 648; *Turnipseed v. McMath*, 13 Ala. 44; *Morris v. Harvey*, 4 Ala. 300; *Swift v. Fitzhugh*, 9 Port. (Ala.) 39; *Mordecai v. Tankersly*, 1 Ala. 100. It appears, however, from the evidence, and it is averred in the bill, that complainant was a married woman at the date of the execution of the deed by her, and that her husband did not join in its execution, or consent, in writing or otherwise, to her signing it. Section 2348, Code 1886, which was in force at the date of the execution of the deed by complainant to the respondent Bettie Turner Brown, prohibited the alienation by the wife of her lands, or any interest therein, without the assent and concurrence of the husband; his assent and concurrence to be manifested by his joining in the alienation in the mode prescribed by law for the execution of conveyances of land. The deed was therefore void, and conveyed no title to the respondent to complainant's one-third interest in the lot.

The bill, in addition to seeking to have this deed canceled, also seeks to have the lot sold for division and distribution of the proceeds among its several owners. All who have an interest in the lot are made parties, and each interest of the several owners in common is distinctly and clearly averred; and there is no controversy as to the legal title of either of the shares or portions, except the complainant's. It further appears, without dispute, from the evidence, that the lot cannot be equitably divided, and that a sale is necessary; and an averment of these facts appears in the bill. It further appears from the evidence, without dispute, that the respondent has denied the right of the complainant to the possession of the lot, and also her title to any

portion of it, and that the respondent (appellant) has claimed, within a recent period after her marriage to Eli Brown, the entire lot, and has been in the possession of it, and also claimed it under the deed from Eli Brown and complainant to her in 1895. There can be no doubt, under the testimony, that appellant was holding the lot adversely to the complainant at the time the bill was filed, and had been so holding for more than two years, and that this was known to complainant. Courts of equity, without the aid of some statutory provision conferring it, have no jurisdiction to sell lands for partition among adult owners, without their consent. *Wilkinson v. Stuart*, 74 Ala. 198; *Deloney v. Walker*, 9 Port. (Ala.) 497; *Oliver v. Jernigan*, 46 Ala. 41. Under section 3262, Code 1886, jurisdiction was conferred upon the chancery court, concurrent with the probate court, to divide or partition, or to sell for division or partition, any property—real, personal, or mixed—held by joint owners or tenants in common. In *Sellers v. Friedman*, 100 Ala. 499, 14 South. 277, this court, in construing this section, held that where a defendant holds possession of the property adversely, under claim of title founded on disputed facts, a court of equity had no jurisdiction to sell for partition. To the same effect is the case of *Davis v. Bingham*, 111 Ala. 292, 18 South. 660. Since these adjudications, the act of November 27, 1896 (Acts 1896-97, p. 17), was enacted, which is in the following words: "The courts of chancery shall have jurisdiction to divide or partition, or to sell for partition or division, any property, real, personal or mixed, held by joint owners or tenants in common, whether the defendant denies the title of the complainant or sets up adverse possession or not." The manifest purpose of this act was to obviate the difficulties pointed out in the two decisions last above referred to, and to avoid compelling the complainant to first establish her legal title, when disputed, in a court of law, before she could prosecute her suit in a court of equity for partition, or a sale for partition, and to permit such a bill to be maintained by a complainant out of possession, as against her joint tenants or tenants in common, provided she can show that she has such an interest or title in the property, though disputed, as entitles her to share in the distribution of the proceeds.

What we have said is conclusive of complainant's right to maintain the bill in this case; her deed to the respondent Brown being void for want of a joinder by her husband with her in its execution, unless the special equities set up in respondent's cross bill should prevail. It appears that a demurrer was sustained to her cross bill as first amended, and thereupon a second amendment was filed, which, in our opinion, contained immaterial averments, and imposed upon her no greater burden of proof than she would have had to bear under the first amendment. After this second amendment, a demurrer was

again filed, but was not ruled upon; and the cause was submitted upon the pleadings and proof for final hearing, and a decree was rendered dismissing the cross bill upon the merits. After a careful examination of the testimony offered by respondent in support of the equities invoked in her cross bill, we are of the opinion that it was not her money used by Eli Brown, her husband, in the purchase of the lot in controversy. We are unable to reach any other conclusion, growing out of the improbable state of facts narrated by Brown. We feel strengthened in this conclusion when we consider the fanciful, imaginary, and accidental occurrence of their becoming lovers, which ripened into matrimony within two or three days. A failure to make this satisfactory proof would necessarily have resulted disastrously to the cause of action in the cross bill, no matter what other averments germane to it may have been made. For this additional reason, if it be conceded there was error in sustaining the demurrer to it which resulted in the second amendment, it was without injury. The decree must be affirmed. Affirmed.

(121 Ala. 250)

STAMPHILL v. BULLEN.

(Supreme Court of Alabama. May 17, 1890.)

EVIDENCE—LATENT AMBIGUITY—DEEDS—PROOF OF EXECUTION—ACKNOWLEDGMENT.

1. A deed conveyed land bounded by the bank of a mill race. The race had two banks,—one which immediately formed the race, and another which was thrown up to prevent an overflow. *Held*, that parol evidence was competent to show which bank was meant by the description.

2. A certificate of acknowledgment to a deed which does not certify that the grantor was informed of the contents of the conveyance, or that he voluntarily signed it, is insufficient, and such a deed is not admissible in evidence without proof of execution.

3. A conveyance of property not recorded within 12 months after its execution is not admissible in evidence without proof of execution, since, under Code 1896, § 992, a conveyance, to be self-proving, must be acknowledged and recorded within that time.

4. Under Code 1896, § 1797, providing that the execution of an instrument may be proved by the maker, the testimony of a husband alone, who joins his wife in a conveyance of her separate property, is insufficient proof of its execution.

Appeal from circuit court, Franklin county; Thomas R. Roulhac, Judge.

Action by William G. Stamphill against La Fayette Bullen to recover damages for trespass upon the plaintiff's land and cutting timber therefrom. The trial was had upon issue joined upon the plea of not guilty. The plaintiff, as a witness in his own behalf, testified that he owned a mill on or near Bear creek, in Franklin county; that the water used in running said mill flowed from an artificial mill race cut for that purpose through the N. W. $\frac{1}{4}$ of section 28, township 7, range 15, in said county; that on the north side of said

mill race, varying from 10 to 25 yards from the margin of said mill race, there was an artificial bank or levee, which had been thrown up for many years to prevent the overflow of water from the mill race; that said artificial embankment runs some distance down said mill race in a zigzag line, approaching at some points to within a few yards of the mill race, and at other points being at a greater distance from the mill race; that the strip of land left between the margin of the mill race and this artificial levee or embankment was covered with trees of various kinds; that this strip of land was owned by the plaintiff, and it was for cutting trees therefrom that he now complains. The plaintiff further testified that, before the cutting of the trees complained of, he sold and conveyed to one Serena Bullen a tract of land off the N. W. $\frac{1}{4}$ of section 28, township 7, range 15, north of said mill race, and the southern boundary of the tract so sold and conveyed to Serena Bullen was the "bank of said mill race," and was so described in said deed. The plaintiff offered to prove that he pointed out to said Bullen, in the negotiation for the sale, the artificial embankment or levee as the southern boundary of the land, and that it was agreed by and between him and Bullen that this embankment should be the boundary line between them. The defendant objected to this evidence upon the ground that the deed alone could be looked to to determine the boundary. The court sustained the objection, and refused to allow the witness to so testify, and to this ruling the plaintiff duly excepted. The plaintiff further testified that he never parted with the strip of land between the margin of the mill race and the artificial embankment, and that, while he was in possession thereof, the defendant, against his will and without his consent, entered upon said strip of land, and cut down many trees from said strip, causing the damages of which he now complains. The defendant offered in evidence a deed from the plaintiff to Serena Bullen. In this deed the land conveyed was described as follows: "A portion of the northwest quarter of section 28, T. 6, R. 7, in Franklin county, Alabama, commencing on said quarter at the northeast corner, thence south to Big Bear creek; thence down said creek to W. G. Stamphill's mill race, down said bank of said race to the section line, run north to section corner; thence east to the commencing corner,—supposed to be fifty acres." The certificate of acknowledgment, which was signed by John B. Cox as notary public, was as follows: "Personally appeared before me, J. B. Cox, a notary public in and for said county, Wm. G. Stamphill and Nancy Stamphill his wife who is known to me acknowledge before me that they signed the foregoing conveyance of the contence[?] of the foregoing deed on the day the bares date and the said Nancy Stamphill after being examined separately and apart by me seals signes and acknowledged the same on the same bares date." The plain-

tiff objected to the introduction of this deed in evidence upon the ground that it was not acknowledged as prescribed by law, nor was it proved to have been executed. The court overruled this objection, and allowed the deed to be introduced in evidence without further proof of its execution, and to this ruling the plaintiff duly excepted. The defendant then offered in evidence a deed from Serena Bullen and her husband, Robert Bullen, to the defendant, La Fayette Bullen, conveying the lands involved in the controversy. This deed was executed on November 15, 1894, and was acknowledged on that date. It was not filed for record, however, until May 6, 1898. The plaintiff objected to the introduction in evidence of this deed upon the ground that it had not been recorded as required by law, and was not self-proving. The court overruled the objection, and to this ruling the plaintiff duly excepted. Robert Bullen was introduced as a witness, and he testified that he executed said deed. The plaintiff objected to this evidence. The court overruled the objection, and the defendant duly excepted. Upon this admission by Robert Bullen that he executed the said deed to the defendant, the court admitted said deed in evidence, against the plaintiff's objection, and to this ruling the plaintiff duly excepted. In rebuttal the plaintiff offered to prove that the "bank of the mill race," as used in the deed from him to Serena Bullen, was intended to refer to the artificial embankment heretofore described, and not to the margin of the mill race, and that it was agreed between the parties to said instrument that said embankment should be the boundary line. The defendant objected to this evidence on the ground that it varied the written instrument. The court sustained this objection, and to this ruling the plaintiff duly excepted. Upon the introduction of all the evidence, the court, at the request of the defendant, gave the general affirmative charge in his behalf, to the giving of which charge the plaintiff duly excepted. There was verdict and judgment for the defendant. The plaintiff appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved. Reversed.

Almon & Bullock, for appellant. John T. Ezzell, for appellee.

DOWDELL, J. The rule has been long and well settled that, in the construction of a written instrument or contract, a latent ambiguity appearing, parol evidence is admissible to explain and show the intention of the parties. 1 Greenl. Ev. § 297; Gullmartin v. Wood, 76 Ala. 204; Vann v. Lunsford, 91 Ala. 576, 8 South. 719. One of the boundary lines of the land conveyed by Stamphill to Bullen, as described in the deed, was as follows: "Thence down said creek to W. G. Stamphill's mill race, down said bank of said race to the section line," etc. The mill race mentioned had been cut for the purpose of

utilizing the water from a certain creek, and along this race an "artificial bank or levee" had been thrown up to prevent an overflow of the land by water from the race. This "bank or levee" ran in a zigzag course,—at some points within five yards of the race, at others a greater distance from the race. The trespass complained of was upon the strip of land lying between the race and the bank which had been thrown up to prevent overflow from the race. The defendant claimed that under the description contained in the deed he owned the land up to the race; that the bank of the race was the land or earth that formed the race itself. There being two banks,—the one which immediately formed the race, and the one which was thrown up to prevent an overflow of water from the race,—this condition rendered it competent to show by parol evidence which bank was intended or meant by the description in the deed.

The certificate of acknowledgment to the deed of Stamphill to Bullen does not certify that the grantor was informed of the contents of the conveyance, nor that he voluntarily signed the same. This was not a compliance with the statute, and the certificate was therefore insufficient. Jackson v. Kirksey, 110 Ala. 547, 18 South. 304; Railroad Co. v. Davis, 91 Ala. 615, 8 South. 349. The deed was not self-proving, and should not have been admitted in evidence, without proof of execution, against plaintiff's objection.

Neither was the deed from Robert Bullen and Serena C. Bullen to La Fayette Bullen self-proving. This deed was not filed and recorded after its execution within the time prescribed by the statute necessary to render it self-proving. Code 1896, § 992. Section 1797 of the Code provides that "the execution of any instrument of writing attested by witnesses may be proved by the testimony of the maker thereof, without producing or accounting for the absence of the attesting witnesses." The defendant proved by Robert Bullen, who joined with his wife, Serena Bullen, in the conveyance,—the land being the separate estate of the wife,—his execution thereof; but no proof of the execution by the wife was made. The objection of the plaintiff to this deed should have been sustained. For the errors pointed out, the judgment of the circuit court is reversed, and the cause remanded.

(76 Miss. 879)

CALDWELL et al. v. WALKER.

(Supreme Court of Mississippi. April 24, 1899.)

FRAUDULENT CONVEYANCES.

Where property is transferred in fraud of the grantor's creditors, the facts that claims against the grantor in excess of the value of the property were canceled by the transaction, and that the grantee has retained possession of the property for a number of years, treating it as his own, do not purge the transaction of fraud.

Appeal from chancery court, Washington county; A. H. Longino, Chancellor.

Suit by J. S. Walker against A. S. Caldwell and the Scottish-American Mortgage Company, Limited. From a decree for plaintiff, defendants appeal. Affirmed.

In December, 1892, C. W. Dudley, one of the defendants herein, owned a large plantation in Washington county, Miss., about 70 head of horses and mules, and farming implements on said place. He and W. O. Bacon, under the firm name of W. O. Bacon & Co., rented this place, mules, etc., and were engaged in farming, and also in the mercantile business. They were to pay \$4,000 per year for the rental of the place. Dudley had given a deed of trust, in 1890, on the real estate to the Scottish-American Mortgage Company, Limited, to secure a debt to it of \$25,000, bearing 7 per cent. interest, and the rent for the year 1892 had been turned over to A. S. Caldwell, the general agent of the Scottish-American Mortgage Company, Limited, to secure the interest on the loan for the years 1891 (which had not been paid) and 1892, and the taxes on the land. Dudley, in April, 1892, borrowed \$8,000 from J. E. Pepper, and, to secure him, he and Bacon gave a deed of trust on the mules and agricultural products to be grown on the place in 1892. In addition to these debts, Dudley owed other debts, aggregating a large amount, and was insolvent. The circuit court of Washington county convened on the 12th day of December, 1892, and a number of creditors had sued Dudley, and also W. O. Bacon & Co., which firm was also insolvent, and among them G. D. Thomas, receiver of the Bank of Greenville, brought suit against Dudley for over \$10,000. This was the largest creditor. On the 6th day of December, 1892, Dudley purchased W. O. Bacon's interest in the store and planting business, and paid him \$800 therefor. On the 8th of December, 1892, Dudley went to Memphis, Tenn., where A. S. Caldwell lived, and Caldwell purchased from J. E. Pepper the trust deed and notes held by him, paying him for them \$8,400, and on the 10th of December, 1892, Caldwell purchased from Dudley his plantation, all his agricultural products, farming implements, horses, mules, cattle, mercantile stock, book accounts, store fixtures, and everything on said plantation; a consideration of \$37,000 being recited in the deed. On the 14th day of March, 1893, both the deed of trust given to Pepper and the mortgage to the Scottish-American Mortgage Company, Limited, were foreclosed, and all the property was bid in by the Scottish-American Mortgage Company, Limited, and this company immediately went into possession of all the property, and remained in the undisturbed possession and control thereof until the 29th day of February, 1896, when it sold all said property to A. S. Caldwell for \$28,000. On the 19th day of May, 1896, J. S. Walker purchased the judgment of G. D. Thomas, receiver of the Bank of Greenville,

and on the 11th of September, 1896, filed the bill in this case in the chancery court of Washington county, seeking to have set aside the conveyance from Dudley to Caldwell made on the 10th day of December, 1892, and the sale of the personal property sold in March, 1893, under the trust deed to Pepper, and to subject the personal property sold to A. S. Caldwell, and that sold under the trust deed to Pepper, the trust deed to Pepper not embracing some of the personalty on the place, and which was not otherwise incumbered, to the payment of the judgment held by him. A. S. Caldwell, the Scottish-American Mortgage Company, Limited, and C. W. Dudley were made parties to the suit. The bill alleges that these transfers were in pursuance of a scheme of A. S. Caldwell personally and as the agent of the Scottish-American Mortgage Company, Limited, and C. W. Dudley to hinder and delay the creditors of C. W. Dudley in the collection of their debts. Dudley did not answer, and a decree pro confesso was rendered against him, and a final decree also. A. S. Caldwell and the Scottish-American Mortgage Company, Limited, answered the bill, denying the collusion and fraud charged in the transfers made. On this bill and the answers a great deal of testimony was taken which is conflicting. A commissioner was appointed by the court, and upon his report a final decree was rendered against the Scottish-American Mortgage Company, Limited, and A. S. Caldwell for \$8,400, and the other relief sought granted. From that decree, the defendants, A. S. Caldwell and the Scottish-American Mortgage Company, Limited, appealed. Appellants contended that as all dealings between the parties had long since terminated, and all indebtedness of Dudley to the Scottish-American Mortgage Company, Limited, and to A. S. Caldwell had been extinguished, and Caldwell had been in absolute possession for a number of years, dealing with it and treating it as his own, and that as the bona fide debts of Dudley so extinguished were far in excess of the value of the property, the conveyances were purged of fraud, even if they were fraudulent in the first instance.

Miller, Smith & Hirsh and Calvin Perkins, for appellants. Yerger & Percy, for appellee.

WHITFIELD, J. If profound legal ability were all that was needed to save an utterly bad cause, the appellants might entertain hope. But the facts in this record are beyond legal medicament, and bring the case squarely within the condemnation of *McLean v. Letchford*, 60 Miss. 169, and *May v. Taylor*, 62 Miss. 500, as appellants were duly advised at the outset by learned counsel. It is said that there has been here an *ex post facto* purgation of the actual fraud tainting the original conveyance, and *Bank v. Haskins*, 3 Metc. (Mass.) 332, and *Hutchins v. Sprague*, 4 N. H. 469, and *Thomas v. Goodwin*, 12 Mass. 140, are

mainly relied on to support the view. In the first case there was a "new agreement," by reason of which the original paper stipulating for a reconveyance had become unimportant, and the whole discussion shows that it was the validity of the new agreement which protected the party. *Hutchins v. Sprague* is severely criticised in a later case in New Hampshire (*Boardman v. Cushing*, 12 N. H. 106); and in *Albee v. Webster*, 16 N. H. 362, 370, *Hutchins v. Sprague* and *Thomas v. Goodwin*, supra, are both said by Chief Justice Parker to hold merely that "a sale may be fraudulent as to creditors on account of a secret trust accompanying it; but if by a subsequent agreement, before the creditors interfere, the secret trust is discharged, and the sale is otherwise valid, the fact that the trust once existed will not operate longer to vitiate the sale, the fraud being purged." And Mr. Bigelow says (2 *Bigelow*, Fraud, p. 408) that where, "after the conveyance has been made and before any steps have been taken against it by the creditor, a reconveyance is made, this is proper, and there is nothing then for the statute to operate upon"; and, concluding a review of the authorities, he says, "On the whole [page 411] it is difficult to sustain the doctrine of purging fraud, in its ordinary manifestation, and it is better to leave the parties to the unlawful transaction in the meshes of their own net." The true view is that it is not, properly speaking, any *ex post facto* purgation of fraud,—a doctrine which would encourage fraud and put a premium upon its perpetration. Cases which are said to illustrate that doctrine are often misunderstood, and simply hold that where a conveyance which is voidable for fraud has been abandoned, and before the rights of third parties intervene, a new and independent conveyance is made in good faith, it will be upheld, not because of any supposed purging of the fraud from the old, but because of the good faith and legality of the new, conveyance. But, whatever the true doctrine, it has no possible application on the facts of this case. It is wholly inapplicable. We see no good to be subserved by setting out at large the facts. Affirmed.

(51 La. Ann. 1093)

**CITY OF NEW ORLEANS v. DANNEMAN
et al. (No. 13,077.)**

(Supreme Court of Louisiana. May 1, 1899.)

BUILDING ORDINANCE—ENFORCEMENT.

The city of New Orleans is authorized by Act No. 143 of 1898 to enforce obedience to, and to punish the violation of, what is known as the "Building Ordinance" (being Ordinance 6,533, O. S.), through the recorders, by fine and imprisonment, or both, or by imprisonment in default of the payment of the fine, and legitimately exercised that authority in the adoption of Ordinance 14,804, O. S.

(Syllabus by the Court.)

Appeal from recorder's court of New Orleans; W. G. Thompson, Judge.

Danneman and Charlton were convicted of

violating a city ordinance, and appeal. Affirmed.

Kossuth V. Richard, for appellants. James J. McLoughlin, Asst. City Atty., and Samuel L. Gilmore, City Atty., for appellee.

MONROE, J. This is an appeal from a judgment rendered by the recorder of the Third recorder's court of New Orleans sentencing the defendants to pay a fine of \$10, or, in default thereof, to be imprisoned for 20 days, for erecting a building within the city limits without having first obtained a permit from the city engineer, in violation of the provisions of a city ordinance upon that subject. The defendants demurred on the grounds: "That there is no delegation of power in the city charter of New Orleans to create as a misdemeanor, punishable by fine and imprisonment, the noncompliance by an owner of property therein with an ordinance prohibiting owners of property from erecting buildings on their premises until they have obtained the consent of the city engineer to the building of the structures (as being in conformity to city regulations), and until they have obtained a permit from him. That such ordinance is unconstitutional, null, and void. Further, that an ordinance amending an ordinance declared null and void by the supreme court of the state is null and void. That this court [the recorder's] is without jurisdiction to enforce it." The ordinances called in question are Ordinance 6,533, O. S., adopted in 1892, and Ordinance 14,804, O. S., adopted in November, 1898. The first is known as the "Building Ordinance," and the first section provides that "no building shall be erected, or its erection commenced * * * unless plans * * * shall have first been submitted to the city engineer, and a certificate of approval and a permit granted by him therefor," etc. The 28th section provides that a violation of the ordinance shall constitute a misdemeanor, and that the violator (owner) shall be punished by fine and imprisonment. This ordinance came before this court for construction in the case of *State v. Zurich*, 49 La. Ann. 447, 21 South. 977, and it was held that there was no delegation of power in the city charter authorizing the city to declare infractions of the ordinance to be misdemeanors, and to punish them by fine and imprisonment. This judgment was rendered in 1897. Subsequently, in November, 1898, the city council adopted Ordinance 14,804, O. S., which provides in different terms from, but with the same object in view as, section 28 of Ordinance 6,533, that violations of that ordinance shall be punished by fine and imprisonment. The counsel for the appellants, arguing upon the basis of the decision in the *Zurich* case, claims that, if section 28 of Ordinance 6,533 was ultra vires of the city, Ordinance 14,804 is equally so, and for the same reason; and this position would be unanswerable were it not for the fact that in 1898 the general as-

sembly granted the authority, the lack of which was the basis of the judgment in the Zurich Case. Act No. 143 of 1898 provides that "it shall be lawful for the city of New Orleans, through the several recorders thereof, to enforce obedience to, or to punish the violation of, all ordinances passed by the city council thereof, by a fine and imprisonment, or both, or by imprisonment in default of the payment of the fine." This act was approved in July, 1898, and thereafter, in November of the same year, the city council adopted Ordinance 14,804, C. S., imposing the penalty of fine and imprisonment for violations of Ordinance 6,533, C. S., and several other ordinances. The legislative authority was no longer lacking, therefore, when the ordinance under which the appellants were prosecuted was adopted, and the decision in the Zurich Case loses its application. This really disposes of the whole case; for, while it is set up in the demurrer that the ordinance is unconstitutional, no other grounds of objection have been urged or suggested in the brief, save that Ordinance 14,804 and section 28 of Ordinance 6,533 involved the exercise of power not delegated by law to the city of New Orleans, from which we understand that the word "unconstitutional," as used in the demurrer, was intended to apply to that condition, and was not intended to apply otherwise to the building ordinance, or to the act of the general assembly No. 143 of 1898, which is nowhere mentioned in the pleadings, or to the exercise by the city of the authority as delegated by that act. The judgment appealed from is therefore affirmed.

(51 La. Ann. 1052)

Succession of ARONSTEIN. (No. 12,775.)
(Supreme Court of Louisiana. May 1, 1899.)

ADMINISTRATION OF SUCCESSION—OPPOSITION TO APPOINTMENT—AFTER-DISCOVERED PROPERTY—RIGHTS OF PARTIES.

1. One having an interest to oppose the application of another to open and administer a succession is not confined to merely resisting the application on the ground of a better right in himself.

2. He may go further, and resist the application by raising the issue of a succession to administer, or that of necessity vel non of administration.

3. Where the administration of a succession has been closed, and many years afterwards the heirs of the deceased, suing as heirs, recover property, a creditor of the deceased will not be permitted to reopen the succession, and bring the property thus recovered under administration, as belonging to the succession, and have himself appointed administrator.

4. The heirs take by inheritance the property thus recovered from adverse claimants; but this is not to say that they take the property free from the pursuit of the creditors of the succession.

5. Creditors with valid, existing claims have their recourse clearly pointed out by the law.

(Syllabus by the Court.)

Appeal from judicial district court, parish of West Feliciana; John H. Stone, Judge ad hoc.

Application of J. F. Irvine, Jr., to be appointed administrator of the succession of Louisa Aronstein. From a judgment refusing the application, petitioner appeals. Affirmed.

Olivier O. Provosty, for appellant J. F. Irvine, Jr. Samuel McC. Lawrason, for appellee A. Aronstein, opponent.

BLANCHARD, J. Louisa Aronstein, a married woman, separate in property from her husband, died in 1878. She left a small estate. She owed debts. Her succession was insolvent. Her surviving husband qualified as natural tutor of her minor children, and, as such, was permitted by the creditors to administer the succession. In the course of this administration, he obtained an order to sell the property to pay the debts of the succession. At this sale a tract of land known as the "Neville Plantation" was bought by Julius Aronstein. This man was the tutor and administrator. He bought in his individual capacity. He was not surviving partner in community. His purchase was therefore in contravention of a prohibitory law, and an absolute nullity. After his purchase, he conveyed to other parties, and in 1895 John F. Irvine, Sr., was in possession thereof as owner. In that year, the heirs of the dead woman brought an action against Irvine to have the succession sale of the Neville plantation to Julius Aronstein, and the subsequent conveyances of the same through which Irvine acquired title, declared null and void, and to have the ownership of the property decreed to be in themselves, as her heirs. This suit was prosecuted to final judgment, and concluded by decree of this court, handed down in May, 1897. See 49 La. Ann. 1478, 22 South. 405. The Neville plantation was declared to be the property of the succession of the dead wife. It was held that the title of the tutorship had never been divested. The purchase by the tutor was decreed null ab initio, and his subsequent conveyances of the property likewise absolute nullities. Following this, John F. Irvine, Jr., alleging himself to be a creditor of the succession of Louisa Aronstein, that the debts of the succession were unpaid, its movable property still undisposed of, and the necessity for administration, applied to be appointed administrator. Aaron Aronstein, one of the heirs of the deceased, and one of the plaintiffs in the suit at which the nullity of the tutor's purchase of the Neville plantation had been decreed, opposed this application on the following grounds (abbreviated), to wit: (1) That the succession of his mother had already been fully administered. (2) That the suit of the heirs of Aronstein against Irvine to have decreed the nullity of the purchase of the Neville plantation by Julius Aronstein, and his subsequent conveyances thereof, was an acceptance by them of the succession, doing away with the necessity of an administration. (3) That John F. Irvine, Jr., the applicant for administrator, is not a creditor of the succession, and the Metropolitan

Bank, of whose claim he avers himself to be the transferee, was not the owner or holder of any note or debt due by the dead woman, and, if it were, the same has been extinguished by the prescriptions of five and ten years. (4) That the question as to the right to have the Neville plantation (the only property appraised in the inventory taken in these new proceedings) returned to the succession of Louisa Aronstein for administration was an issue tendered in the suit to annul its pretended purchase by the tutor and by the defendant in that suit; that this issue was decided adversely to the defendant therein, and the property adjudged to the heirs of Mrs. Aronstein, with the condition that they should pay to the possessor the sum of \$501, representing the amount the heirs had been benefited by the sale, as being that which, in the course of the former administration, had been paid to the Metropolitan Bank, mortgagee of the property; and that J. F. Irvine, Jr., present applicant for administration, was a person interposed for his father, defendant in the suit to annul, and against whom *res judicata* is pleaded. (5) That the Metropolitan Bank (transferor of the applicant), having accepted the proceeds of the sale of the Neville place in the succession proceedings, was estopped to claim an administration of the property again, which estoppel bound its transferee, and, if not estopped, that no tender of the said proceeds had been made. The judgment of the court *a qua* sustained the opposition, and rejected the application to administer. The applicant appeals.

One having an interest to oppose the application of another to open and administer a succession is not confined to merely resisting the application, on the ground of a better right in himself. He may go further, and resist the application, by raising the issue of a succession to administer, or that of necessity *vel non* of administration. The opponent herein had such an interest to oppose this application to administer. He had evinced by his acts an unconditional acceptance of the succession. 49 La. Ann. 1482, 22 South. 405. In March, 1879, a year following the offering at public sale of the Neville plantation and its purchase by the tutor, the latter filed a final account of his administration of the succession, and a tableau of distribution of its assets. In April, 1879, this account and tableau were homologated, so far as not opposed, and in December, 1880, the opposition of L. Bloom, the only opposing creditor, was overruled, and final judgment of homologation entered up. The distribution of the assets according to this account and tableau followed. This closed the tutor's administration of the succession. The creditors took no further interest in it, and no steps to make amenable to their claims the immovable property held adversely under the void purchase of the

tutor. It was left to the heirs to do this, and, accordingly, we find that when several of the heirs became of age, and others emancipated by marriage, they brought suit to have decreed the nullity of the pretended titles by which the tutor and his transferees held the property, and to have themselves declared the owners; joining with them, as parties plaintiff, through the appointment of a special tutor, three of the heirs who were still minors. And now, when they have succeeded in this suit to recover the property as heirs of their deceased mother, a transferee of one of the creditors of the succession, who has remained silent for many years, appears, seeking to reopen the succession, and to have the property thus recovered brought again under administration as belonging to the succession, and himself appointed administrator. Succession of Sarrazin, 34 La. Ann. 1168. We do not think this can be done. The succession of Louisa Aronstein, as such, must be considered closed, and as no longer existing. See Succession of Gaines,¹ 30 La. Ann. 139; *Freret v. Freret's Heirs*, 31 La. Ann. 506; *Atkinson v. Rodney*, 35 La. Ann. 313; Succession of Thibodeaux, 38 La. Ann. 716. The heirs take by inheritance the property of the dead woman which they have recovered from adverse claimants,—those of them of age and those emancipated taking as heirs who have accepted the succession unconditionally; those who are minors taking as beneficiary heirs. See Succession of Sarrazin, 34 La. Ann. 1168. This is not to say that they take the property free from the pursuit of the creditors of the succession of Louisa Aronstein. Creditors, who have valid, existing claims, have their recourse clearly pointed out by the law.

The applicant for this administration has mistaken his remedy. Instead of seeking to reopen the succession long since concluded, his course was rather to proceed against the major and emancipated heirs, who, by accepting unconditionally, have become his debtors, and against those who, as minors, accept conditionally, to subject the property in question, now vested in the heirs, to the payment of whatever legal claim he may have, as creditor of Louisa Aronstein, deceased, and as creditor of those heirs of hers, who, legally capable of accepting unconditionally her succession, have done so. *Soye v. Price*, 30 La. Ann. 93; *Lemmon v. Clark*, 36 La. Ann. 744; Rev. Civ. Code, art. 1422 et seq. The judgment appealed from reserves to the applicant, Irvine, the right to prosecute what claims he may have against the succession of Louisa Aronstein by direct proceeding against her heirs. This is well. Judgment affirmed.

MONROE, J., takes no part, as he was not a member of this court when the case was submitted.

¹ Correct citation should be *Woolfolk v. Woolfolk*

(51 La. Ann. 1046)

SAUFLEY v. JOUBERT. (No. 12,934.)¹(Supreme Court of Louisiana. March 7, 1899.)
LOAN TO MARRIED WOMAN—JUDICIAL AUTHORIZATION—ESTOPPEL—BURDEN OF PROOF.

1. The lender who lends money to a married woman is not required to inquire into the purpose of the loan, when she is duly authorized by the court to borrow a specific amount.

2. The judicial admissions of the wife when being examined by the judge that the amount she was about to borrow, when she appeared before the judge, was to be used for her separate advantage, and the preponderance of testimony showing that the lender was not aware that the purpose of the wife was other than that shown by the certificate, will conclude the wife, and render it impossible for her to have the mortgage decreed a nullity.

3. The judge of the district court saw the witnesses and heard them testify. The review of their testimony on appeal led to the conclusion arrived at by him.

4. Under the rules of evidence, witnesses for each party being about equal in number, the burden of proof being with plaintiff, and plaintiff's declarations when the loan was gotten not being in harmony with allegations made in her pending suit, *held*, that plaintiff has no right of action to set aside the act of mortgage attacked.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frank A. Monroe, Judge.

Suit by Mrs. Susan A. Sauflay against Leon Joubert. Judgment for defendant, and plaintiff appeals. Affirmed.

Frank E. Rainold, for appellant. Alcée J. Villeré, for appellee.

BREAUX, J. The object of plaintiff in instituting this suit was to annul and have decreed void a mortgage which she signed to secure a loan made by the defendant; also to obtain a judgment annulling a sale made in foreclosing the mortgage, and pronouncing the note of the mortgagor identified with the act of mortgage she executed null and of no effect. We are informed that plaintiff's husband was the principal owner of a factory for creosoting wood by a process of which he is the originator and patentee; that the charter of the company was a nullity; and that in fact the interested parties were only partners and owners of the business in the proportion of \$50,000 of the firm owned by plaintiff's husband, and \$5,000 by the other partners; and, in consequence of the large interest of her husband, plaintiff in this suit alleges that the business of the firm was in reality his own. Owing to the financial embarrassment, the company had to close down and stop its business. Plaintiff sought to prove that about that time her husband sought a loan from the defendant, and, to secure it, offered a mortgage on the company's property, which defendant declined, after having found out in course of a talk with her husband that the company was not a going concern, and would remain idle until the money was obtained; that therefore he made known to defendant

that plaintiff had improved property which he would mortgage to secure the loan; that he held plaintiff's power of attorney; and that he had, moreover, an equitable interest in the property of his wife, growing out of the payment by him of a mortgage of \$9,000, resting on the property at the date of their marriage. The testimony discloses that defendant consented to make the loan and accept the mortgage offered. He informed plaintiff's husband and agent that his lawyer, after an examination, made a favorable report as to the title. He at the same time asked him to call on the lawyer the next day with his wife to have the petition signed, which, it appears, was done. Defendant's lawyer is also a notary. Plaintiff's husband employed him as notary, and, as such, directed him to draw up a mortgage upon the property of the company to secure the wife, since that was borrowed on the property of plaintiff as security. He wanted to secure her by executing a mortgage in her favor on the factory property.

The contention of the plaintiff is at this point in the case that the notary who was defendant's lawyer was fully informed of the facts before recited. The acts were written the same day, and plaintiff avers that the check handed over by the lender, the defendant, was made out to her favor, and that immediately it passed into the hands of the secretary of the creosoting company. It appears of record that the company went into liquidation, that it was insolvent, and that plaintiff never got anything out of the insolvency.

Defendant, as a witness, testified that he did not know anything about the use the plaintiff intended to make of the money, and that he loaned it in the regular course of business; that plaintiff's husband came to his office and offered the mortgage, which he accepted; that plaintiff's husband talked at some length, but that, if he had said anything about wanting the money for himself to be secured by mortgage on his wife's property, the loan would not have been made; that he had experience as a lender of money, and knew that that was not sanctioned by law. Defendant's lawyer and notary swore that, at whatever time his client, the defendant, makes loans, he leaves it to him to examine the title, and, if he is satisfied of its legality, he is usually directed to prepare the deed, and that when a married lady is the borrower she is required to furnish the certificate of the judge, authorizing her to borrow the money; that he in this case made the usual examination; that he prepared the deed; and that then the mortgagee signed the act. He had the usual certificate in his possession authorizing her to sign. The act of mortgage to the defendant was signed in the morning, and the act of mortgage on the creosote company, in favor of the wife, was signed in the afternoon of the same day the mortgage to the defendant was signed. The witness testified that plaintiff's husband never told him that the two acts were in any way connected, one

¹ Rehearing denied May 15, 1899.

with the other, and that he had no reason to suspect that there was any connection between them; that when plaintiff's son came to his office to sign the second act there was no conversation held, as stated by the former; that the money borrowed from the defendant was to go into the business of the creosoting company. One or two suits grew out of defendant's foreclosure proceedings under the mortgage he held against plaintiff. One of these was decided by this court. *Joubert v. Sampson*, 49 La. Ann. 1008, 22 South. 203. The judgment of the district court was in favor of defendant. From the judgment, plaintiff appeals.

For a long time in the history of the jurisprudence of this state it was not enough to prove that the wife received the money to recover on a mortgage signed by her as mortgagee. Proof that it was for her separate advantage was required. In 1855 the adoption of a statute effected a change which has been repeatedly interpreted by the supreme court as relieving the creditor from the necessity of proving, in order to recover, that the amount loaned was applied (as the act of mortgage imported) to the borrower's benefit and advantage. Although the money, after the loan was effected, was placed to the credit of a corporation in which the husband of the plaintiff was principal stockholder, or (if the charter of this corporation was a nullity, as contended by plaintiff) to the credit of a partnership, in which he (the husband) was the principal owner and partner, it would not have the effect of rendering the mortgage given by the wife a nullity, provided the lender, prior to the loan, had no knowledge of the intention of the borrower to apply the amounts to the payment of her husband's debts.

In the case of *Dougherty v. Insurance Co.*, 35 La. Ann. 629, the position of the married woman was that, as she could not mortgage her property as she had for the benefit of her husband, the burden of proof was on the lender. The court, meeting this contention, held that in the case of fraud or complicity on the part of lender the latter is not bound to look behind the judge's certificate; citing a number of decisions in support of the interpretation. Here the weight of the evidence shows that the defendant had no such knowledge as plaintiff charges in her petition. The importance sought to be given to conversations said to have been held many years ago between the plaintiff's husband and the talk the son claims to have had with the notary and lawyer lose all force in the presence of the positive denial of two witnesses for defendant, as far as we know, equally as credible as the two witnesses first mentioned, who testified for plaintiff. We have seen that the burden of proof on this point was with the plaintiff. She obtained a certificate from the judge, on her own testimony, that the loan was made to her in her own interest and for her advantage. The judge of the district

court, after hearing these witnesses, decided that the weight of the testimony was with the defendant.

Having given these grounds due weight, and after an attentive reading of the testimony of the witnesses, we did not find that our learned Brother of the district court erred. Plaintiff pitched her case exclusively on the ground of defendant's knowledge of her husband's intention to use the money loaned in his business and appropriate it to himself. Having failed to sustain this ground by preponderance of proof, no alternative is left us, save to affirm the judgment. There was no question before the court of complicity, fraud, or persuasion,—only the one question of knowledge of plaintiff's intention when she borrowed the money. Her judicial agreement in this regard, we have seen, is supported by the testimony of two witnesses, contradicted, it is true, by the husband of the plaintiff, also in part by her son. In our judgment, under no rule of evidence would we be justified in reversing the judgment of the district court. The law and the evidence being with the defendant, the judgment appealed from is sustained.

(51 La. Ann. 341)

STATE ex rel. TANNER v. POLICE BOARD
OF CITY OF NEW ORLEANS.

(No. 12,942.)¹

(Supreme Court of Louisiana. April 17, 1899.)
MANDAMUS TO POLICE BOARD—REMOVAL OF OFFICER.

If the action of the police board of the city of New Orleans in removing a police officer from the force had been of a character such as to be an absolute nullity, the officer so removed, being still legally on the force, would have been entitled to be so recognized, and mandamus could properly issue to the board, directing it to do so; but the action taken in this case was not null and void, and the district court properly refused to issue the writ.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frederick D. Judge, Special Judge.

Application by William J. Tanner for a writ of certiorari to the police board of the city of New Orleans. Judgment for defendant, and plaintiff appeals. Affirmed.

William J. Tanner, a corporal on the police force of the city of New Orleans, applied to the civil district court for the parish of Orleans for a writ of certiorari commanding the police board of that city to send up to that court the record of its proceedings against him, to the end that their validity might be ascertained, and praying that its sentence dismissing him from that force be decreed to be null and void, but praying, in the alternative, "should certiorari be held not to be the proper remedy in the premises, that a writ of mandamus issue to said board, to reinstate him as corporal of the police force, and to amend its sentence to a fine of ten days' pay, and in the

¹ Rehearing denied May 15, 1899.

alternative, if this could not be done, then to try him anew, and, if found guilty of drunkenness (of which offense he denied being guilty), that the board, for the first conviction, fine him only ten days' pay, and that the writ be made peremptory, commanding the police force to recognize him as a corporal of the police force, and entitled to his pay, until the board should have regularly tried him, and impose a legal sentence of only ten days' pay, if, from the evidence, they find him guilty of drunkenness while on duty." The allegations on which this remedy and relief were asked were: That he had been for several years a corporal of the police force of New Orleans. That on the 12th of February, 1896, the police board, acting in its legislative capacity, adopted resolutions (a copy of which was annexed) by which a member of the police force convicted of drunkenness for the first time should be fined 10 days' pay, for the second offense 20 days' pay, and for the third offense he should be summarily dismissed from the force. That these resolutions had never been repealed, and were in force, and had been in force, and constituted the law regulating such cases, and the police board was bound thereby when acting in their judicial capacity, and the board had no power to dismiss a member of the police force for the first conviction of drunkenness. That he was on the 12th of November charged with drunkenness, and that it was not charged that he was previously convicted of that or any other offense, and as a matter of fact he had not been previously convicted of that or any other offense as a member of the police force, and on the 22d of June, 1898, he was tried, and by a vote of three to three (the mayor giving the casting vote against him) he was convicted of drunkenness, and was dismissed from the force; and the act of that tribunal was null. Alternative writs issued. The police board, for return, said: (1) That the court was without jurisdiction *ratione materiae*. (2) That the petition disclosed no cause of action. (3) That respondent had already acted upon and decided the matter in controversy, and the court was without jurisdiction or authority to control or review its action in the premises. (4) That it was not the legal duty of respondent to take any further action in plaintiff's case, and no such duty could be imposed upon it by means of the writs of *certiorari* and *mandamus*. (5) That respondent was without legal power or authority to take any further action in plaintiff's case. (6) That, plaintiff having been finally dismissed from the police force, any further action in his case by respondent would be vain, for the reason that respondent was without power or authority to order his reinstatement on the force; all applicants for admission on the same being required by section 7 of Act No. 95 of 1896 and section 66 of Act No. 45 of 1896 to undergo a civil service examination by the board of civil service commissioners of the city of New Orleans. (7) That the facts stated in plaintiff's

petition were untrue, in this: That respondent never did at any time adopt a resolution by which a member of the police force, convicted of drunkenness for the first time, should be fined 10 days' pay; for the second time, 20 days' pay; and for the third offense dismissed from the force. That the fact was that the resolution adopted by the said board on the 12th of February, 1896, was only to the effect that when a member of the police force, having a regular number, shall have been convicted for the first time on the charge of drunkenness, at a trial before the board of police commissioners, the punishment applied should not be less than 10 days' pay; for the second offense, 20 days' pay; for the third offense, the officer shall be summarily dismissed from the force, without recourse. The board annexed to its return a certified copy of the proceedings in the plaintiff's case. The resolutions referred to in the pleadings were as follows: "Whereas, in the recent past there have been more cases of drunkenness for trial before the board than usual, and it is of the utmost necessity, in order to thoroughly discipline the police force, to apply a strong remedy to eradicate this evil, be it resolved, that it is necessary to deal in a summary manner with all officers convicted of drunkenness. Be it further resolved, that when a member of the police force, having a regular number, shall have been convicted the first time on the charge of drunkenness, at a trial before the board of police commissioners, the punishment applied shall be not less than ten days' pay; for the second offense, twenty days' pay; the third offense, the officer shall be summarily dismissed from the force, without recourse." The record sent up shows that the plaintiff was tried and dismissed upon a charge of "drunkenness and conduct unbecoming." The seventh section of Act No. 63 provides that each officer and member of the said police force shall hold office during good behavior, and shall be liable to removal from office after written charges shall have been preferred against him, and due trial had according to the rules and regulations of said board. The thirteenth section gave power to the board, in their discretion, on conviction of any officer or member of said police force for any legal offense, or neglect of duty, or violation of rules, or disobedience of orders, or incapacity, or absence without leave, or any conduct injurious to the public welfare, or immoral conduct, or conduct unbecoming, or other breach of discipline, to punish the offender by reprimand, forfeiture or suspension of pay for a specified time, or by dismissal from the force. The police board, in the sixteenth section, were empowered, in their discretion, in furtherance of the police government, and for promoting and perfecting the police discipline of officers and subordinates of the police force, to enact, modify, and repeal from time to time orders, rules, and regulations of general discipline, wherein, in addition to such general provisions as may be deemed expedient by

the board, there might be particularly defined, enumerated, and distributed the powers and duties and liabilities of the officers, clerks, and members of the police force, and wherein should be declared the mode of appointment to office, the manner of discipline, and procedure of trial, and removal from office of the said officers, clerks, and members of said force, provided that such laws, ordinances, orders, rules, and regulations, forms and modes of procedure, should not conflict with any of the provisions of the said act No. 63.

William J. Hennessey and Benjamin Rice Forman, for appellant. Samuel L. Gilmore, City Atty., for appellee.

NICHOLLS, C. J. (after stating the facts). In 14 Am. & Eng. Enc. Law, p. 153, verbo "Mandamus," subd. "Reinstatement of Member," it is declared that mandamus will not lie to compel a corporation to reinstate a member who has been regularly tried and expelled therefrom. But, where the proceedings were not in accordance with the by-laws of the society, a writ of mandamus will lie against the officers and society to compel reinstatement of expelled members. Numerous authorities are cited in support of that proposition. See, on this subject, *State v. Lusitanian Portuguese Society*, 15 La. Ann. 73. They have considerable bearing upon the question submitted to us in this case, though the latter is not identical with those referred to. The issue here is one between a police officer and a state board having authority to try, and under some circumstances to remove from office, members of the police force. It is not contended that the proceedings were irregular, but that the judgment reached and the sentence pronounced were absolutely null and void, and not such as it was within the power and authority of the board to render. Plaintiff claims that, if this be true, he is still, and in spite of the judgment and sentence, a member of the force, and entitled to be recognized as such, and that it is respondent's duty to do so. We take cognizance of and dispose of the case from that standpoint. *Windsor v. McVeigh*, 93 U. S. 274. The record does not bear out plaintiff's allegations. The judgment and sentence are not nullities. The charge upon which plaintiff was tried and dismissed was not simple drunkenness, but "drunkenness and conduct unbecoming,"—a charge very materially different, and much more serious. Drunkenness, unattended with aggravating circumstances, might not, in some particular case, call for a very heavy penalty, while intoxication, resulting in unbecoming conduct on the part of the drunken person, might justify the infliction upon the offending party of the heaviest punishment which the enforcement of the rules of the board would admit of and permit. But, even had the charge upon which plaintiff was tried and dismissed been one of "simple drunkenness," we find nothing in the resolu-

tions brought to our attention which would render the board's action illegal. They simply fixed the minimum penalty which might be inflicted upon officers of the force when convicted for the first and second times, and withdrew all discretion from the board as to the punishment which should follow from conviction for a third offense; fixing it definitely, in advance, at dismissal. Power to dismiss an officer from the force upon a first or second conviction for drunkenness was not withdrawn by the resolutions. It was upon the lower, and not the higher, limit of punishment that restrictions were provided for. For the reasons assigned, it is ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, affirmed.

MONROE, J., takes no part, not having been a member of the court when the case was submitted.

(51 La. Ann. 965)

POISSENET v. REUTHER. (No. 13,064.)

(Supreme Court of Louisiana. May 1, 1890.)

SLANDER—JUSTIFICATION.

1. An employer who suddenly, upon the spur of the moment, and in a spirit of anger, denounces an employé as a thief, and attributes to him other vile epithets, in a public place, and in the presence of many persons, is liable in damages for slander; this, notwithstanding the employer had been justly annoyed by a quarrel that had arisen between the employé and his manager.

2. Their quarrel constituted no just ground for the employer's slanderous utterances.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas O. W. Ellis, Judge.

Action by Emile Poissenet against Joseph Reuther. Judgment for plaintiff. Defendant appeals. Affirmed.

Branch K. Miller, for appellant. Sambola & Ducros, for appellee.

WATKINS, J. This is an action of slander and defamation of character, and the plaintiff demands of the defendant the sum of \$3,000 "as real and exemplary or vindictive damages." The case was tried before the judge, and, upon the administration of proof on both sides, he rendered judgment in favor of the plaintiff in the sum of \$250, and from that judgment the defendant prosecutes the present appeal.

Answering the appeal, plaintiff and appellee insists that the allowance should be increased to \$500, and that, as thus amended, the judgment should be affirmed. The averment of the petition is that at the defendant's bakery, where petitioner was working on the 20th of June, 1897, as a journeyman baker, said defendant, "without cause or [any] provocation whatever, did then and there maliciously defame and slander your petitioner in the presence and hearing of several persons, the employés of defendant at said bakery, by calling your petitioner a thief,

a damn thief, and son of a bitch," etc., and that said defendant at the same time and place discharged him from his employ, and peremptorily ordered him to leave the place. He represents that he has always borne a good name and character in the community; that his integrity has never been questioned; that he has always earned an honest livelihood, and worked hard to support his family; that the aforesaid vituperative and opprobrious epithets and malicious utterances of defendant have grievously damaged him in character and reputation, and in his business relations, and have also wounded his feelings, and humiliated him, and brought him into contempt and disrespect among his acquaintances and fellow laborers; and that he has since that occurrence been unable to obtain employment as a baker. The defendant's answer is a general denial.

In his reasons for judgment, the judge a quo makes this statement, viz.: "The evidence establishes that the defendant did call the plaintiff a thief, and did use the abusive words regarding plaintiff, in the presence of several persons, as alleged in the petition. It is urged that plaintiff's action should fail, upon the ground that plaintiff and defendant were engaged in a quarrel, and that what defendant said plaintiff was caused by plaintiff's abusive language regarding defendant. The evidence does not sustain this position, and therefore the well-settled rule that when parties quarrel, and in hot blood denounce and abuse each other, neither can recover, does not apply. The evidence shows that some hours before the defendant came in and abused the plaintiff, as alleged, the plaintiff and defendant's foreman had had a quarrel, and had roundly abused each other; the subject of this quarrel being that the foreman was dissatisfied with the manner in which the plaintiff had baked the bread. Whatever may be the merits or demerits of either the plaintiff or the foreman, I do not decide. Whether one or both were in fault does not affect the issue here. Whatever that trouble may have been, the defendant, as proprietor, was sent for, and complaints were lodged with him against the plaintiff; and, after a delay of some hours,—plaintiff still going on with his work,—the defendant came to the bakery, and began talking to the plaintiff. Whereupon plaintiff began denouncing the foreman, but in no wise abusing the defendant. Upon this the defendant called plaintiff a thief, and applied to him other abusive language, in the presence of all who were in the bakery, and ordered him to get his clothes and leave. * * * That defendant was annoyed and angry seems true, but he had no excuse for abusing the plaintiff, and calling him a thief. If he saw proper to do so, he had a right to discharge the plaintiff, but not to denounce him. * * * Unfortunately, men lose their tempers, and the defendant lost his, and without just cause or excuse abused and slandered the plaintiff, as alleged in the petition. For

this injury to his feelings and assault upon his character the plaintiff is entitled to reparation."

Our appreciation of the evidence does not differ from that of our learned Brother of the district court. There is no doubt of the fact that the defendant was greatly annoyed and troubled by the reports that had been made to him of the trouble that existed between the manager of his bakery and the plaintiff, as an employé, and that it had the effect of carrying him to the bakery very early on the following morning. Yet that was no ground or excuse for his epithets and abuse of the plaintiff, suddenly and upon the spur of the moment, in a public place, and in the presence of many persons, and his summary and instantaneous discharge from employment. This case comes clearly within the rule announced in *Spotorno v. Fourichon*, 40 La. Ann. 424, 4 South. 71; *Savole v. Scanlan*, 43 La. Ann. 967, 9 South. 916; *Weil v. Israel*, 42 La. Ann. 955, 8 South. 826; *Warner v. Clark*, 45 La. Ann. 883, 13 South. 203. But we do not think it a proper case for an increased allowance of damages. Judgment affirmed.

(51 La. Ann. 968)

Succession of LANDIER. (No. 13,039.)

(Supreme Court of Louisiana. May 1, 1899.)

COMMUNITY—RIGHTS OF SURVIVING WIFE—INVENTORY AND APPRAISEMENT—REGISTRATION.

1. Notwithstanding the surviving widow in community has, under our law, a legal usufruct upon the undivided share of the heirs in the property of the succession of the deceased, she is not entitled to take possession of such property, and enjoy the fruits and revenues thereof, until she shall have caused an inventory and appraisal to be made of such property, and an abstract of said inventory to be registered in the book of mortgages in the parish in which the property is situated.

2. This is a condition precedent, imposed by our law upon the exercise of the legal usufruct of a surviving spouse.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; George H. Théard, Judge.

In the matter of the succession of Julien Landier. Felicien Landier applied to be appointed administrator. From an order refusing the application, petitioner appeals. Reversed.

E. Howard McCaleb, for appellant. E. J. Méral, for appellee.

WATKINS, J. Application was made by Felicien Landier, as an emancipated minor, residing in the city of New Orleans, to be appointed administrator of the succession of his father, a late resident of said city, who departed this life on the 4th of July, 1898, leaving some property within the jurisdiction of the court. In his petition it is alleged that his father was married to Felicie Janin in said city in 1878, and of that marriage three children were born, and respectively aged 19,

15, and 18 years,—petitioner being 19; that at the time of his death his father was a passenger on the ill-fated French steamer *La Bourgogne*, destined to Paris, France, and perished, with all who were on board of her, when she sunk off the coast of Sable Island. He avers that his mother resides at Malakoff, in the vicinity of Paris, France, and that his two younger brothers are residing with her, and that they have so resided for many years. His prayer is that an inventory be taken, and that he be appointed and confirmed administrator of his father's succession in this state.

The inventory, when taken, showed as total assets the following, viz.:

(1) A bill of exchange for 8,000 francs, valued in American money at	\$ 576 90
(2) A promissory note due to the deceased, by C. A. Dinkel.....	150 00
(3) Real estate in New Orleans.....	2,500 00
	<hr/> \$3,226 90

To the aforesaid application Felicie Janin, as widow in community of the deceased, alleging her residence to be in the republic of France, makes opposition, appearing by Paul Desmaries, as agent and attorney in fact. The grounds of her opposition are: (1) That the applicant is a minor, and that the judgment of the court emancipating him is absolutely null and void, having been obtained by the consent of the curator ad hoc; (2) that the property inventoried belonged to the legal community of acquets and gains which existed between herself and her deceased husband, and that she is owner in her own right of one-half of same as surviving widow, and usufructuary of the other half; (3) that there are no debts due by the deceased except one of \$198.50, for which the deceased had made provision, with which the creditor is satisfied. She avers that, as surviving widow, she is entitled to peaceable enjoyment of the property, and of its fruits and revenues, as provided by law, "and that she is now in legal possession of the same," and hence there is no necessity for an administration of the succession of the deceased. The court, being of opinion that an administration was unnecessary, sustained the opposition of the widow in community, and rejected the demand of the petitioner, and from that judgment the latter has appealed.

The tendency of the evidence is to the effect that the deceased had arranged with his creditor that the rent of his house should be applied to the discharge of his indebtedness. From the foregoing statement it is clear that an administration of the succession is not necessary. True it is that the opponent, as surviving widow in community, is owner of one-half of the property which is community; but it is equally true that the other half belongs to the children, all of whom are minors, except petitioner, who is emancipated. But she was bound to cause an inventory of the community property to be taken. Rev. Civ. Code, art. 251. She was required to give a

special mortgage, or to cause the legal mortgage in favor of the minor to be inscribed in the manner prescribed by law. Id. The mother who refuses the tutorship of her children retains the superintendence of them, and the care of their education. Id. art. 253. Among the mandatory provisions of our law, the following are conspicuous, viz.: "In the several cases in which the tutor is not required by law to give bond, it shall be the duty of the clerk of the district court of the parish in which the appointment is to be made to furnish a certificate of the amount of the minor's property according to the inventory on file in his office. This certificate must be recorded in the mortgage book of the parish in which the tutor resides." Id. art. 321. "Before fathers and mothers, who, by law are entitled to the usufruct of property belonging to their minor children, shall be allowed to take possession of such property, and enjoy the fruits and revenues thereof, they shall cause an inventory and appraisement to be made of such property, and cause the same to be recorded in the mortgage book of every parish in the state where they, or either of them have immovable property." Id. art. 3350. See Id. arts. 3351, 3356. In the instant case the opponent has failed altogether to observe a single one of these requirements. While still residing in the republic of France, where she affirms her domicile to be, she retains the custody of the two minor children, and sends a power of attorney to a creditor of the succession residing in New Orleans, who, in her name, sets up claim to one-half interest in property situated here, and which chiefly consists of improved real estate, on the ground that she is surviving widow of the deceased, and entitled, under the law of Louisiana, to a legal usufruct upon the one-half belonging to the heirs of deceased. And all this is asserted notwithstanding the fact that she had never caused an inventory to be taken, or an abstract of inventory to be recorded. While we are of opinion that in the present situation an administration would be both unnecessary and expensive, and that the judge a quo properly maintained the opposition of the surviving widow, yet we feel constrained to hold that she should cause an inventory and appraisement to be made—one upon her account—of all the property and effects of the deceased, and an abstract of same recorded in the book of mortgages, so as to amply protect the rights of the heirs of the deceased. Thus holding will necessarily result in reversing the judgment appealed from, and the entering of a different decree. It is therefore ordered and decreed that the judgment appealed from be annulled and reversed, and it is further ordered and decreed that the opposition of the widow in community be rejected at her cost. It is further ordered and decreed that the surviving widow and opponent shall cause a true and faithful inventory and appraisement to be made of all of the effects of the succession of the deceased, and that she shall cause an ab-

stract of said inventory to be duly registered in the office of the recorder of mortgages of the parish of Orleans, conformably to law, and within 10 days from the finality of this decree; and that, in default of so doing, the judge of the district court shall proceed to appoint an administrator for said succession, according to law. It is finally ordered that the cost of appeal be taxed against the opponent.

(51 La. Ann. 1099)

STATE v. GRANDJEAN. (No. 13,132).¹

(Supreme Court of Louisiana. April 17, 1899.)

DISTRICT COURT—JURISDICTION—RECORDER—TITLE TO OFFICE—FILLING VACANCIES.

1. The civil district court has jurisdiction in a suit between the state and a recorder to test the title of the latter to the office held by him.

2. The state, through the attorney general, may bring suit, under the "Intrusion Act," against a de facto officer, without joining as plaintiff any claimant to the office in question, and without there having been any appointment made to fill the vacant office into which such officer is charged with having intruded.

3. Article 157 of the constitution, authorizing the governor to fill, by appointment, vacancies in the judicial offices of the parish of Orleans and city of New Orleans, applies to vacancies in the office of recorder, which, as now constituted, is a judicial office, within the meaning of the article.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

Action by the state against George H. Grandjean. Judgment for defendant, and the state appeals. Reversed.

Milton J. Cunningham, Atty. Gen. (Frank D. Orléan and B. Howard McCaleb, of counsel), for the State. James J. McLoughlin, Asst. City Atty., and Samuel L. Gilmore, City Atty., for appellee.

MONROE, J. The office of recorder of the Second district of New Orleans became vacant in December, 1898, by the death of Henry Bezou, the incumbent, and in January, 1899, the city council of New Orleans elected the defendant to fill the vacancy. The state now brings suit, through the attorney general, and alleges that the action of the council in the premises was ultra vires, unconstitutional, and null, and that the occupation of said office by said Grandjean is an unlawful intrusion and usurpation, and that he should be excluded, and said office declared vacant, to be filled, under article 157 of the constitution, by appointment by the governor. Defendant excepted that the court was without jurisdiction, and that the petition disclosed no cause of action, and, answering, avers that he was legally elected, and is entitled to hold the office in question and discharge the duties thereof.

1. The exception to jurisdiction is based upon the proposition that the constitution of 1898 confers on the civil district court no pow-

er to determine the issues presented. Article 133 reads: "The civil district court shall have * * * exclusive jurisdiction in suits * * * involving title * * * to office or other public position, or civil or political rights; and in all other cases except as hereinafter provided," etc. No sufficient reason is suggested why this comprehensive grant of jurisdiction should not be considered sufficient for the purposes of the instant case, nor is it suggested that any other court would have jurisdiction in the premises.

2. The exception of "no cause of action" is based, as appears from the argument of counsel, upon the proposition that, because the governor has made no appointment, and no one is claiming the office, save the defendant, the attorney general has no right to bring the suit. The suit is brought under Act No. 156 of 1868, known as the "Intrusion Act" (Rev. St. § 2593 et seq.), which, so far as it is necessary to quote it, reads: "Section 1. * * * That an action by petition may be brought before the proper district court or parish court by the district attorney or district attorney pro tempore, and for the parish of Orleans by the attorney general or any other person interested, in the name of the state, upon his own information or upon the information of any private party against the party or parties offending in the following cases: First. When any person shall usurp, intrude into or unlawfully hold or exercise any public office or franchise within this state. * * * Section 4 provides: "That when an action shall be brought by virtue of * * * this act by the * * * attorney general * * * on the relation or information of any person interested, the name of such person shall be joined with the state as plaintiff." And there are other provisions as to the judgment which may be rendered. The language conferring the authority upon the attorney general, however, to bring the suit, is specific, to the effect that it may be brought by him "or any other person interested," and all the other provisions of the statute harmonize with the idea thus conveyed that the suit may be brought by the attorney general alone in cases where there is no "other person interested," though, when it is brought by him upon the information of a person interested, the name of such person must be joined with that of the state. The decision in the case of *Guillotte v. Poincy*, 41 La. Ann. 333, 6 South. 507, to which we are referred, has no bearing upon the question at issue. In that case it was claimed that Guillotte, who was in possession of the office, and who had proceeded by way of injunction to quiet his title, should have proceeded under the intrusion act to oust the plaintiff, who was not in possession. And the court simply held that in a proceeding under that act, between a party claiming and a party in possession, the defendant must necessarily be the officer de facto.

3. The defense on the merits presents the

¹ Rehearing denied May 15, 1899.

single question, does the office of recorder fall within the meaning of article 157 of the constitution? That article reads as follows, to wit: "Art. 157. Vacancies occurring from any cause in the judicial offices of the parish of Orleans or city of New Orleans shall be filled by appointment by the governor, with the advice and consent of the senate, for the unexpired term." One of the propositions of the defense is that this article is controlled by article 319, which reads: "Art. 319. The electors of the city of New Orleans, and of any political corporation which may be established within the territory now, or which may hereafter be, embraced within the corporate limits of said city, shall have the right to choose the public officers, who shall be charged with the exercise of the police power and with the administration of the affairs of said corporation in whole or in part." Conceding, arguendo, that the recorder is a city officer, the proposition of defendant's counsel would have greater force if article 157 referred only to "the judicial officers of the parish of Orleans"; but it will be observed that the article in question also provides that the governor shall fill by appointment vacancies in "the judicial offices of the * * * city of New Orleans," from which it follows that, if the office of recorder is a judicial office, whether of the parish or city, and it is held, under article 319, that a vacancy in such office may be filled otherwise than by appointment by the governor, article 157 is stricken with nullity, although that article could have been inserted in the constitution for no other purpose than to provide for the filling of vacancies in judicial offices in the parish of Orleans or city of New Orleans, since it deals with and mentions nothing else, while article 319 does not deal with or mention vacancies at all. The most elementary rule of construction requires that effect shall, if possible, be given to all the provisions of a law, and that different provisions upon the same subject-matter shall be construed together in such a way as to reconcile and harmonize all, with the sacrifice of none. Construing the two articles in question agreeably to this rule, it is evident that article 319 must be regarded as pro tanto modified by article 157, which is to be regarded as though it were an exception embodied in the text of article 319. The remainder of the original question, then, is, is the office of recorder a judicial office of either the parish of Orleans or city of New Orleans? Law dictionaries and books of reference concur in the general proposition that recorders are judicial officers; but, after all, the determination of the question, in any given case, depends upon the law creating the particular office, and the functions and duties imposed upon the particular officer. There was a time when the destinies of the people of New Orleans were presided over by recorders in the different municipalities, who were executive officers to whom certain judicial functions were attached, and if a case of that

kind were here presented it might be a question whether article 157 was intended to apply, where the office was not wholly judicial, but where, perhaps, the most important functions were executive and quasi legislative. But such is not the case with which we have to deal. The learned judge *a quo* argues with great force and effect in his able opinion that the office of recorder, under the existing constitution and statute law, is a municipal and a statutory office, and from these premises he deduces that it cannot fall within the meaning of article 157 of the constitution. He does not suggest that the duties imposed upon the recorders are not judicial, or that any other than judicial duties are imposed upon that officer. Suppose it be conceded, then, that the office is a municipal office; it will hardly be denied that the title "City of New Orleans" describes the municipal corporation known by that name, and it cannot be denied that, under article 157, vacancies in the judicial offices of the city of New Orleans are to be filled by appointment by the governor. And, again, suppose it be conceded that the office, under the constitution, is to be regarded as a statutory, rather than a constitutional, office; in what way does that affect the question under consideration? Most of our constitutions in the past have left the question of the number of courts to be established, and the jurisdiction to be conferred upon each, in a large measure to the general assembly, so that all the courts in the state, with the exception of the supreme court, were statutory courts. Thus: Constitution of 1812: "Art. 4, § 1. The judiciary power shall be vested in a supreme court and inferior courts. * * *" "Sec. 4. The legislature is authorized to establish such inferior courts as may be convenient to the administration of justice." But it certainly could not be claimed that tribunals performing no other than judicial functions, thus provided for, in articles collected together under the title "Judiciary Department" by the framers of the constitution themselves, did not become part of the judiciary system of the state merely because it was left to the legislature to establish and disestablish them. Considering the decisions of this court to which the defendant's counsel refers as supporting his position upon this branch of the case, they deal mainly with the question of motion, impeachment, and removal, and it would seem only necessary to say that the framers of our constitutions have not generally provided that officers shall be removed in the same manner in which they are appointed, or by the same authority. The two things have therefore no necessary connection with each other.

In the case of *State v. Adams*, 46 La. Ann. 830, 15 South. 490, the question was whether the recorder could be suspended and impeached by the city authorities, and a distinction was found to have been made by the legislature between the "removal for cause after

trial," as provided for in the constitution, and the "impeachment" authorized by the city charter, and this court said: "We are of opinion that the legislature was justified in making the distinction it did." In the case at bar no such distinction is possible; for, while it may be advisable, and is frequently the case, that more than one method should be provided by which obnoxious public servants may be required to make room for more efficient ones, there can be, in the nature of things, but one way of filling a vacancy in a particular office, though, no doubt, different methods may be provided for different offices.

The case of *State v. Judge of Civil District Court*, 50 La. Ann. 655, 23 South. 886, seems to be cited as establishing the proposition that the office of recorder, under the constitution of 1879, was statutory, and not constitutional, and from this premise the learned counsel for the defendant argues as follows, to wit: "If the recorder is a judicial officer, he must be an officer of the state of Louisiana, and, if he is an officer of the state of Louisiana, he cannot be an officer of the city of New Orleans." Unfortunately for this argument, and aside from other considerations which might be suggested, the constitution of the state contemplates that there shall be, or may be, judicial officers of the city of New Orleans, for it says so in terms, and it provides that vacancies in such offices shall be filled by appointment by the governor. The final suggestion that even the constitution cannot deprive the people of New Orleans of the right to fill such vacancies can hardly be entertained. For these reasons, it is ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed. And it is now ordered, adjudged, and decreed that there be judgment in favor of the plaintiff, the state of Louisiana, and against the defendant, George H. Grandjean, adjudging said defendant guilty of usurping, intruding into, and unlawfully holding and exercising the office of recorder of the second recorder's court of the city of New Orleans, and that he be excluded therefrom, and that said office be decreed vacant; said defendant to pay costs in both courts.

(51 La. Ann. 1068)

COURREGÉ v. COLGIN. (No. 12,997.)

(Supreme Court of Louisiana. May 1, 1899.)

COMMUNITY PROPERTY—LIABILITIES—REPAIRS—IMPROVEMENTS.

1. The fruits and revenues of the wife's separate property, administered by the husband, fall into the community.

2. Where the husband, for the community, cultivates a plantation, the separate property of the wife, the indebtedness incurred in such cultivation is a liability of the community, and the wife cannot be individually held for same.

3. And this includes the ordinary repair account of the plantation, by which the same is kept in a fair state of preservation, and deterioration prevented.

4. This is to be differentiated from the expense incurred by which improvements of a substantial,

permanent character are added to the wife's separate estate. In the latter case the rule of law may well be invoked which holds the wife liable for the cost of such betterments, whether she retains the administration of the property, or abandons it to her husband.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Iberia; Félix Voorhies, Judge.

Action by Jean M. Courrégé against Mrs. Celine M. Colgin. Judgment for defendant, and plaintiff appeals. Affirmed.

L. O. Hacker, for appellant. Foster & Broussard, for appellee.

BLANCHARD, J. Defendant, a married woman, not separate in property from her husband, owned several tracts of land, or small plantations, which were her paraphernal property. On one of these she lived with her husband and children. The husband, George Colgin, owned no property, and was without means. Plaintiff is a merchant, who makes advances of supplies and money to those engaged in farming. In January, 1891, an account was opened with him, and supplies and advances obtained, with which the plantations belonging to the wife were cultivated, and the family supported. This continued down to January 31, 1895, when the account closed. The proceeds of the cotton and sugar cane produced on the places were received by plaintiff, and credited on the indebtedness resulting from the advances made by him. A large balance was left due when the account was closed, for which a promissory note was given, signed by the wife and husband, payable February 1, 1896, with interest. This note was not paid at maturity, and another was given for \$3,124.70, representing the principal, with interest added, of the first note. It was not paid, whereupon this action was instituted. It does not purport, specifically, to be a suit on the note, though the sum for which judgment is asked in the petition is that named in the note. The cause of action set out is that plaintiff sold and delivered to defendant articles of merchandise, provisions, farming implements, cattle, and cash, and other plantation supplies, for her own use and advantage, and for the cultivation and improvement of her paraphernal property; and the averment is made that on the 1st of February, 1896, defendant owed him the \$3,124.70 aforesaid, and promised to settle the same 12 months from that time. He charges that the wife's property, to cultivate and exploit which the indebtedness was incurred, was under her administration; that he dealt with and gave the credit to her, and not to him; that she and her separate property were directly benefited by the same; and that she was duly authorized by her husband in all her dealings with him. The defense is that, while the plantations cultivated are the separate property of the wife, the same were not under her control or administration, but under that of her husband; that a community of acquets and gains exists between them;

that the account with plaintiff was opened by the husband, with whom plaintiff dealt, and to whom the credit was extended; and that the indebtedness is that of the husband, or of the community, for which neither she nor her separate property is liable. She denies that the indebtedness inured to the benefit of her separate property. The judgment below rejected plaintiff's demand. He appeals.

The evidence establishes that the husband, not the wife, had the administration of the paraphernal property. The account, from the time when opened, in January, 1891, down to September 15, 1894, was carried on the books of the merchant in the name of George T. Colgin, the husband. From September 15, 1894, to January 31, 1895, when the account was closed, it appears to have been carried on in the name of the wife. The wife did not authorize this substitution of her name. Besides, changing the account to her name was of no consequence. *Chaffe v. McIntosh*, 36 La. Ann. 826. The dealings of plaintiff were with the husband, not the wife. It was the husband who bought the goods, obtained the advances, and whose orders for supplies were honored. It was he who delivered the crops to plaintiff, or paid over the proceeds to him. The wife did not figure at all in these transactions,—beyond, perhaps, a few minor purchases by herself individually at the store. The contracts of the plaintiff were with the husband. The credit was extended to him. This wife did not cultivate her plantations, and the same were not cultivated by the husband as her agent, nor for her account and benefit. The fruits and revenues of the wife's separate property administered by the husband fall into the community, and the debts contracted in such administration are community obligations. *Rev. Civ. Code*, art. 2386; *Van Wickle v. Violet*, 30 La. Ann. 1106; *Chaffe v. McIntosh*, 36 La. Ann. 824; *Pior v. Giddens*, 50 La. Ann. 232, 23 South. 338; *Hall v. Wyche*, 31 La. Ann. 734; *Trudeau v. Row*, 23 La. Ann. 197. That portion of the indebtedness contracted with plaintiff, chargeable to the household expenditures of the family, was mingled with the plantation account, was extended on the same basis of credit (that of the husband and the revenues of the property), and cannot be viewed in any other light than as a community obligation, for which, under the circumstances here presented, and considering the situation of the parties, the wife and her separate estate cannot be held liable at the suit of the plaintiff. *Id.* arts. 2389, 2395, 2435; *Choppin v. Harmon*, 24 La. 327.

But plaintiff urges that the wife is liable for that portion of the indebtedness which is shown to have been for those things or articles which by their nature and character entered into the permanent improvement of her separate estate; and he culls from the account, beginning with June 27, 1893, and ending with January 23, 1895, the items under this head, aggregating \$303.75. An examina-

tion of the items shows them to have been purchases of nails, staples, fence wire, fence posts, hinges, screws, locks, lumber, and lime, all in small quantities, and one item of \$35 for building cabins, and another of \$17.50 for building a crib. Even if these expenses are considered as rightly coming under the head of betterments or permanent improvements put upon her paraphernal property, and if viewed as adequately proven, they are entitled to be considered paid in whole or in part by the credits received by plaintiff from the crops and proceeds of crops raised on the places. In other words, plaintiff cannot be permitted to cull out these items of indebtedness, so as to deprive them of all benefit of the credits he has received, apply such credits exclusively to other items of indebtedness in the common account, and hold the wife for the aggregate sum of the items exculpated from the benefit of the credits. There would be gross inequity in this. The husband and the community of which he is the head incurred this indebtedness and put these things on the plantation for his and its benefit. The revenues of the place belonged to the community. As such they were received by the plaintiff, and credited on the account, and the sums so received entered into the payment, pro tanto, as far as they went, of each and every item on the account. Besides, we are not impressed that the items of expense so culled out are entitled to be classed as improvements on the plantation. Most of the items—indeed, all, unless it be the two for cabins and crib—are rather to be viewed as for current repairs (repair account) and, like those on another list furnished by plaintiff (of items used in the cultivation of the plantation), must be held as liabilities of the community, and not of the wife. Where the husband, for the community, cultivates a plantation, the separate property of the wife, the indebtedness incurred in such cultivation is a liability of the community, and the wife cannot be individually held for same. And this certainly includes the ordinary repair account of the plantation, by which the same is kept in a fair state of preservation, and deterioration prevented. This is to be differentiated from the expense incurred by which improvements of a substantial, permanent character are added to the wife's separate estate, thereby appreciably enhancing the value of same. In the latter case that rule of law may well be invoked which holds the wife liable for indebtedness incurred for the improvement of her separate property, whether she retains its administration or abandons it to her husband.

Plaintiff claims he paid taxes on the property. He did not produce the tax receipts, and his evidence of the payment of taxes was objected to, and bill reserved on the ground that the best evidence of such payment was the receipts themselves. Besides, his testimony was to the effect that he gave the money to defendant's husband to pay the taxes. This is not sufficient to establish that the

taxes were actually paid by plaintiff. *Carroll v. Manning*, 24 La. Ann. 142. And, if they were, such items of indebtedness, charged as they were on the common account, are, too, entitled to share in the benefits of the credits plaintiff received from the proceeds of the crops raised on the plantations. Besides all this, the community, enjoying, as it did, the usufruct of the wife's landed estate, ought, in good conscience, to be chargeable with the taxes on the same. We find no sufficient warrant for disturbing the judgment of the court *a qua*, and the same is affirmed.

MONROE, J., takes no part, the case having been submitted before he became a member of this court.

(51 La. Ann. 1074)

STATE v. PERRY. (No. 13,007.)¹

(Supreme Court of Louisiana. May 1, 1899.)

CRIMINAL LAW—APPEAL—CORRECTION OF MINUTES—ATTACHMENT OF WITNESS—CONTINUANCE—HOMICIDE—EVIDENCE.

1. Even after appeal in a criminal case, the trial court may, in a proceeding taken contradictorily with the appellant, correct and amend its minutes so as to present the true facts for the consideration of the appellate court.

2. District attorneys prosecuting on behalf of the state should look carefully after the minute entries of the court relating to prosecutions.

3. Judges and clerks of trial courts might save much delay and trouble, as well as facilitate good order and promote regularity of proceeding, by more attention to such details.

4. Defendant, on trial, is not prejudiced by denial of motion to attach a witness whose evidence is immaterial.

5. Granting or denying applications for continuance of criminal causes rests largely in the discretion of the trial judge, and his rulings will not be interfered with, unless a clear case of abuse of discretion is presented.

6. A possible motive existing in another other than the accused, and that other not named or suggested, to slay the deceased, through revenge for an antecedent killing by him, has a bearing, if any at all, so remote as to render subject to the objection of irrelevancy and immateriality evidence sought to be introduced of such killing by the accused.

7. Where the accused objects to evidence of inculpatory declarations by him on the ground that a proper foundation for the same has not been laid, he should specify the defect complained of.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Vernon; S. D. Read, Judge.

R. E. Perry, alias Jack Moore, was convicted of murder, and appeals. Affirmed.

Don E. Sorrelle, for appellant. Milton J. Cunningham, Atty. Gen., and A. R. Mitchell, Dist. Atty., for the State.

BLANCHARD, J. Indicted for murder, found guilty without capital punishment, and sentenced to imprisonment at hard labor for life, defendant appeals.

In an assignment of errors filed here, it is complained that the minutes of the court do

not show the presence of the accused at important stages of the trial. This is true, as far as the minutes, as first transcribed by the clerk, read in open court, and attested by the signature of the trial judge, are concerned. But, after the transcript was filed here, the attorney general, suggesting that the minutes of the court relating to the trial of the case were defective, in not showing the presence of the accused at any stage of the trial, and averring that he was present at all the stages thereof, moved for a correction of the minutes, and for a continuance of the case, to allow the district attorney to take proper proceedings in the court below to have the correction made so as to conform to the facts. An order to this effect, without prejudice to the accused, having been entered here, the district attorney took a rule in the court *a qua* on the accused to show cause why the minutes of the trial should not be corrected so as to show his presence in court throughout the trial of the case. He averred the fact to be that he was present at each and every stage of the trial. Defendant, answering the rule, pleaded that it was then too late to make any change in the minutes of the trial, for the reason that nearly four months had elapsed since the holding of the term of court at which the trial was had; that the proper time for the correction of the minutes, if incorrect, was when they were read in court, after the same were first transcribed; that the district attorney was present when they were so read, and suffered the same to be approved without objection on his part; and that the practice of attempting to effect changes in the minutes of court long after the adjournment of the term at which the trial was had was unsafe, and an unfair preference shown the state as against the accused. On trial of the rule, the testimony showed the presence of the accused throughout his trial; whereupon judgment for correction of the minutes accordingly was entered up, and an amended transcript of the case, showing such correction, was presented here, and ordered filed without prejudice. Neither bill of exceptions nor appeal was taken by the accused to the ruling and judgment allowing the correction. But, even if there had been, it would not have availed him. It has been held repeatedly that, even after appeal, the trial court may, in a proceeding taken contradictorily with the appellant, correct and amend its minutes so as to present the facts for the consideration of this court. *State v. Revells*, 31 La. Ann. 387; *State v. Judge*, Id. 557; *State v. Tassier*, 32 La. Ann. 1227; *State v. Howard*, 34 La. Ann. 369. The corrected minutes showing the presence of the accused throughout the trial, his assignment of errors falls.

But, while so holding, we deem it not amiss to admonish district attorneys, prosecuting on behalf of the state, of the necessity of looking carefully after the minute entries of the court relating to prosecutions. Judges and clerks

¹ Rehearing denied May 15, 1899.

of trial courts might save much delay and trouble, as well as facilitate good order, and promote regularity of proceeding, by more attention to such details.

After having obtained a continuance of his case, and postponement of trial, for more than 12 months, the accused applied for a change of venue, on the ground of the existence of prejudice in the public mind against him to such an extent as precluded the possibility of an impartial trial in the parish. To an adverse ruling thereon he reserved a bill of exceptions, to which is attached the evidence taken on trial of the application. This testimony fails entirely to show the existence of such prejudice against him as he contended for, and every one of the many witnesses he called declared the belief that he could obtain a fair and impartial trial in the parish of Vernon. There was no error in the ruling denying the change of venue.

A witness, T. J. Grissom, living in an adjoining parish, having been subpoenaed on behalf of the defense, failing to appear, an attachment was asked. His testimony was wanted to establish the fact that the accused went by the assumed name of J. B. Moore long prior to the date of the murder charged in the indictment; that the reason for this change of name was because he had been blacklisted by the railroads; and that his motive in passing under a name other than his real one was not to conceal his identity, because of crime committed. To the refusal of the court to order the attachment, a bill of exceptions was reserved. The ruling was based, in the main, upon the immateriality of the testimony to affect the substantial issues of the case. To have granted the attachment of the witness would have necessitated the further postponement of the trial, having then already been postponed more than a year since the arraignment under the indictment. The testimony of the witness Grissom could not possibly become material unless the state attempted to make capital of the change of name in the instant prosecution, and this the judge could not anticipate or foresee. The materiality of the evidence was not apparent at the time the attachment was applied for. It did not appear that the prosecution was then seeking, and it is a fact that it did not subsequently seek, to turn to the disadvantage of the accused the circumstance of the change of name as an incident having any bearing upon the case. On the contrary, the judge states in the bill of exceptions that the evidence of the state itself showed the accused had given the name of "Jack Moore" as his several months prior to the murder. The accused was not prejudiced by the denial of the attachment, and the ruling of the trial judge thereon is sustained.

On the day the case was called for trial, defendant applied for a continuance on the ground of the absence of certain witnesses for whom subpoenas had issued, and reserved a bill to the denial of the motion. As to two

of the witnesses, Williams and Blevins, the sheriff's return shows they had left the state; one of them being in Texas, and the whereabouts of the other unknown. As to another, Sullivan, the return of the sheriff states no knowledge of his whereabouts, and inability to learn anything concerning him upon diligent inquiry. It is established, by repeated decisions, that the matter of granting or denying applications for the continuance of criminal causes rests largely in the discretion of the trial judge, and that this court will not interfere unless a clear case of abuse of such discretion is presented. No such abuse appears here. To the statements made in the motion for continuance, as to what was expected to be proven by the absent witness, the judge replied, in his reasons embodied in the bill of exceptions for denying the motion, that circumstances within his knowledge forced him to conclusions of fact entirely different. While not justifying this as sufficient grounds for withholding his assent to the demand for continuance, the whole case, as presented on the motion to continue, does not impress us that the ends of justice would have been subserved by the granting of the continuance, and, accordingly, we cannot say there was error in its refusal.

The state having called the widow of the murdered man to the stand, seeking to identify the accused as one of the two men who had committed the murder, she was asked, on cross-examination, if her deceased husband had not, a short while previous to his death, killed a man by the name of Sam Williams; counsel for defendant stating his only purpose to be to show motive may have existed in another or others to commit the murder with which the accused stood charged. Objection by the state being interposed, the same was sustained. Defendant excepted. The ruling was correct. The burden rested on the state to prove the dead man was killed, that the killing was a murder, and that the accused was the murderer. If any one of these essentials failed of proof, the prosecution fell. A possible motive existing in another, and that other not named or suggested, to slay the deceased, through revenge for an antecedent killing by him, had a bearing, if any at all, so remote as to make the question put to the witness well subject to the objection of irrelevancy and immateriality.

The state offered one George Rivers as a witness to prove inculpatory declarations by the accused. The latter objected on the ground that the proper foundation had not been laid for the admission. Required by the court to declare wherein the foundation was defective, declined to say; whereupon the objection was overruled. Defendant excepted. The statement of the witness is annexed to the bill. We think it competent testimony.

The last bill of exceptions was taken to the denial of the motion for new trial. The principal ground averred for the motion was separation of the jury. Evidence was taken in

the effort to show the separation. It all comes up as part of the bill. It falls entirely to show any separation of the jury. Judgment affirmed.

(51 La. Ann. 1085)

GAGNEAUX v. DESONIER. (No. 13,130.)

(Supreme Court of Louisiana. May 1, 1890.)

DIVORCE—CRUELTY—INTOXICATION—EVIDENCE—ALIMONY.

1. Where, in a suit for separation from bed and board, brought by a wife upon the grounds of habitual intemperance, cruel treatment, and public defamation, several unimpeached witnesses, including adult children of the marriage, testify affirmatively to specific conduct on the part of the defendant sustaining the charges contained in the petition, such testimony will not ordinarily be considered rebutted by the testimony of witnesses for the defendant establishing for him a good general character or reputation.

2. Where the evidence in such a case shows that, during a series of years preceding the institution of the suit, the defendant husband has been a regular drinker of intoxicating liquor; that he has been quarrelsome and abusive at home; that his wife has on several occasions left the common domicile; that his children have, one after another, left the paternal roof at their father's command, or with unfriendly feeling; and that the defendant has on more than one occasion, in presence of the adult children of the marriage, and of other persons, made the vilest charges and insinuations against his wife,—the latter is entitled to a separation.

3. The alimony to be allowed in such a case should be regulated by the revenues of the community property, considered in connection with the earning capacity of the husband, and the amount required for the wife's support.

(Syllabus by the Court.)

Appeal from judicial district court, parish of St. Mary; A. C. Allen, Judge.

Suit by Mrs. Ursules Gagneaux against Louis C. Desonier. Judgment for plaintiff. Defendant appeals. Modified and affirmed.

D. Caffery & Son and J. Sully Martel, for appellant. Milling & Sanders, for appellee.

MONROE, J. This is a suit for separation from bed and board, and for a dissolution of the community, upon the grounds of habitual drunkenness, excesses, and cruel treatment, and public defamation. Plaintiff obtained an injunction, in limine, restraining defendant from disposing of community property, and, by supplemental petition, prayed for alimony. Defendant, after an unsuccessful attempt to set aside the injunction, answered, admitting the marriage, and denying all the other allegations of the petition. There was judgment for plaintiff in the court a qua, from which defendant has appealed; and plaintiff answers, praying that the judgment be amended by increasing the allowance for alimony, and in other respects affirmed.

The evidence shows that the defendant came from Canada to Louisiana many years ago, and found a wife among the Creole young ladies of this state. With her he moved to the parish of St. Mary, where they have lived for more than 30 years. Ten children were

born of the marriage, of whom but three are living at this time, viz. Henry, aged 39, Alcide, aged 28, and a married daughter, Mrs. Boudreaux. Joseph, another son, died within the past four or five years, and left a widow and one child. The other children appear to have left no issue. Defendant and his wife have acquired, in community, real estate consisting of a dozen small tenements, the rental value of which is said to be from \$3 to \$5 per month each, but which are not always rented, and the residence in which they lived, with garden attached, worth about \$6 per month. They have also some live stock and other movables, the total value of the community property approximating \$10,000. It further appears that about 12 or 14 years ago the defendant said to his oldest surviving son, "I am going to put the whole shooting place out, and sweep the place clean," and that the son thereupon left, and went to Galveston and elsewhere, and only returned to Sorrel, where his parents lived, in 1896, after an absence of 11 years, and that he has his own blacksmith's shop, and lives in his own house; that, a few years later, Alcide, another son, having reached the age of 17, was turned adrift by his father, and since then has shifted for himself, and in some way picked up the trade or profession of electrician, by which he now makes his living; that in 1892 still another son, Joseph, married, and lived with his wife for a few months under the parental roof, when he, too, left, for some cause unexplained, but under such circumstances that there was little or no communication between his family and his father's thereafter until he died, two or three years later; that in 1892 the plaintiff, with the only remaining and youngest child, who afterwards became Mrs. Boudreaux, left their home in consequence of some trouble or misunderstanding with the defendant, but returned after a short absence, after which the daughter married Boudreaux, and was taken to a home of her own, and the old couple were left to themselves. In 1896, however, as it appears, the plaintiff again left the house, and remained away for nine months, staying with her children. She again returned to her husband, but from that time up to December, 1897, when she again left him, she frequently went for a night at a time to the house of her daughter-in-law, in alarm and distress. Finally, in December, 1897, she went with her son to Franklin to consult an attorney, and upon their return they were accosted by the defendant, who inquired, and was informed, where they had been, and thereupon used such language towards and concerning his wife as no wife, mother, or woman could well forgive. If there was no other evidence of similar purport in the record, it might be said that a single ebullition of temper, provoked by the circumstances stated, ought to or might be condoned; but there is proof that on other occasions, in the presence of other children of the marriage, and of third

persons, the defendant had made the vilest and most infamous charges against the plaintiff. It is in evidence that they had little or nothing to do with each other, though living in the same house; that she did not occupy the same room or sit at the table with him; and that he rarely spoke to her, unless to curse and abuse, or to sneer at the Creoles as cattle and animals, upon which occasions she sometimes retallated in kind, and at other times sought refuge at the house of her daughter-in-law. Precisely why the sons were turned out by their father, and why the wife left the common domicile on the several occasions mentioned, does not clearly appear. If there had been troubles with the wife alone, the blame might be imputed to her. If there had been troubles between the wife and one son and the defendant, and no explanation, the presumption would be rather against the defendant; but when a man manages to get upon bad terms with his whole family, one after the other, and when it appears, as it does from this record, that he indulges regularly in the use or abuse of intoxicating liquor, and, upon occasions, for a week at a time, purchases and disposes of as much as a quart of whisky a day, the presumption is decidedly against him; and this presumption is strengthened, and we are enabled to read between the lines and account for that which is unexplained, when we consider the affirmative testimony as to the defendant's conduct and language towards and concerning his wife, because that conduct and language shows of what the defendant is capable. It is suggested, however, that in view of the testimony of the defendant's witnesses as to his general character, and as to their ignorance of any misconduct on his part, the court should believe him incapable of such misconduct, in spite of the affirmative testimony to the contrary. The difficulty in the way of the adoption of this theory is that the witnesses who testify to the misconduct refer to specific and affirmative facts, which must be as they state, or else they are committing perjury. They seem to be respectable people (with two exceptions, defendant's own children), and are wholly unimpeached. The defendant's witnesses, also unimpeached, merely testify to what they know of the defendant from casual or business acquaintance, and give us the benefit of their knowledge or ignorance of his conduct at home, as based upon visits more or less unfrequent, and observations made while passing along the public road; so that it is easy to believe that all the witnesses are testifying truthfully, and, if they are, then the plaintiff's case is made out; whereas, in order to hold that the defense is sustained, we must conclude that all of the plaintiff's witnesses have testified falsely, for which there can be no possible justification, since their testimony is strongly corroborated by facts which are undisputed, and they themselves are unimpeached.

It is asked that the amount allowed to the

plaintiff as alimony be increased. The evidence shows that the rental of the real estate belonging to the community can hardly be less than \$36 per month, in addition to which defendant has the occupancy of the matrimonial domicile and the use of the movables. He has also an earning capacity, and a trade or profession out of which he ought easily to make a living. Under these circumstances, \$10 a month is rather a scant allowance, which might well be increased to \$15. It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by increasing the amount allowed the plaintiff as alimony from \$10 per month to \$15 per month,—such increase to take effect from the date from which alimony was originally allowed,—and, in all other respects, that said judgment be affirmed; defendant to pay costs in both courts.

(61 La. Ann. 980)

Succession of PARHAM et ux. (No. 12,983.)

(Supreme Court of Louisiana. March 20, 1899.)¹

TAX LIENS—LIMITATIONS—CONSTITUTIONAL LAW.

The terms of article 186 of the constitution of 1898 relate to the future, and their effect is prospective only, and they cannot be given a retrospective operation, the result of which would be a remission of a large amount of delinquent taxes, in the absence of any provision clearly indicative of that purpose on the part of the framers of the organic law.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; George H. Théard, Judge.

In the matter of the succession of William Parham and Martha Rhodes, his wife. Rule against tax collector to cancel and erase tax privileges and mortgages. From the judgment a tax collector appeals. Reversed.

Francis C. Zacharie, for appellant. Fergus Kernan, E. Evariste Moise, John Wagner, and Junio F. Socola, for appellee.

WATKINS, J. It appears from the record that, notwithstanding the fact that William Parham departed this life in the city of New Orleans on the 26th of June, 1865, possessed of one horse, which was valued in the inventory then taken at \$50, and a small lot of ground, with the improvements thereon, valued at \$1,100, and that his surviving widow, Martha Parham, was qualified as the administratrix of his succession on the 17th of July, 1865, the public administrator opened his succession and that of his wife on the 17th of July, 1897,—the latter having died on the 4th of November, 1874, after the lapse of a 10-years administration. The conspicuous feature of the present administration is that the horse described in the former inventory has disappeared, and the appraised value of the lot and improvements has been reduced to \$50, same being the sole asset of the succes-

¹ Rehearing denied May 15, 1899.

sions of the aforesaid deceased persons. It further appears that an order for the sale of said property was granted on the 9th of September, 1898, upon the representations of the public administrator "that there are taxes and costs of administration due, and the only way to settle these successions is to cause the property to be sold." A short while subsequently the attorney for the public administrator, joined by other counsel, obtained a rule on the tax collector to show cause why the assessments of taxes against the aforesaid property as that of William Parham for the years 1872, 1873, 1874, 1875, 1876, 1881, 1882, 1883, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, 1895, and 1896—a period of about 25 years—should not be declared null and void on the ground that same were made against and in the name of a dead person; and why, for the same reason, all the inscriptions of the tax liens, privileges, and mortgages securing same should not be canceled and erased. Subsequently the aforesaid rule was supplemented with pleas of prescription of three and five years against "all taxes and tax inscriptions for the years 1890 to 1895, inclusive." All these proceedings were taken antecedent to the adoption of the constitution of 1898, but immediately thereafter the aforesaid rule was again supplemented by a statement to the effect "that all tax liens, privileges, and mortgages against said property are prescribed by three years from the 31st day of December of each of said years,"—reiterating the other allegations of his previous rule. The definite object of the last amendment was to enable the successions to avail of the possible benefit of the 168th article of the constitution of 1898 as a supposed constitutional remission of all taxes, and the consequent release of all tax inscriptions antecedent to that limit. That this seems to have been the appreciation of the district judge is evidenced by his decree which made the rule absolute to the extent of ordering the cancellation and erasure of all the tax inscriptions, liens, and privileges and mortgages for the various years enumerated from 1872 to 1890, inclusive, and all tax inscriptions of liens and privileges for the years 1891, 1892, 1893, and 1894, bearing upon or affecting said property. It is from that judgment the state tax collector has appealed, and in this court there has been no answer to the appeal filed, and no amendment thereof requested.

Upon this statement it is evident that this is a proceeding specially inaugurated for the purpose of disincumbering said succession property of its accumulated burden of taxes and tax incumbrances, so as to effectuate a sale by the public administrator, and whether the judgment appealed from shall be sustained or not exclusively depends upon what is the proper interpretation to be placed upon the aforesaid article of the constitution. This is conceded by the counsel for the public administrator, who make this statement in their

brief, viz.: "The question before the court is the construction of article 166 of the constitution of 1898. It reads as follows: 'No mortgage or privilege on immovable property shall affect third persons, unless recorded or registered in the parish where the property is situated, in the manner and within the time as is now or may be prescribed by law, except privileges for expenses of last illness and privileges for taxes, state, parish or municipal: provided, such tax liens, mortgages, and privileges, shall lapse in three years from the 31st day of December, in the year in which the taxes are levied, and whether now or hereafter recorded.'" The foregoing article is an exact reproduction of article 176 of the constitution of 1879, except the proviso, which reads as follows, viz.: "Provided such privilege shall lapse in three years." A comparison made of the two discloses that the present article contains the following words in addition to those contained in the former, viz. "tax liens and mortgages," and "from the 31st day of December in the year in which the taxes are levied, and whether now or hereafter recorded." The terms of the former article are broadened so as to cover and include tax mortgages as well as privileges, and so as to fix a date from which the time within which they are to lapse shall be computed; and thereto is superadded the phrase, "and whether now or hereafter recorded." The question for consideration and decision is whether that article is to be given a retrospective signification and effect, or, rather, to determine whether such was the purpose and intention of the framers of the organic law. It is the general rule that a law can only prescribe for the future. Rev. Civ. Code, art. 8. It is generally understood to be a sound rule of construction never to consider a law as applicable to cases or questions arising before their passage, unless the legislature have, in express terms, declared such to be their intention. In *City v. Vergnole*, 33 La. Ann. 35, this question was discussed, and the court held that article 8 of the Revised Civil Code "merely dictates a universal rule of construction, recognized in every known system of jurisprudence." A leading author on the question puts the proposition thus: "One of the cardinal rules by which courts are governed in interpreting statutes is, they must be construed as prospective in every instance, except when the legislative intent that they shall act retrospectively is expressed in clear and unambiguous terms, or such intent is necessarily implied. * * * Every reasonable doubt as to the intention of the lawmaker is resolved against, rather than in favor of, the retrospective operation of the statute." Wade, *Retro. Laws*, §§ 33-35. The same identical rule of construction unquestionably prevails in regard to constitutional provisions as with regard to statutes. On this subject the same author says: "This principle is not only applicable to legislative acts, but to state constitutions, and, in fine, to all writ-

ten law. Being a rule of construction, it may be applied to every conceivable expression of the will of the lawmaking power where there is a doubt whether it was intended to take effect prospectively or retrospectively," etc. *Id.* The same principle is announced by Sedgwick. *Vide* Sedg. St. & Const. Law, p. 19; Cooley, Tax'n, p. 321. "We shall venture, also, to express the opinion," says the same author, "that a constitution should operate prospectively only, unless the words employed show a clear intention that it should have a retrospective effect." Cooley, Const. Lim. p. 62; Story, Const. § 454; Sayre v. Wisner, 3 Wend. 661; Price v. Mott, 52 Pa. St. 315. On the foregoing authorities, we are of opinion we can safely announce the governing rule to be that the terms of a constitutional article, like the words of a statute, should be considered as having a prospective effect only, unless they clearly exhibit the intention of their framers to have been that they should be given a retrospective effect.

In this discussion we do not propose to argue the question of the power of the convention to adopt an ordinance having a manifestly retroactive effect. The power of a constitutional convention so to do may, for the purposes of the present decision, be conceded. The only language of the article which has been pointed out as justifying the retrospective operation of same is that of the last paragraph, *viz.* "and whether now or hereafter recorded." In other words, the contention of the public administrator is that, by declaring that tax liens, privileges, and mortgages securing the payment of taxes shall lapse in three years from the 31st day of December in the year in which such taxes are levied, "and whether now or hereafter recorded," the framers of the constitution intended to release all property from their operation and effect in any and all years preceding its adoption. We are most certainly unwilling to adopt such an interpretation as that, unless our judgment is clearly convinced that the words of the constitution imperatively require such a construction at our hands. We know as a fact that the constitutional convention of 1879 pursued an exactly opposite course, and adopted an ordinance for the relief of delinquent taxpayers, for the express purpose of saving all antecedent taxes from remission; and it is common knowledge that no revenue law of the state has been enacted during many years past which contained a sweeping repeal of all previous revenue laws. Consequently, in our opinion, such an interpretation of the aforesaid article as is contended for by counsel of the public administrator would be received as a surprise, and the result of such a construction would be little short of a public calamity, because of the vast amount of delinquent taxes which are covered by the aforesaid ordinance, and which have been heretofore held imprescriptible by many decisions of this court. We have given this question most careful and

serious consideration, and have reached a conclusion exactly opposite to that of our learned Brother of the district court.

Counsel for the state has reproduced and had incorporated into his brief the opinion of the court of appeals for the parish of Orleans in the case of *State ex rel. Hart v. City of New Orleans*, which involves the question we have under consideration, and the examination of which has afforded us pleasure and satisfaction, in that it perfectly accords with our views, and is both admirably and forcibly expressed. We have therefore concluded to adopt the same, and make it part of the opinion of this court. It is as follows, in so far as it appertains to the question under consideration, *viz.*:

"We now pass to the consideration of the plea of prescription of three years under article 186 of the constitution of 1898. Article 176 of the constitution of 1879 reads as follows: 'No mortgage or privilege on immovable property shall affect third persons, unless recorded or registered in the parish where the property is situated, in the manner, and within the time as is now, or may be, prescribed by law, except privileges for expenses of last illness, and privileges for taxes, state, parish or municipal, provided such privilege shall lapse in three years.' In *Davidson v. Lindop*, 36 La. Ann. 767, it was decided that the limitation of three years only applied to special privileges named when they are unrecorded, and the article meant that no unrecorded privileges shall affect third persons, except the special ones mentioned, which, though unrecorded, shall have effect, provided such unrecorded privileges shall lapse in three years. Article 176, *supra*, was *ipsisimis verbis* incorporated into article 186 of the constitution of 1898, and we must presume that it was adopted with a knowledge of the judicial construction placed upon the former, and such construction consequently attaches to the latter. But article 186 goes on to say (and here the difficulty arises), 'from the 31st day of December in the year in which the taxes are levied, and whether now or hereafter recorded.' The relator urges that the tax liens, mortgages, and privileges securing the city taxes of 1874, 1875, 1876, 1894, are prescribed under the last-quoted terms of the article. We may dispose of the discussion in the briefs as to the power of a constitutional convention to pass a retroactive ordinance when it does not impair the obligation of contracts with the simple statement that the affirmative of the proposition is beyond dispute. The present inquiry is not as to the power, but as to the intention, of the framers of the organic law. It is elementary that a constitutional enactment should be construed to operate prospectively only, unless the language employed manifests a clear intention to give it a retrospective effect. Do the words 'shall lapse in three years from the 31st of December in the year in which the taxes are levied, and whether now or hereafter recorded,'

clearly manifest an intention to sweepingly prescribe all tax privileges which, by existing law and jurisprudence, have heretofore been deemed imprescriptible? We think not. The language already cited, as common to the analogous clauses of both constitutions, decrees that there shall exist a privilege for unrecorded taxes for three years. This would leave to legislative discretion the right to fix any limit it might deem proper to the prescription of recorded tax privileges. Since 1880 this limit has been variously fixed at three years by most of the revenue acts, and five years by the revenue act of 1882. It was evidently the purpose of the constitution to curtail the power of the legislature in this respect, and to permanently fix in the instrument itself, and beyond reach of legislative uncertainty, the prescriptive period of recorded tax privileges at three years.

"The same may be said as to the time from which prescription is to run. There had been conflict of legislation on this point, some of the revenue acts providing that prescription ran from the filing of the tax roll, and one of them—that of 1888—and a special statute (Act No. 26 of 1886) fixing the date at December 31st of the year of the levy of the tax. It was, doubtless, to prevent similar conflict in the future that the date 'December 31st' was inserted in the organic law. It may be conceded that the words immediately following, to wit, 'and whether now or hereafter recorded,' are intended to have, and do have, a retroactive effect, but not to the extent and in the manner suggested by relator. At the time of the adoption of the constitution the term of prescription of the privileges securing the taxes of 1895, 1896, and 1897 had not expired. They were then recorded, or, in other words, within the meaning of the constitutional expression 'now recorded.' These words were intended to say that as to those tax privileges prescription should run, not from the filing of the tax roll, but from the 31st of December of the year in which the tax was levied, and that this should also apply to all tax privileges 'hereafter recorded.' We think that an analysis of the article, in connection with law and jurisprudence as they stood at the time of its adoption, shows the intention of the constitution to provide: First. That all privileges for taxes, whether recorded or unrecorded, shall lapse in three years, and that it shall not be competent for the legislature to extend this period of prescription. Second. That prescription shall run, not from the filing of the tax roll, but from the 31st of December of the year in which the tax is levied, as to all tax privileges hereafter recorded. Third. That as to the tax privileges already recorded by the filing of the roll, prescription shall run, not from the filing of the tax roll, but from the 31st of December of the year in which the taxes were levied. See revenue acts of 1886 and 1888. The view we have expressed as to the intention of the constitution is confirmed by the fourth para-

graph of article 325 (schedule) to the effect that 'all fines, taxes, penalties, forfeitures and rights due, owing or accruing to the state of Louisiana, or to any parish, city, municipality, board, or other public corporation therein, under the constitution and laws heretofore in force, * * * shall continue and remain unaffected by the adoption of this constitution.' This is so strongly illustrative of the purposes of the convention that we do not deem it necessary to determine whether, in case of conflict, article 325, the higher number and latter in position, would not necessarily take precedence of article 186. It has been aptly said that a construction which raises a conflict between parts of the constitution is not permissible when, by any reasonable construction, the parts may be made to harmonize. An interpretation of the meaning of a particular clause, based on all the provisions in *pari materia* of the instrument as a whole, should prevail when it alone can harmonize the apparent contradictions of an inartistic phraseology. It may be added that, while the argument, from inconvenience, cannot properly be used by courts to avoid the effect of a plain declaration of a constitution, yet it may be properly invoked as a guide for the ascertainment of intent where doubt may exist. Act No. 67 of 1894 (section 3) makes it the duty of the city to turn over to the board of liquidation of the city debt all uncollected revenues of the city anterior to the year 1879, when collected, to be applied to the payment of interest on and redemption of bonds issued for the retirement of the judgment debt arising from municipal obligations anterior to 1879. Pretermittting the question of the impairment of a contract, and assuming, as we must, that no state constitution would deliberately violate the federal limitation, we may view the matter as one of interpretation, and not of constitutionality. The convention cannot be credited with the intention of destroying the securities pledged sacredly by law to the payment of municipal creditors, in the face of the declaration of article 325 that no tax or right due to any city or board shall be affected. Therefore it is ordered, adjudged, and decreed that the plea of prescription filed in this court be overruled, and that the judgment be, and the same is hereby, affirmed, with costs."

Concurring in the foregoing opinion, the necessary result is that the judgment appealed from must be reversed, and one entered discharging the rules taken in behalf of the succession of William and Martha Parham. It is therefore ordered and decreed that the judgment appealed from be annulled and reversed, and it is further ordered and decreed that the rules taken in behalf of the successions of William and Martha Parham, deceased, for the cancellation and erasure of the inscriptions of certain tax liens, privileges, and mortgages against succession property, be discharged and rejected, at the cost of the plaintiff in rule.

(51 La. Ann. 812)

STATE ex rel. HART v. CITY OF NEW ORLEANS et al. (No. 13,090.)

In re HART.

(Supreme Court of Louisiana. April 3, 1899.)

TAX LIENS—LIMITATIONS.

The proviso of article 186 of the constitution of 1898 again held not to be retrospective in its operation. The doctrine announced in Succession of Parham, 25 South. 947, 51 La. Ann. —, reaffirmed.

(Syllabus by the Court.)

Application by the state, on the relation of Robert A. Hart, for a writ of mandamus against the city of New Orleans and others. Judgment for defendants. Application by relator for a writ of review or certiorari. Denied.

Thomas J. Kernan and Dart & Kernan, for relator. Walter B. Sommerville, Asst. City Atty., for respondents.

BLANCHARD, J. The writ of review applied for was granted in the following order made by this court, viz.: "This application invokes the construction of article 186 of the constitution of 1898. While that article is substantially a reproduction of article 176 of the constitution of 1879, a new and enlarged clause was added to it in the later constitution, which clause has not yet received the interpretation of this court. For this reason the preliminary writ applied for is granted. The record of the case is ordered to be brought up, parties interested will be notified, and time given until Monday, March 6, 1899, in which to file briefs." The applicant had instituted in the civil district court for the parish of Orleans a proceeding by mandamus against the city of New Orleans and the recorder of mortgages for the cancellation and erasure of the inscription of certain city taxes and tax liens and privileges for the years from 1874 to 1893, inclusive, appearing upon the public records, and affecting certain properties of which he averred himself the owner. The ground upon which he had based his demand for this cancellation and erasure was that the assessments on which the taxes had been levied against the property were null and void, because made in the name of persons not the owners of the property at the time of the assessments, and because the tax liens and privileges recorded against the property were prescribed by three, five, and ten years. The judgment of the district court, rendered in December, 1897, directed the cancellation and erasure of the tax inscriptions for the years from 1877 to 1893, both inclusive, but refused the relief sought as to the inscriptions for the years 1874, 1875, 1876, 1894, and 1895. An appeal was prosecuted to the court of appeals for the parish of Orleans. Pending this appeal the constitution of 1898 was adopted, with its article 186; and based on this article a new plea of prescription of three years was filed in the court of appeals by the relator, who was appellant. That

court considered the case from the standpoint as made up and determined in the district court, and also in the new aspect as presented by the plea of prescription based on article 186, Const. 1898. Its decision as to both was against the relator, and the judgment of the district court, ordering the cancellation of the tax inscriptions in part, and refusing same in part, was affirmed; whereupon relator applied to this court for its writ of review, urging that the court of appeals had erred—First, in holding the assessments complained of good, and the taxes predicated thereon valid outstanding obligations; and, second, in denying the applicability of the prescription announced in the last clause of article 186, Const. 1898. From the order granted by this court, and heretofore quoted, it is apparent that the case is brought up only in so far as may be necessary to review the interpretation put by the honorable court of appeals upon article 186 of the constitution aforesaid in its effect and operation upon the state of facts disclosed by this controversy. It is not considered that the case as made up and determined in the district court and affirmed by the court of appeals presents any question of law or fact justifying the bringing of it here under the authority with which this court is vested by article 101, Const. 1898. In re Ingersoll, 50 La. Ann. 748, 23 South. 889. Since the order was granted bringing up the case for review as to the interpretation put by the court of appeals upon the concluding clause of article 186 of the constitution of 1898, this court has had occasion to consider that clause, and has placed the same construction upon it as did the court of appeals in the instant case. Therefore, for the reasons assigned in the opinion of Mr. Justice Watkins, as the organ of the court, in Succession of Parham, 25 South. 947, on rule against the tax collector to cancel and erase certain tax privileges and liens (recently decided), it is ordered, adjudged, and decreed that the judgment of the honorable court of appeals in this cause be not disturbed, and the same is sustained as the proper adjudication of the issue presented in respect to the question arising on the interpretation of the proviso of article 186 of the constitution.

(51 La. Ann. 1062)

STATE v. FURCO. (No. 13,109.)¹

(Supreme Court of Louisiana. May 1, 1899.)

DRAWING JURY—WITNESSES—GRAND JURY—DISSOLUTION—CHARGE TO JURY—OATH—DISTRICT ATTORNEYS.

1. While it would be in better form to go outside the coterie of court-house officials for witnesses to the drawing of juries, a deputy clerk of court and deputy coroner, acting in their individual capacities, and not as officials, are not incompetent to serve as such witnesses.

2. The fact that an incompetent person happens to find a place on the grand jury is no ground for the dissolution of that body. The judge may dismiss such ineligible juror, and sup-

¹ Rehearing denied May 15, 1899.

ply his place from the names remaining on the grand jury list.

3. It is not deemed essential that the judge should deliver anew a full charge to the grand jury after each filling of a vacancy in the panel.

4. But the failure to administer the full oath of a grand juror to the person chosen from the grand jury list to fill such vacancy is reversible error, when timely objection is made to the indictment, the finding of which was participated in by the juror improperly sworn.

5. The abbreviated form of oath administered to those chosen with the foreman, and who heard the full oath administered to him, suffices; but later, when another is added to the panel to fill a vacancy, it will not do to qualify him by the abbreviated oath.

6. A wise discretion to select his witnesses and manage the prosecution according to his best judgment, under the eye and reasonable direction of the court, is vested in the district attorney.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Assumption; Walter Guion, Judge.

Samuel Furco was convicted of manslaughter, and appeals. Reversed.

John Marks and Beattie & Beattie, for appellant. Milton J. Cunningham, Atty. Gen., and G. A. Gondran, Dist. Atty., for the State.

BLANCHARD, J. The accused was indicted for murder, and convicted of manslaughter. From a sentence to six years' penal servitude, he appeals.

The first move made in his defense was a motion to quash the indictment on several grounds, viz.: (1) Because the grand jury which returned the true bill was illegal, for the reason that the jury commissioners did not draw the jury in the presence of two disinterested witnesses, as prescribed by law. (2) Because, after the grand jury had been impaneled and sworn, and had commenced its work, it was found and adjudged that two of its members were disqualified under the law, and they were discharged from the panel, and two others drawn from the grand jury list, and sworn and installed as grand jurors in their place. That later it was found another member of the grand jury had permanently left the state, and thereupon another name was drawn from the jury list to fill this vacancy, and the person so drawn was not qualified by the taking of any proper or sufficient oath to conscientiously perform his duties as grand juror. (3) Because, after the juror last taken had been added to the panel, the grand jury had not been charged anew as to its duties, but did the following day return the indictment against the accused. (4) Because the first two grand jurors declared incompetent did not become so after being impaneled, but were so when impaneled, and their discharge dissolved the grand jury, which could not be afterwards added to, and made a further, continuing legal body. This motion to quash was overruled, and a bill of exceptions taken.

1. The jury commissioners for the parish selected the jury in accordance with section 4 of Act No. 135 of 1898. The clerk of the

court was himself present, acting as one of the commissioners. There were two witnesses present, witnessing the drawing of the jury. One of these witnesses was deputy clerk of the court, and the other was connected with the coroner's office of the parish, in the capacity of so-called deputy coroner. They, in their individual capacities, not as officials, had been summoned to attend the drawing of the jury, as witnesses thereof. In acting as witnesses, they did so as citizens and individuals, not as deputy clerk or deputy coroner. The contention that they are not to be considered "competent and disinterested" witnesses, in the language of the statute, because they held the official positions designated, is of insufficient force to justify setting aside the panel. While it would be in better form to go outside of the coterie of court-house officials for persons to witness the drawing of the jury, the language of the statute does not exclude such officials from acting in their individual capacities as witnesses, and we cannot. We are not unmindful of the fact the statute directs that, in case of inability of the clerk of court to act as jury commissioner, his chief deputy is ex officio to serve as such. But the chief deputy, in this instance, who acted as one of the witnesses, was not serving as jury commissioner. The clerk himself was there, performing that duty; and hence the deputy was a stranger to the proceeding, except in his capacity as citizen called to witness the drawing.

2. Some days subsequent to the impaneling of the grand jury, it was found that one of them could not read and write the English language, whereupon the judge ordered his dismissal from the panel because of disqualification. Still later another juror was dismissed because found also to be disqualified. Having found these jurors to be without the proper qualification, it was competent for the judge to dismiss them, and supply their places by two other persons, whose names were duly drawn from those yet remaining upon the grand jury list. Section 7, Act No. 135 of 1898.

A third grand juror having left the state permanently, and thus created a vacancy, another drawing from the grand jury list became necessary; and Thomas J. Dyer was drawn, sworn, and thereafter sat with the grand jury, participating in the finding of the indictment. It is strenuously insisted on by the accused that Dyer must be considered as not having been sworn. This contention is based on the form of oath administered to him. It was as follows: "You do solemnly swear that the oath your foreman has taken on his part you will observe and keep on your part, so help you God." The method of impaneling a grand jury is about as follows: The jury commissioners select the names of 20 persons to serve as grand jurors for the next ensuing six months. Section 7, Act No. 135 of 1898. These 20 persons are summon-

ed by the sheriff to appear in court on a day named, and they do so appear. The judge of the court, then, from this grand jury list of 20, selects a suitable person to act as foreman of the grand jury about to be organized. Section 8, Id. This person so selected as foreman has then administered to him the usual oath of grand jurors. Following this, the sheriff, under the direction of the court, draws from the grand jury list of names, one by one, the names of the jurors, until 11 answer, and these 11, with the foreman, constitute the grand jury. The practice, in administering the oath to these 11 so drawn, appears not to be to repeat over again the oath taken by the foreman, but a formula like that administered to the grand juror Dyer. Those drawn to serve as grand jurors are present, and hear the oath as the same is administered to the foreman, and accordingly it is not necessary to repeat over again to the 11 the full oath. The abbreviated form, such as that administered to Dyer, suffices. But when a vacancy occurs in the panel, and it becomes necessary to fill it from those remaining on the grand-jury list, as in case of the selection of Dyer, the regular oath in full of a grand juror should be administered to such person so selected; and the failure to do so is reversible error, when, as in this case, timely objection is made to the indictment, the finding of which was participated in by the juror improperly sworn. The abbreviated oath administered to those chosen with the foreman, and who heard the full oath administered to him, is all right; but later, when another is added to the panel, it will not do to qualify him by the abbreviated oath. Unless he were present, and heard the oath administered to the foreman, the abbreviated formula is equivalent to no intelligible oath administered to him at all; and a grand juror not duly sworn vitiates all indictments in the finding of which he took part, where seasonable complaint is made. We feel constrained to hold that it was error in the court below in not sustaining the motion to quash on this ground. The case might properly end here, by reversal of the judgment and remanding for further proceedings; but, inasmuch as the other points raised by the defense are important in the criminal practice, we deem it wise, for the guidance of the courts, to consider and determine the same.

3. A grand jury having been fully charged by the judge on the day of its organization, it is not required by the statute that he should charge it fully anew each time another juror is added to fill a vacancy occurring. It appears in the instant case, however, that, after the new jurors were added to fill vacancies, the judge did charge the jury anew as to the necessity of reporting all crimes and offenses, and as to the necessity of secrecy.

4. We cannot give our sanction to the proposition that, should a person not having the qualification prescribed by the statute for a grand juror be placed accidentally or inadver-

tently upon the grand-jury list of 20, and be drawn in the makeup of the jury, and serve upon it, the entire panel of the grand jury is stricken with nullity. To hold this would be to precipitate endless confusion upon the administration of criminal justice throughout the state. Nor does the statute warrant such holding. Care should be taken, first, by the jury commission, to exclude incompetent persons from the grand-jury list; next, by the judge, to prevent an incompetent person who happens to get upon the grand-jury list from being included in the grand-jury organization. But, if an incompetent person should happen to find a place on the grand jury, it is no ground for the dissolution of that body. As soon, however, as his disqualification comes to the knowledge of the judge, it is his duty, as was done in the instant case, to dismiss such person, declare a vacancy, and fill it by drawing from the remaining names on the grand-jury list. There is force in the contention that, within the meaning of the jury statute under consideration, the disqualification exists only from the time when it becomes known to the court; and finding a person on the jury who is disqualified, whether his disqualification antedates his selection or develops afterwards, it equally presents the case of a vacancy that the judge may order filled by a further drawing from the grand-jury list. And, as none of the incompetent persons dismissed from the panel were serving upon the grand jury at the time the present indictment was returned, we do not see that the accused has just cause of complaint on that score. In this respect the case at bar differs from *United States v. Hammond*, 2 Woods, 197, Fed. Cas. No. 15,294; *State v. Clough*, 49 Me. 573; *State v. Thibodeaux*, 48 La. Ann. 601, 19 South. 680; *State v. Jones*, 8 Rob. 618; *State v. Parks*, 21 La. Ann. 251; and other cases cited by counsel for defendant. In those cases incompetent persons actually sat upon the grand jury, and participated in the finding of the true bills.

Another bill of exceptions was reserved to the ruling of the court refusing the motion of counsel for the accused to compel the district attorney to call, on behalf of the prosecution, certain witnesses who were alleged to have been present at the homicide, and had knowledge of facts relating to the same. It seems that, after the state had announced its case closed so far as further evidence was concerned, counsel for defendant stated that there were in the witness room two witnesses whose presence at the time of the homicide had been shown by the testimony adduced on the part of the state; and he thereupon called upon the state to put those persons on the witness stand, to the end that what they knew about the case might be stated to the jury, and the accused be given the opportunity of cross-examination. The prosecuting attorney declined to call these persons as witnesses, and the court refused to direct him to do so. This is averred to be reversible error. The

parties referred to had been subpoenaed by the defense, not by the state. In Louisiana, as elsewhere, the humane policy of the law has ever been that it were better "ten guilty men escape than one innocent man should suffer." Furthermore, the rule obtains here that the officer prosecuting on behalf of the state represents the public interest, which can never be promoted by the conviction of the innocent. All the information possible relating to a crime charged to have been committed should be disclosed. The state has no interest to suppress real facts, whether they sustain the prosecution or overthrow it. The state is far better served when an innocent man escapes conviction for crime he did not commit, than it is when a guilty man is brought to punishment for the crime he did commit. This is the general rule that should guide the courts in their administration of criminal justice, and the law officers of the commonwealth in conducting prosecutions. At the same time, a wise discretion to select his witnesses and manage the prosecution according to his best judgment, under the eye and reasonable direction of the court, to the end that the law may be vindicated and the guilty brought to punishment, is vested in the district attorney. *State v. Williams*, 30 La. Ann. 843. The witnesses in question in the instant case were in court by the action of the accused. He had called them as his witnesses, and, when the state declined the invitation to put them on the stand, they were put upon the stand by the defense. What they knew of the case, therefore, went to the jury. They likely did not testify as the defendant hoped they would, and his case may have been prejudiced thereby; but this cannot be held sufficient ground to set aside this verdict and remand the case. *State v. Ford*, 42 La. Ann. 259, 7 South. 696.

The matters set forth in the bill of exception relating to the denial of the motion for new trial and that in arrest of judgment have been, for the most part, already discussed and disposed of. What is further urged in regard to the absence of a witness named Testa has had our attention. Without going into its discussion, we think the trial judge ruled properly therein. The same is true of the objection raised with respect to the interpreter who was sworn at the instance of the accused to translate the utterances of witnesses who testified in the Italian language; and of the further complaint that the district attorney filed an information, the day following the trial, against the accused, charging him with cutting and stabbing one of his witnesses.

One or two minor matters of objection are suggested in briefs of counsel for the accused, but since they do not form the subject-matter of bills of exception, nor are brought to our attention by an assignment of errors filed here, we decline to consider the same.

Because of the failure to administer a sufficient oath to the grand juror Dyer, as hereinbefore set forth, it is ordered, adjudged, and

decreed that the verdict, sentence, and judgment appealed from are avoided and reversed, and the case is remanded for further proceedings according to law; the accused to remain in the custody of the law.

(51 La. Ann. 1089)

STATE v. THOMPSON. (No. 13,147.)

(Supreme Court of Louisiana. May 1, 1899.)

INDICTMENT—SEPARATE OFFENSES—CONCLUSION OF COURT.

1. Cutting and stabbing with intent to murder, and wounding less than mayhem, while separate and distinct offenses, may be cumulated, in one presentment, provided each is charged in a separate count.

2. Bill of information, as here drawn, held to set forth two counts, and that one of said offenses was averred in each.

3. Not necessary to conclude each count of a presentment with the formula, "contrary to the form of the statute," etc. It suffices if the indictment or information concludes with it. So concluding, the formula is held to apply to each count of the bill.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Lafourche; Louis P. Caillouet, Judge.

Westley Thompson was indicted for cutting with intent to kill. Verdict for plaintiff. From an order sustaining a motion in arrest of judgment, the state appeals. Reversed.

Milton J. Cunningham, Atty. Gen., and Leonard O. Moise, Dist. Atty., for the State. John S. Billu, for appellee.

BLANCHARD, J. An information was filed against the accused, charging him with cutting and stabbing with intent to kill and murder, and with inflicting a wound less than mayhem. These are separate and distinct offenses, though kindred. Cutting and stabbing with intent to commit murder are actionable under section 791, Rev. St., as amended by Act No. 43 of the Acts of 1890. Inflicting a wound less than mayhem is actionable under section 794, Rev. St., as amended by Act No. 17 of the Acts of 1888. The two may be cumulated in one indictment or bill of information, provided each is charged in a separate count. *State v. McDonald*, 39 La. Ann. 959, 3 South. 92; *State v. Judge*, 33 La. Ann. 1294; *State v. Mosely*, 42 La. Ann. 978, 8 South. 471. Whether they are charged in separate counts is an issue in this appeal. The first part of the bill recites that the district attorney gives the court "to understand and be informed that Westley Thompson * * * on the 27th day of December, in the year of our Lord 1898, with force and arms, * * * did feloniously, willfully, and of his malice aforethought, with a dangerous weapon, to wit, a knife and hatchet, stab, cut, and thrust one Artemise Thompson, with intent her, the said Artemise Thompson, then and there, feloniously, willfully, and of his malice aforethought, to kill and murder." The end of a sentence (full stop or period) is here, and then follows another sentence, concluding the

bill, as follows: "The district attorney further gives the court to understand and be informed that the said Westley Thompson, on the day aforesaid, in the month and year aforesaid, and in the parish and state aforesaid, the said Westley Thompson in and upon the said Artemise Thompson, with a dangerous weapon, to wit, a knife and hatchet, did inflict a wound less than mayhem, contrary to the form of the statute of the state of Louisiana in such cases made and provided, and against the peace and dignity of the same." Appended is the signature of the district attorney. The bill is indorsed: "State of Louisiana vs. Westley Thompson. Information. First count, cutting with intent to murder; second count, inflicting wound less than mayhem." The jury which tried the accused returned this verdict: "Guilty, first charge; guilty, second charge." A motion for new trial having been overruled, counsel for defendant filed one in arrest of judgment, on the ground that the information is defective because of illegal joinder of offenses, and bad for duplicity. This motion the court a quo sustained, and the state appeals.

We think it clear that the bill contains two counts, and that one separate offense is charged in each count. The authority relied on by counsel for the accused (*State v. Johns*, 32 La. Ann. 812) is not in point. There was in that case but one count, charging the same two distinct offenses, which in the instant case are charged in separate counts. A test as to whether or not there are separate counts in this bill, and distinctive offenses averred in each count, is presented when the inquiry is made, could the jury have found the accused guilty as to one offense, and not guilty as to the other? Undoubtedly, this could be done, as the bill is drawn. And, if such had been the verdict, the prisoner would be sentenced for that offense for which convicted, under the section of the Revised Statutes applicable to the same, and, of course, not sentenced for the other offense, as to which he was acquitted, and relative to which the penalty prescribed in another section of the law applies. Having been convicted, however, on both counts,—a separate verdict as to each count being returned,—there is nothing in the way of the trial judge passing upon the accused the sentence of the law for each of the offenses he has committed. Each count in the bill states and charges unmistakably, and with certainty, the offense with which it deals, so that the accused was thoroughly and distinctly informed and advised why and to what extent he was in jeopardy. There was no duplicity here, and no illegal joinder of offenses.

Another issue raised is, there being two separate counts in the bill, each count should conclude with the words "against the peace and dignity of the same." Article 90 of the constitution of 1898 is an exact reproduction of article 86 of the previous constitution. It directs that "all prosecutions shall be carried

on in the name and by the authority of the state of Louisiana, and conclude: 'against the peace and dignity of the same.'" The concluding words of this bill of information were, "contrary to the form of the statute of the state of Louisiana, in such cases made and provided, and against the peace and dignity of the same." But this formula was not used in concluding each count. It appears only at the end of the bill. The question is, is that count of the indictment bad which did not conclude with the formula aforesaid? It is settled in the negative. In *State v. Scott*, 48 La. Ann. 294, 19 South. 141, the point was made that the first count in the bill was defective, in not ending with the words "contrary to the form of the statute of the state of Louisiana in such cases made and provided." As to this the court said, "The concluding words of the information necessarily referred to the several counts therein, and their repetition after each count would be useless tautology." In *State v. Travis*, 39 La. Ann. 356, 1 South. 817, there was a motion in arrest of judgment on the ground that the information contained one charge against some of the accused as principals in the crime, and another charge against others as accessories before the fact, and each charge did not conclude with the words, "contrary to the form of the statutes and against the peace and dignity of the state." While the opinion of the court does not say so precisely, we conclude, from the language used, that there were two counts in the indictment, one charging the principals, the other charging the accessories. The syllabus speaks of "each count." The formula "contrary to the form of the statutes," etc., was found at the close of the indictment. This was held to suffice. We think this ruling sustained by reason, and adhere to it.

For the reasons assigned, it is ordered and decreed that the judgment appealed from, sustaining the motion in arrest of judgment, be avoided and reversed, and it is now ordered that the motion in arrest be overruled, and the case remanded, with instructions to pronounce the sentence of the law upon the accused.

(51 La. Ann. 1079)

KANSAS CITY, S. & G. RY. CO. v. SMITH'S HEIRS et al. (No. 13,012.)

(Supreme Court of Louisiana. May 1, 1890.)

EMINENT DOMAIN—COMPENSATION—FINDING OF JURY—REVIEW ON APPEAL.

1. The finding of a jury of freeholders in an expropriation case, as to the compensation to be paid the owner for property taken in the exercise of the right of eminent domain, is entitled to the greatest weight.

2. While in a case showing unreasonable disproportion, one way or the other, of the amount of the award of such jury with what the evidence shows the true value of the property to be, this court will interfere, and increase or reduce such award according as the facts and real condition of things may warrant, it is only a clear case of error or mistake, fraud, prejudice,

or misconduct on the part of the jury that would justify the disturbance of their verdict.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Caddo; Watkins, Judge, vice A. D. Land, Judge, recused.

Eminent domain proceedings by the Kansas City, Shreveport & Gulf Railway Company against the heirs of W. W. Smith and others. From the judgment, certain of the defendants appeal. Affirmed.

Albert H. Leonard and D. T. Land, for appellants. Taliaferro Alexander, for appellees.

BLANCHARD, J. This is an expropriation suit, and the only issue presented is as to the value of the ground sought to be taken for the use of the railroad. There are several rival, adverse claimants to the land over which the railway demands the right of way, to wit: (1) the city of Shreveport; (2) the Vicksburg, Shreveport & Pacific Railway Company; (3) the heirs of W. W. Smith, deceased, and their transferees. Plaintiff caused all the claimants to be cited, and prayed to be permitted to deposit in court the sum awarded by the jury as the value of the land and damages, subject to the contest of those claiming title. A jury of freeholders from the vicinage was impaneled, heard the evidence, inspected the premises, decreed the expropriation, and fixed the value of the land taken at \$1,960. Defendants had claimed a much larger sum. From the judgment based on the verdict of the jury, the Smith heirs and their transferees appeal. The city of Shreveport and the Vicksburg, Shreveport & Pacific Railway Company have not appealed. The strip of land involved, varying from 100 to 115 feet in width, comprises $5\frac{2}{10}$ acres lying in the bed of what was once Silver Lake, and within the limits of the city of Shreveport. The lake during the last 80 years has gradually died up, and its bed filled with deposits from the river water and detritus from the higher contiguous land, until the same has become susceptible of occupancy. It is still, however, subject to inundation from the Red river, and at the point where the railway crosses the depth of overflow is several feet. The lake bed is, too, the natural receptacle of the rainfall and the drainage of the hills which surround it. Owing to these conditions, and because of the disputed title, the land forming the lake bed remains unoccupied, save by negro squatters or ground renters, who inhabit miserable shanties erected by themselves.

The evidence shows this property is not as yet fitted either for business or residential purposes. Consequently its value is largely speculative. Under the circumstances now surrounding and controlling it, the property can hardly be said to have, for selling purposes, any real market value or price, based upon the usual conditions of inquiry,—sup-

ply and demand. To make the strip sought by the railroad available for its purposes, huge embankments, or fills, and a long and high trestle have been necessary.

The testimony makes it clear that to put the ground embraced in this strip, and that contiguous to it, in condition for warehouse purposes, or as sites for manufactories, supplying a demand (not shown) for the same for such enterprises, would require a fill with earth to a depth of six or eight feet, which would cost, considering the conditions for obtaining dirt, from 32 to 40 cents per cubic yard. Thus, to raise, by filling, a lot 40 by 125 feet, would involve an expense of from \$400 to \$500 a lot. As to the value of the ground embraced in the strip, five witnesses testified for defendants and an equal number for plaintiff. Those of plaintiff averaged the value of the five and a fraction acres in the strip at from \$300 to \$500 per acre, and those for defendants averaged it at as many thousands per acre. Several sales of recent date of near-by property, showing prices, were offered by defendants, and one by plaintiff of an interest in the Silver Lake property, of which the strip in question is part; but we do not consider that any of these sales, owing to widely differing conditions and to peculiar circumstances existing, shown by the evidence, furnish any criterion, even remotely proximate, by which to judge of the value of the ground sought to be expropriated. And this must have been the view taken by the jury. By their verdict they fixed upon \$350 per acre as the value of the land and damages. The trend of the evidence was to show that the Silver Lake property was benefited, not damaged, by the location of the railroad track on it; and consequently it is likely what the jury allowed was really what they considered the value of the land. Nor are we impressed with the contention of defendants that, as the negro ground renters pay a dollar or more per month for their small holdings in the lake bed, it furnishes a criterion for appraising the land at a much higher value than that determined by the jury. These are an undesirable class of tenants; the evidence showing that the collection of not more than two-thirds of the revenues from such sources can be depended on. The ground renters on this lake bed are hardly more than squatters, acknowledging to hold for and from the parties who put them there, or authorized them to settle there. The huts they occupy are hardly more than temporary structures of their own erection, most of them not even approaching to the importance of an ordinary plantation negro cabin. There is a precarious tenure,—nothing to hold them if they chose to go, and irresponsible as to the obligation of tenancy they may have assumed. The jury of freeholders, after hearing the evidence, viewed the premises. Their conclusion as to the proper compensation to be paid defendants is entitled to the greatest weight. While in a case show-

ing unreasonable disproportion, one way or the other, of the amount of the award of a jury in an expropriation suit with what the evidence shows the true value of the property to be, this court will interfere and increase or decrease such award according as the facts and real conditions of things may warrant, it is only in a clear case of error or mistake, fraud, prejudice, or misconduct on the part of the jury that we would feel justified in disturbing their verdict.

In *Railroad Co. v. Frank*, 39 La. Ann. 707, 2 South. 310, it was held that "in an expropriation proceeding for a right of way, the verdict of a jury of the vicinage, composed of landowners, and presumed to be familiar with the value of the land sought to be expropriated, will not be disturbed by this court, unless it is found to be inconsistent with the proof in the record, or entirely unsupported by the evidence." In *Postal Tel. Cable Co. v. Louisville, N. O. & T. Ry. Co.*, 43 La. Ann. 522, 9 South. 119, this doctrine was approved in the following language: "It has long been held in this state that the jury of freeholders, authorized by our laws to act in expropriation proceedings, have to some extent the character and authority of experts, supposed to have some personal knowledge of the matters submitted to them, and authorized to rely on their own opinions, as well as the testimony adduced before them. Their verdicts are, indeed, subject to review by appeal, and may be amended when manifestly inadequate or excessive; but they are entitled to great respect, and will not be interfered with, except in case of gross or manifest error." See, also, *Railroad Co. v. McNeely*, 47 La. Ann. 1293, 17 South. 798; *Reny v. Municipality No. 2*, 12 La. Ann. 500; *New Orleans, Ft. J. & G. I. R. Co. v. Rabasse*, 44 La. Ann. 178, 10 South. 708; *New Orleans & W. R. Co. v. Morere*, 48 La. Ann. 1273, 20 South. 733.

We are constrained to hold that the situation here does not warrant the court in concluding that gross or manifest error characterizes the verdict of this jury, nor that fraud, prejudice, or error perverts their finding. Judgment affirmed.

MONROE, J., takes no part, as he was not a member of the court when the case was submitted.

(51 La. Ann. 932)

STATE v. SINEGAL. (No. 13,112.)

(Supreme Court of Louisiana. May 1, 1899.)
CRIMINAL LAW—TRIAL—JURY OF FIVE—CUTTING WITH INTENT TO KILL.

1. The punishment to be inflicted upon an accused convicted under an indictment charging him with violation of section 791 of the Revised Statutes, as amended by Act No. 43 of 1890, being "imprisonment at hard labor, or otherwise," the issues in the case were triable by a jury of five.

2. Although a razor may not be *eo nomine* a dangerous weapon, it may become such by its

use, and a conviction under section 791 of the Revised Statutes, in which an accused is charged with cutting, with intent to murder, with a dangerous weapon, to wit, a razor, is justified if supported by proper evidence.
(Syllabus by the Court.)

Appeal from judicial district court, parish of St. Landry; Gilbert L. Dupré, Judge.

Alexander Sinegal was convicted of cutting with a dangerous weapon with intent to kill, and appeals. Affirmed.

The defendant was indicted for having feloniously, willfully, and of his malice aforethought cut one Alfred Jean with a dangerous weapon, to wit, a razor, with the intent feloniously, willfully, and of his malice aforethought to kill and murder him; contrary to the form of the statute of Louisiana in such cases made and provided. He was tried by a jury of five, which returned a verdict against the prisoner of guilty of cutting with a dangerous weapon with intent to kill, whereupon the court sentenced him to be imprisoned in the state penitentiary for the space of one year. He appealed. Before sentence was pronounced upon him defendant moved in arrest of judgment, for the reasons: (1) That he was indicted under section 791 of the Revised Statutes; that the penalty under the same was necessarily imprisonment in the state penitentiary with or without hard labor; that Act No. 44 of 1890, which provides for cutting with intent "to kill" (not with intent to murder), makes the penalty necessarily imprisonment in the penitentiary with or without hard labor; that article 116 of the constitution of 1898 provides that all cases where the punishment is necessarily imprisonment at hard labor (which means in all cases where the punishment is necessarily in the state penitentiary) should be tried by a jury of twelve, nine of whom must concur to find a verdict; that, as shown by the minutes, he was tried by a jury of five only; that this was illegal, and in violation of his rights in the premises. (2) The indictment charged him with cutting with a dangerous weapon, to wit, a razor, with intent to kill and murder; that, the supreme court having decided that a razor was not a dangerous weapon, he could not be legally convicted under either section 791 of the Revised Statutes or Act No. 44 of 1890, both of which required the cutting to have been done with a dangerous weapon.

C. F. Garland, for appellant. Milton J. Cunningham, Atty. Gen., and R. Lee Garland, Dist. Atty., for the State.

NICHOLLS, C. J. (after stating the facts). Appellant evidently relies upon the decision of this court in *State v. Nelson*, 38 La. Ann. 942, in support of his proposition that he could not have been legally convicted of having cut a person with a dangerous weapon with intent to kill or murder when the weapon with which the cutting was done was declared in the indictment to have been a razor. That case was relied upon also by the accused

in *State v. Scott*, 39 La. Ann. 943, 3 South. 83, but we held that it afforded him no relief. The reasons assigned by the court for that declaration are adhered to. We said: "It may well be that the accused could not, under section 932, Rev. St., have been convicted of having a dangerous weapon concealed on or about his person, because a pocketknife is not eo nomine a dangerous weapon; but it does not follow that when, under section 794, the charge is that the accused did with such a knife feloniously inflict a severe wound less than mayhem, such weapon may not be considered by the court and jury as a dangerous weapon by the use made of it, within the meaning of that section, particularly as the description of the weapon is not necessarily required by the statute, which merely mentions a dangerous weapon; i. e. any dangerous weapon which may be so by the use or in itself. Under the charge, evidence could well have been received, and, if deemed sufficient, the jury could have convicted the accused for having with a dangerous weapon inflicted a wound less than mayhem on the body of another person." We have never said, nor could we say, that a razor, when used by a person in cutting another with the intent of killing or murdering him, would not be a dangerous weapon, for, as said by Mr. Justice Fenner in *State v. Nelson*, the records of our criminal courts show that it has been especially selected as the instrument for carrying out such a purpose, and to have been frequently effectually used. See, on this subject, *State v. Jacob*, 10 La. Ann. 141; *State v. Martin*, 31 La. Ann. 849; *State v. Lowry*, 33 La. Ann. 1224; *State v. Jackson*, 37 La. Ann. 467; *State v. Nelson*, 38 La. Ann. 946; *State v. Wilson*, 39 La. Ann. 206, 1 South. 418; *State v. Scott*, 39 La. Ann. 943, 3 South. 83; *State v. Brown*, 41 La. Ann. 345, 6 South. 541; *State v. Hertzog*, 41 La. Ann. 777, 6 South. 622; *State v. Alfred*, 44 La. Ann. 584, 10 South. 887; *State v. Braxton*, 47 La. Ann. 159, 16 South. 745. Article 116 of the constitution of 1898, referred to by appellant, reads as follows: "The general assembly shall provide for the selection of competent and intelligent jurors. All cases in which the punishment may not be at hard labor shall until otherwise provided by law, which shall not be prior to 1904, be tried by the judge without a jury. Cases in which the punishment may not be at hard labor shall be tried by a jury of five, all of whom must concur to render a verdict. Cases in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom concurring may render a verdict. Cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict." The indictment in this case does not, in terms, mention under what particular statute it was brought, but it states the facts. Appellant's counsel argue upon the assumption that his client was charged under section 792 of the Revised Statutes. The judge, in sentencing the defendant, de-

clared that the jury had returned a verdict finding accused guilty, under Act No. 44 of 1890, of cutting with a dangerous weapon with intent to kill. The charge itself, as made, was of having cut Alfred Jean with a dangerous weapon with intent to "murder." The phraseology of the indictment is that of section 791 of the Revised Statutes as amended and re-enacted by Act No. 43 of 1890. The punishment affixed as to follow from a conviction under the latter section, as amended, for cutting with a dangerous weapon with intent to murder, as it reads, is "imprisonment with or without hard labor for not more than three years"; that affixed for a conviction under Act No. 44 of 1890 for cutting with a dangerous weapon with intent to kill, as it reads, is "imprisonment with or without hard labor for not more than three years." It will be seen that the punishment affixed is not necessarily "imprisonment at hard labor," but "imprisonment at hard labor or otherwise." We are not authorized to expunge the words "or otherwise" from the law. Those words remaining, leaves the character of the imprisonment, as to whether it should be at hard labor or not, discretionary. That may not have been the intention of the lawmakers, but they have expressed themselves in language so unambiguous as not to admit of judicial construction. Under the terms of the indictment and of the law applicable to it as framed, the charge was triable, under the constitution, by a jury of five.

The examination of the question submitted led to an examination by us of all the statutes of the state covering "crimes against the person." Among them our attention was attracted to section 792 of the Revised Statutes and Act No. 59 of 1896, amending that section. Section 792, prior to amendment, read as follows: "Whoever shall assault another by willfully shooting at him, or with intent to commit murder, rape or robbery, shall on conviction thereof be imprisoned at hard labor not exceeding two years." Under the amendment of 1896 to that section the punishment was changed to imprisonment at hard labor not more than 20 years. It will be noticed that under the section originally and as amended the character of the imprisonment was fixed absolutely as imprisonment at hard labor. There was no discretion left with the court on that point. Had the defendant in this action been indicted, not for cutting with a dangerous weapon, with intent to commit murder, but simply for "assaulting" Alfred Jean with intent to commit murder, and had he been found guilty, the character of the imprisonment to which he would have been sentenced under such a charge would, under section 792, as amended, have been necessarily imprisonment at hard labor; and in view of that fact defendant would have been entitled to a trial by a jury not of five, but of twelve. Now, the actual cutting of a person with a dangerous weapon with intent to commit murder, is much graver a crime than a

mere assault upon a person with intent to commit murder, the assault not ending in an actual wounding, without reference to the employment of a weapon; and yet we find, following the language of the law and the constitution, the graver crime triable by a jury of five, and the far less serious one by a jury of twelve. The party guilty of the lesser crime, if convicted, would have to be necessarily sentenced to the penitentiary at hard labor, while the one guilty of the higher crime might possibly escape a sentence to hard labor, and by reason of this possibility he would be forced to submit to a trial by a jury of five. However anomalous this situation may be, we are powerless, we think, to control it. We find no reason to set aside the verdict or judgment. The judgment is hereby affirmed.

(51 La. Ann. 1064)

MAY et al. v. CITY OF NEW ORLEANS.
(No. 12,957.)¹

(Supreme Court of Louisiana. April 3, 1899.)

TAXATION—IMPORTED GOODS—ORIGINAL PACKAGES.

1. Goods imported, and remaining in the original boxes or cases or wrappings in which shipped, are held to be, until sold by the importer, not subject to assessment and taxation for state and municipal purposes; being exempt under article 1, § 10, par. 2, of the federal constitution.

2. But goods taken from the original cases or boxes or wrappings in which shipped and received by the importer, even though still remaining in the manufacturers' packages, become incorporated into the general mass of property of the state, and subject to its tax laws.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Nicholas H. Rightor, Judge.

Action by F. May & Co. against the city of New Orleans. Judgment for plaintiffs, and defendant appeals. Reversed.

Samuel L. Gilmore, City Atty., and Walter B. Sommerville, Asst. City Atty., for appellant. Gurley & Mellen, for appellees.

BLANCHARD, J. Plaintiffs are importers of merchandise. Their place of business and store is in the city of New Orleans. They were assessed for the year of 1897 on "merchandise or stock in trade" at \$2,500, and under the printed heading on the assessment roll, of "money loaned on interest, all credits, and all bills receivable for money loaned or advanced or for goods sold, and all credits of any and every description," they were assessed at the further sum of \$1,000. They refused to pay the city tax based on this assessment, on the ground that the same is void because in conflict with article 1, § 10, par. 2, of the constitution of the United States. Their position is that the merchandise and stock of goods carried by them in 1897 consisted of dry goods imported from foreign countries, upon which duties were levied by

the United States, and paid by them; that the goods so imported were by them sold only in the unbroken original packages; and that the only credits and bills receivable appertaining to the firm were those representing sums due them on account of the sale as aforesaid of goods in the original packages. They brought this action to have the assessment declared unconstitutional and void, and coupled with it a proceeding by injunction to restrain the city treasurer from attempting to enforce payment of the taxes. The city answered by general denial, and from a decree favorable to the plaintiffs prosecutes this appeal.

The tax assessor appears to have arrived at the conclusion that part, at least, of the merchandise received by plaintiffs at their place of business, kept in stock there, and sold during the year 1897, had lost its distinctive character of "goods in the original package" by the breaking of the packages in which imported, and that the contents of such packages so broken had become incorporated into the general mass of property in the state in such way as to become the objects of state and municipal taxation. Accordingly, to reach and tax this part of their stock, he returned an assessment of \$3,500, in the aggregate, against them. The burden of proof is on plaintiffs, resisting the assessment and asserting exemption, to show that no part of their stock of merchandise is of a character rendering it subject to taxation, and that no portion of their credits or bills receivable is for goods sold which were subject to taxation. If it appears from the evidence that they kept in stock and sold goods which must be considered, at the time of such keeping and sale, not to have been in the "original package," in the legal interpretation of that phrase,—if the original packages, in which such goods were, had been broken, and merchandise taken therefrom, put in stock, and sold,—then are plaintiffs subject to this taxation. It is established, we think, that plaintiffs imported a large quantity of merchandise; that such merchandise was bought for their account; they were the parties ordering same, and to whom the goods were shipped, and in this sense were the vendees thereof; that the greater part, or from 60 to 65 per cent., of the merchandise so imported, was purchased on import orders, or for customers whose orders they had taken; that the remainder was purchased for their own stock, and sold as such out of their store; that the goods purchased on import orders (for those ordering same), as well as those purchased on stock orders (for their own store), would be shipped in large wooden cases; that a case would sometimes contain only the goods embraced in one order (that is to say, all for one firm or business house), and then it would be delivered to such firm or business house in the original package; that at other times a case would contain the goods to fill several orders of different firms and busi-

¹ Rehearing denied May 15, 1899. Taken by plaintiffs to the supreme court of the United States on writ of error.

ness houses, in which event the original package in which they were imported would be opened by the importer, and the goods for the different orders sorted out, separated, and delivered to those ordering same; and that sometimes goods purchased on stock orders (for their own store) would be shipped in large cases, which, when received by the importer, would be opened, and the goods taken out and put in stock and sold, but that such goods were only sold in the packages in which they were put by the manufacturer (that is to say, a case would contain many packages; these packages would be taken out of the case, which was broken for the purpose, but the packages themselves would not be broken). The business of plaintiffs, as importers, was, in this sense, a wholesale business (selling only by the package as put up by the manufacturer), not a retail business, because no package was broken, and the individual articles of the same kind and make it contained were not sold separately. Sometimes a case would contain goods purchased on import orders for customers, and likewise goods purchased on stock orders for the importers themselves. When this was so, the case would be opened by the plaintiffs, who would take out the goods purchased on the import orders, and deliver same to their customers so ordering; and the goods purchased on the stock orders would also be removed from the case, and sold as stock to those choosing to buy. All the goods, whether purchased on import orders or stock orders, that came to plaintiffs, did so as the goods of F. May & Co. They were the owners of same. The goods plaintiffs kept in stock were for the most part bobbinet, and household linens, towels, sheetings, embroideries, laces, etc. They dealt only in imported merchandise. The goods mentioned would be put up by the manufacturers in convenient packages. For instance, towels may be put up by the manufacturer in packages containing 2, 3, or 5 dozen to the package. But a large order for towels might include 500 dozen towels. These would all come in one case, done up in packages of, say, 5 dozen to the package. The importer would open the case, take these packages of towels out, and sell them by the package. He would not break a package to sell one or more towels. Conducting their business on this line, plaintiffs claim to sell only in the original package.

The question, then, which the case really presents is, what is the "original package"? Is it the package in which the goods are put up for the convenience by the foreign manufacturer, or is it the case, the box, the covering in which the goods so put up by the manufacturer are packed for shipment? Is the manufacturer's package the original package, in the legal interpretation, or must that be held to be the original package which is delivered to the carrier for transportation to the desired destination? If the package put up by the manufacturer be the original package,

then plaintiffs' objection to the assessment complained of is well taken. If the case or box in which the goods are placed for shipment be the original package, then their case falls. This court, in *State v. Board of Assessors*, 46 La. Ann. 147, 15 South. 10, defined a "package" to be a "number of things bound together, convenient for handling and conveyance"; "a bundle put up for transportation or commercial handling." In the early and leading case of *Brown v. Maryland*, 12 Wheat. 442, it was said that the thing imported, "while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported," was not subject to taxation, under the prohibition of the constitution. In *Low v. Austin*, 13 Wall. 34, it was said that "goods imported do not lose their character as imports, and become incorporated into the mass of property of the state, until they have passed from the control of the importer, or been broken up by him from their original cases." In *Keith v. State (Ala.)* 8 South. 353, it was held that when intoxicating liquors are imported in small bottles, each of which is wrapped in paper, and labeled "Original Package," the bottles being packed, for the purpose of facilitating the shipment, in an open box marked with the number and size of the bottles contained therein, the box, and not the bottle, is the original package. To the same effect is *State v. Winters (Kan. Sup.)* 25 Pac. 235, where the package, as it existed at the time of its transportation, was taken to be the "original package." Also, *Guckenheimer v. Sellers*, 81 Fed. 997, where it was said that an original package appears to be the package delivered by the importer to the carrier at the initial place of shipment, in the exact condition in which it was shipped, and that, if afterwards this package be broken, "it comes within the police regulations of the state"; and *McGregor v. Cone (Iowa)* 73 N. W. 1041, where it was said that the words "original package" had reference "to a unit which the carrier receives, transports, and delivers as an article of commerce," and which, when sold or broken after delivery, ceases to be an article of interstate commerce, and becomes a part of the common mass of property within the state, and subject to its tax laws. Other authorities of the same tenor might be cited, but these suffice to support the contention of the defendant that the "original package," in this case, must be held to be that in which the goods were shipped to and received by the plaintiffs, and not the smaller packages put up by the manufacturer, and packed within the case delivered to the carrier. It follows that since many of the cases of goods received by plaintiffs were opened, and the contents removed therefrom and sold after such removal by plaintiffs, the merchandise imported in such cases so afterwards broken as aforesaid lost its distinctive character as an object of foreign commerce, not subject, while remaining in the original case, to the police

laws of the state, and thereafter, to wit, after the case was broken and the goods removed therefrom, became incorporated in the general mass of property in the state, and thus subject to state and municipal taxation. In the *Gelpi Case*, supra, it appearing that the larger part of the assessment of complainants was based upon imported goods, never removed from the original cases in which shipped, and held by them in such cases, as "unbroken packages," for sale, we decided that part of their stock not to be subject to assessment and taxation. The other part of their stock, however, representing goods removed from broken packages, was subject to assessment. And so, in the instant case, the goods imported by plaintiffs, and remaining in the original boxes or cases or wrappings in which shipped, are held to be, until sold by the importer, not subject to assessment and taxation for state and municipal purposes; but the goods taken from the original cases or boxes or wrappings in which shipped, even though still remaining in the manufacturers' packages, are subject to assessment and taxation by defendant. Accordingly, the assessor having fixed upon \$3,500 as the sum covering that portion of plaintiffs' stock, and its proceeds, for the year 1897, so taken from the broken packages after importation, such assessment must be sustained. It is therefore ordered and decreed that the judgment appealed from be annulled, avoided, and reversed; that the demand of plaintiffs be rejected, their injunction dissolved, and their suit dismissed, with costs in both courts.

MONROE, J., takes no part, as he was not a member of the court when this case was heard.

(51 La. Ann. 1123)

WILSON v. LOUISIANA & N. W. R. CO.
(No. 12,838.)

(Supreme Court of Louisiana. June 21, 1898.)
INJURY TO EMPLOYE—DERAILMENT OF TRAIN—ASSUMPTION OF RISK.

Original judgment amended so as to amount to \$1,000; otherwise reaffirmed.

1. It is the duty of the party controlling a railroad train to advise himself, before it starts, not only as to one part of the existing situation, but of the whole, and govern himself accordingly.

2. Though a train be a "repair train," and the employes thereon may have assumed, in accepting employment thereon, that they may be in greater danger of accident than they might be under other circumstances, they have the right to assume that, this very fact of increased danger being known to the conductor, he will guide his conduct so as to minimize the danger by the increased care and precautions which the occasion calls for.

3. A railroad company which permits its tracks to become unsafe should be held to an increased responsibility for the manner in which its trains are run on such a track.

(Syllabus by the Court.)

Appeal from Third judicial district court, parish of Claiborne; Allen Barkadale, Judge.

25 So.—41

Action by John Wilson against the Louisiana & N. W. Railroad Company. Judgment for plaintiff. Defendant appeals. Amended and affirmed.

John A. Richardson, for appellant. J. C. Theus, Dormon, Reynolds & Dormon, and McClendon & Seals, for appellee.

NICHOLLS, C. J. Plaintiff asked for a judgment against the defendant for damages for injuries received by him through the derailment of a car operated by officers and employes of the defendant company, on which car he was riding at the time. He averred that he was an employe of said company at the time, and on said car in the discharge of his duty as such; that the accident was caused by the negligence and carelessness of the parties in charge. The case was tried by the court, which rendered judgment in favor of the defendant. Plaintiff appealed, and on appeal the judgment was altered to one of nonsuit. The pleadings and facts of the case were identical with those of *Smith v. Same Company*, 49 La. Ann. 1325, 22 South. 359. The case itself is reported in 49 La. Ann. 1330, 22 South. 1007. Plaintiff renewed his demand in the present suit. Defendant pleaded the general issue. After defendant had answered, pleading the general issue, defendant filed a plea of estoppel, alleging that plaintiff had instituted suit against it for the identical cause of action, in which he set up the cause of the injury; that he could not change the judicial admission of his first suit; that he could not add to nor take from the same, so as to show a different cause for the injury. This exception was based upon the claim that the allegations of plaintiff in his second were inconsistent with those in his first suit, and sought to change the issues between the parties. Plaintiff's allegations in his first petition, touching the accident, were as follows: "That said derailment and injuries and loss were occasioned by the gross, wanton, and criminal negligence of said railroad company and its servants, agents, and employes, who were superior in authority to plaintiff; that at said time and place said train and car on which plaintiff was riding was thrown from the track by one or more pieces of timber or wood falling or being carelessly dropped by the employes from the engine tender or bin or other places of storing or carrying wood or timber on said train or locomotive, or some of the attachments thereto, which caught under the wheel or wheels of said train of cars or locomotive, or both, which derailed and threw said car on which petitioner was riding and all or a part of the train, including locomotive and tender, from the track, and in the wreck he was damaged by the fall and being struck by falling timbers and cross-ties and the car or cars and other parts of the train or locomotive or tender, and other causes occasioned by said wreck; that the wreck and damage to

petitioner were caused by the said defendant company failing to provide proper and safe places or apartments for storing or carrying said wood or timber, and from the failure of said company and its employes who were in command of the train to have said wood or timber properly loaded or stored, and from the careless and negligent handling of said wood and timber by the employes and servants of said company, and which wood or timber fell from the place where it was stored or piled, or by the servants or employes of said company's careless and negligent handling of said wood or timber while said train was running or in motion; that it was no part of petitioner's duty to superintend the loading of said wood or timber, and that said injury and loss were caused by no negligence or fault of his, but wholly by the negligence and fault of the defendant company or its servants and employes in charge of the train, or for the want of necessary appliances for the safety of the employes of the company." In plaintiff's second petition he averred that at said time and place said car on which petitioner was riding was thrown from the track by a piece of timber or wood falling from the tender or usual place of carrying wood on said train, locomotive, or attachments thereto, which caught under the tracks or wheels and axles of said car on which petitioner and others were riding, which derailed said car; which car, after running off the rails onto the roadbed and rotten ties, ran onto or struck a rotten bridge or trestle of said company, which gave way, and precipitated petitioner and others and said car and cross-ties to the ground, a distance of about 12 feet; that at the time of said wreck said train was being run at a high and dangerous rate of speed over a dangerous and unsafe track with rotten cross-ties, and the rails on said tracks were low and sunken in places and high in other places, and the cross-ties and roadbed, together with the unsafe condition of the rails, and the great and dangerous rate of speed, caused violent rocking, jumping, and shaking of said locomotive, tender, and cars; that the defendant company did not provide safe and proper apartments for storing and carrying said wood, and said company and its agents and employes who were in command of petitioner caused said firewood to be improperly loaded and carelessly and negligently piled at least three feet above the outer wall or rim of said tender or wood bin, without there being any guard or other protection to prevent said wood or timber from falling over the outer wall or rim of said wood bin or tender, and that said wreck was caused by the fall of said wood or timber, and the above alleged reckless running and defective roadbed, etc.; that it was no part of petitioner's duty to superintend the loading or storing of said wood or timber, or to control the rate of speed, or to examine or repair the track,

roadbed, or anything in connection therewith, and his only duties were to obey his superiors in command, he being a common laborer, and having no dominion or control over any part of said train or roadbed, or anything connected therewith, other than as a common laborer; and that the said injury and loss were caused by no negligence or fault of his, but wholly by the fault of the defendant company and its agents and vice principals in charge of said train, and for want of necessary appliances for the safety of the employes of said company, and the defective roadbed and track and reckless running, etc., as above stated. In defendant's plea of estoppel it asked that all allegations of plaintiff's petition which were different from or changed the allegations and judicial admissions in the suit first filed be stricken out, and that no evidence be permitted to be received under the same. No separate action was taken upon this exception. The case was tried twice before a jury. The first trial resulted in a verdict of \$5,000 for the plaintiff, but the verdict was set aside, and a new trial granted. The second trial resulted in a verdict of \$2,500 for plaintiff, and judgment was rendered in accordance therewith, though the court, in refusing an application to have the verdict set aside, and a new trial ordered, expressed its disapproval of the verdict, assigning as its reason for entering judgment that he thought the litigation should be brought to an end.

The first suit of the plaintiff against the defendant was, by consent of parties, taken up at the same time with that of *Smith v. Railroad Co.*, and upon the same testimony, except in so far as testimony as to the extent of injuries received by each, and the amount of the damage claimed by each, made special testimony necessary. In the opinion in the *Smith Case*, 49 La. Ann. 1328, 22 South. 361, the court said: "As the case was left by the witnesses, it seems clear that the piece of wood was the proximate cause of the accident, but, without showing directly that the stick of wood was on the track through the fault of the defendant, its servants or agents, the company is not connected with the proximate cause, so as to make it responsible. The break in the continuity of the testimony is in the manner in which the stick occasioned the derailing of the train, and by whose fault it was placed in position to produce the same." It was in view of the possibility of plaintiff's being able in a second suit to supply this missing link that the judgment—originally a final one against him—was altered to one of nonsuit. The testimony taken upon the first trial was considered in the second, both sides introducing additional evidence. Plaintiff introduced two new witnesses, whose testimony was to the effect that at the time of the accident they were riding upon a flat car directly in rear of the tender on which the firewood for the train was piled up; that, as they were sitting, they faced the tender; that di-

rectly in front of, and facing one of them, a man by the name of Crawford was sitting on the rear end of the tender. Each one of them testified to having seen the piece of wood which the pleadings refer to fall from the rear end of the tender to the track between the tender and the flat car just behind, and upon which they were sitting; that immediately afterwards there was a violent jerking of the cars, followed by the derailment of the same. Neither saw the piece of wood strike the ground, nor knew how or where it came in contact with the cars. Both say that Crawford did not touch the wood, or have anything to do with its fall. They differ somewhat as to the point from which it fell; one stating it fell from a point near the eastern side of the tender, the other, from the western side. But we think the establishment of the particular point from which it fell an immaterial fact, except in so far as it might tend to affect the credibility of those witnesses. We do not understand defendant to attach any importance to it, other than for that purpose. The character of those two witnesses was not impeached. The effect of their respective statements is weakened only in so far as the fact that they were not in accord as to the point from which the stick of wood fell might be calculated to throw doubt upon their accuracy,—if that fact were important. Crawford was not put upon the stand. From whatever side the piece of wood fell, it obviously struck in such a manner as to occasion, as the immediate and direct result of its falling, the derailment of the cars. The question is, how came it to fall? Plaintiff, in his pleadings, says the wood upon the tender was piled three feet high, and left there without guards, while defendant undertook to show that it was only two feet high at the middle, and that the fireman straightened it out after it had been placed upon the tender. There is very considerable difference in the testimony as to the rate of speed at which the train was running at the time of the accident. It is claimed by plaintiff that the train, being behind time in consequence of having had to take on a quantity of cross-ties, was being hurried forward in order to reach Athens before the passenger train coming from Homer should reach that place. One of the witnesses said that Mr. Beardsley, the manager of the road, hurried the conductor, giving him (he said) the "high ball" (orders to go faster) several times. Mr. Beardsley, though on the train at the time, did not take the stand as a witness. The testimony, we think, shows that the roadbed, the ties, and the track were in very bad condition at the point where the accident occurred, and for some distance in front and in rear of that place. We are satisfied that the stick of wood was detached from its position by the rocking of the cars, caused by rapidly running cars over the uneven and defective roadbed and track at that point. We are also satisfied

that the immediate cause of the derailing of the cars was the falling of this piece of wood, and its being caught under the wheels or tracks of one of the cars. It is contended that the plaintiff was one of the parties who loaded the tender; that he went on the train voluntarily as an employé of the corporation, with knowledge of the situation and condition of the road (if, in fact, it was in bad condition), and that in accepting service he assumed the risks of employment taken under such conditions. Employés entering the service of a railroad company have a right to assume, should it fall to comply with its duty of keeping its roadbed, ties, and track throughout in safe condition, that it will at least meet and compensate its failure in this respect by steps taken by it, and those having charge of its trains, to remedy and save the situation from danger for the benefit of its passengers and employés by special care taken and precaution resorted to in the running of the trains themselves over dangerous places. We do not think that employés, by accepting service with a badly-equipped railroad corporation, accept, as a matter of course, the double risk of insufficient and bad tracks and careless and negligent handling of cars over dangerous places. Two juries have found the facts of the case in favor of the plaintiff, and we see no good reason for holding them to have been in error in their conclusions. We see no question of law standing in opposition to an affirmance of the judgment on the facts so found, though we are of the opinion that the amount found as damages is too high. No action was taken in the lower court upon defendant's plea of estoppel.

It is insisted that the exception was well founded. We do not think so. It is rarely possible for a person injured by the derailment of a car to know with certainty to what particular cause it was attributable. In cases of that character a plaintiff's pleadings are made usually as general as safety will permit them to be made so as to enable him to take advantage of the facts which may develop on the trial. He may sometimes, by too minute particularity, be held down on a first trial to specific allegations as then existing; but if, on plaintiff's demand, being met by a general denial, the case should terminate in a judgment of nonsuit, plaintiff would have the right, in drafting a second petition, to avail himself of knowledge of the actual facts of the case as made known to him through the testimony taken on the first trial. The allegations made in the first case as to the facts of the occurrence could certainly not be classed as "admissions" made by him from which he could not recede. In the case at bar plaintiff insists still that the falling of the stick of wood was the direct immediate cause of the derailment of the car on which he was riding. He simply adds thereto certain other facts as concurring contributing causes. We think the judgment should

be amended by reducing the amount of the damages according to the plaintiff by the verdict and judgment from \$2,500 to \$1,500, and it is hereby so ordered and decreed.

On Rehearing.

(May 29, 1899.)

A rehearing was granted in this case for the reason that on examining the testimony scattered through three different transcripts a portion of the same had escaped the court's attention. The statement made by the court that Beardsley, the manager of the defendant company, was on the train at the time of the accident, and that he had not testified in the case, was erroneous. The Beardsley who was on the train was the son of the manager or superintendent, and not the superintendent himself, and he was placed upon the stand, and positively denied having given the orders to increase the speed of the train; to the giving of which orders several of defendant's witnesses testified. The engineer to whom the order was declared to have been given made a similar denial. The testimony of the case is utterly irreconcilable. We do not know the witnesses, nor did we have the advantage of seeing them upon the stand. Two juries have rendered verdicts in plaintiff's favor. The first verdict was set aside by the district judge, and plaintiff's counsel calls our attention to the fact that, while declining to set the second one aside on motion for a new trial, the judge expressed very strongly his disapprobation of the result reached, stating that he was more convinced than ever that plaintiff had no right to a judgment. That is true, but the judge's remarks seem to refer more to what he seems to have considered the law applicable to the case than to the facts. He was of the opinion that, although the track was out of order, yet the particular train to which the accident happened was a "repair train"; that plaintiff knew the condition of the track, and the dangerous character of the duty in which he was engaged, and therefore assumed the risk of the dangerous service. He did not say that he did not think the accident was occasioned by the bad condition of the track. We were inclined ourselves to think that the latter fact, standing by itself, and independently of the falling off from the tender of the piece of wood, which the testimony shows did so fall off, would not have caused the derailment of the train, even at the rate at which it was going; that the accident was occasioned by the concurrence of three facts,—the bad condition of the tracks, the speed of the cars, and the particular manner in which the wood was placed on the tender. We did not think the wood as placed would have fallen from the tender simply as the result of the speed of the train had the track been in good condition, nor that it would have fallen even with the track in the condition in which it

was had the speed been regulated so as to conform to what was required by the entire actual situation. We thought that the wood was not placed on the tender in the manner in which it should have been placed there to meet the requirements of a rapidly running train over a bad track; that, as it was, rapid running over a bad track had caused some of the wood in the tender, which had not been placed there in the manner to meet such a condition of things, to gradually work its way to the back of the tender, and to fall out, and by falling out to pass under the wheels of the car, and derail the train. One of the difficulties in the case was that the wood as placed in the tender was placed there by the plaintiff himself and the other parties who were working as laborers in repairing the track in putting ties on the train, and, incidentally, in placing the wood in the tender. We were of the opinion that these men, however, could not have known in advance that the train would be run as it was afterwards probably run; and, besides this, the fireman, Sol Sephus, testified that after it was placed in the tender he had himself to some extent straightened it out. Our judgment proceeded upon the theory that it was the duty of the party who controlled the train to have advised himself before it started not only as to one part of the existing situation, but of the whole, and to have governed himself thereafter accordingly; and that, while it was true that this train was a "repair train," and the parties thereon may have assumed, in accepting employment, that they might be in greater danger of accident than they would have been under other circumstances, they had the right also to assume that, this very fact being known to the conductor, he would guide his conduct so as to minimize the dangers by the increased precautions and the care which the occasion called for. We do not think that the conductor, as representing the defendant company, had afforded to its employes the full measure of protection to which they were entitled. We are of the opinion, and are still of the opinion, that a railroad company which permits its tracks to become unsafe should be held to an increased responsibility for the manner in which its trains should be run over such a track. The direct contradiction of the witnesses of the parties as to most important facts brought especially to our attention in our last examination of the transcripts in the case, coupled with the disagreement between two juries and the district judge, have caused us to hold this cause under advisement a longer time than is usual, for the reason that we have been in great doubt as to what the proper course would be to pursue under the circumstances. After a most careful consideration of this case as presented to us, we adhere to our original judgment, except as to amount. We are of the opinion that the amount for which we have rendered judgment in favor

of the plaintiff against the defendant is too large, and it is hereby reduced from \$1,500 to \$1,000. As so amended, our original judgment must remain undisturbed, and it is so ordered.

MONROE, J., takes no part, as the case was submitted previous to his appointment to this court.

(51 La. Ann. 1035)

HAMILTON v. HIS CREDITORS. (No. 12,830.)

(Supreme Court of Louisiana. Dec. 5, 1898.)

APPEAL—REVIEW—MOTION TO DISMISS—JURISDICTIONAL AMOUNT—INSOLVENCY—VENDOR'S LIEN—TAX PRIVILEGE.

Where a devolutive appeal was taken from a judgment approving a syndic's account, and some time afterwards a judgment was rendered by the court of the first instance discharging the syndic, *held*, on a motion to dismiss the appeal, that, whatever effect the judgment may have on the proceedings hereafter, it does not offer good ground to dismiss the appeal.

On Motions to Dismiss.

1. A motion to dismiss an appeal, having been denied, cannot be renewed or thereafter treated as a pending motion; but this court, in considering a case upon its merits, may deal with such denial as an interlocutory order, which may then be reviewed.

2. The distribution of the fund and the discharge by the lower court of the syndic pending devolutive appeals from a judgment on oppositions to account do not justify the dismissal of such appeals.

3. The test of the appellate jurisdiction of this court, where creditors have litigated in concourse, is the amount of the fund to be distributed.

4. Where a motion to dismiss an appeal, made when a case is called for trial on its merits, on the ground of acquiescence, involves a question of fact, which would necessitate the remanding of the case, and when, the case being heard on the merits, it appears that the appellant would not be entitled to a reversal of the judgment, the motion to dismiss will be denied, and the case decided on its merits.

On the Merits.

1. Creditors in insolvency proceedings, claiming privileges to the prejudice of others, must establish their claims by satisfactory evidence. And a foreign creditor, claiming a vendor's privilege, must prove a contract entitling him to it, and identify the goods.

2. An assessment on "merchandise and stock in trade" gives the city of New Orleans no privilege on the proceeds of the "counters, fixtures, and wooden partitions" in a barroom.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; George H. Théard, Judge.

In the matter of the estate of Charles H. Hamilton, the creditors appeal. Affirmed.

D. M. Sholars, for appellant Paul Jones. Samuel L. Gilmore, City Atty., and Walter B. Somerville, Asst. City Atty., for appellant city of New Orleans. Dinkelspiel & Hart, for appellee Frank Marquez. Robert G. Dugué, for appellee Morris Building & Land Imp. Ass'n, Limited. Harry H. Hall, for appellee widow of James Fahey. Francis C. Zacharie, for appellee C. Harrison Parker. Rouse & Grant, in pro. per.

On Motion to Dismiss the Appeal.

BREAUX, J. The syndic of the creditors of Charles H. Hamilton filed an account of the affairs of the insolvency in his charge as syndic. Oppositions to the account were interposed by several of the creditors. On the 17th day of March, 1898, the oppositions were heard. The provisional account was amended as ordered, and it was approved by the judgment of the court. On the 26th day of April, 1898, Paul Jones & Co., who alleged that they were creditors of the syndic, moved for and obtained an order granting them a devolutive appeal returnable to this court. On May 2d following, their appeal was filed. On this same day the city of New Orleans, also an opponent to the account of the syndic, applied for and obtained an order of devolutive appeal, without bond, as the law authorizes. In this court the syndic appellee moved to dismiss the appeal, alleging that his account was approved by a judgment in the court a qua; that the judgment had become executory, and for that reason that it was executed by him; that he had paid out, in accordance with authority granted by the judgment, the money of the estate of the insolvent; that he was granted a discharge by the civil district court, as shown by a copy of the judgment which he annexed to his motion for the dismissal; and that there was no longer any person before the court competent to represent the appellee. A copy of the judgment was annexed to the motion, to show that the syndic was discharged as he alleged.

The appeals being devolutive, there is no question here of staying the proceedings in the district court. Whether the appellants can still apply to have the judgment reversed, from which they here appealed, presents the issue before us for determination. Repeated decisions have well settled the rule of practice that the court a qua cannot affect the appeal by any judgment it may render. After the appeal was lodged here, it passed out of the jurisdiction of the lower court. Any order it may grant cannot have the effect of compelling the court to dismiss the appeal. The appeal having been granted, and it being before us, we must decline to dismiss it upon proof of a judgment of the court which has no longer jurisdiction in the matter of the appeal.

The propositions argued by counsel in the briefs for the syndic are (1) that the syndic was regularly discharged, and that in consequence the appeal must be dismissed, as he is a necessary and interested party in all proceedings attacking his account; (2) that the court is without jurisdiction *ratione materie*. With reference to the first proposition: It may well be that the syndic has been regularly discharged in the lower court, and yet be a party to the appeal. He, as an appellee, moved to dismiss the appeal. He is an appellee, and the judgment of the lower court discharging him cannot, of itself, have the effect claimed in the motion to dismiss the

appeal. With reference to the second proposition, that the court is without jurisdiction *ratione materie*: The judgment of the lower court cannot have the effect of minimizing a claim, so as to divest the supreme court of its jurisdiction, if it had jurisdiction when the appeal was lodged before that tribunal. A case before it cannot be disturbed by the subsequent judgment of the lower court discharging the appellee. Conceding all that is claimed by appellee, it may be that the creditors, who are appellants, if their demand should be granted, would have rights against the other creditors overpaid, despite the discharge of the syndic. The motion to dismiss is denied.

(May 1, 1899.)

MONROE, J. The syndic filed an account May 10, 1897, presenting for distribution a fund exceeding \$2,000. Oppositions were filed by several creditors, and, among others, by Paul Jones & Co. and the city of New Orleans. Paul Jones & Co. claimed a vendors' privilege for \$401.77 on the proceeds of certain goods, and objected to the amount and rank of certain attorney's and notary's fees. The fees complained of were reduced by the court *a qua*, apparently to the satisfaction of the opponents, who have confined themselves in this court to the question of their privilege. The city of New Orleans claimed taxes for several years, in part on real estate and in part on movables, and its claim was allowed in part and dismissed in part. The complaint here relates to a claim for \$50, tax of 1894, assessed on movable property, with respect to which the opposition was dismissed. There was judgment amending and homologating the account March 11, 1898, and the opponents above mentioned appealed, devolutive, April 26 and May 2, 1898, respectively. There being no other appeals, the syndic proceeded to make a distribution agreeably to the judgment of the lower court, and, having completed the same, was discharged November 22, 1898. The following day he appeared here by counsel, and moved to dismiss the pending appeals on the grounds that the fund to which they related had been distributed, and, he having been discharged, there was no appellee before the court. These grounds were duly considered, and the motion to dismiss was denied by judgment of this court December 5, 1898. When the case was called for trial upon its merits, on April 20, 1899, counsel urged a reconsideration of the judgment mentioned, and has since urged it by brief. On the same day another motion to dismiss the appeal of the city of New Orleans was filed on behalf of Mrs. Widow Fahey. In this motion it is alleged that the only question involved in said appeal is whether or not the city shall be paid the amount claimed by it by preference out of the proceeds of property on which the mover was accorded a lessor's privilege, and it is further alleged that the city has acquiesced

in the judgment appealed from, by receiving the amount for which judgment was rendered in its favor.

On the Motions to Dismiss.

The motion made on behalf of the syndic, having been denied, could not, under the practice of this court, be renewed; nor can it now be urged as a pending motion. *Duncan v. Duncan*, 29 La. Ann. 829; *Succession of Edwards*, 34 La. Ann. 216. The judgment of this court, however, denying the motion to dismiss, is to be regarded as in the nature of an interlocutory order, subject to revision in the rendition of the final judgment on the merits. This being the case, while we think the reasons already given for such denial sufficient, we will consider the matter somewhat further, in deference to the earnestness with which it is pressed.

The first proposition is that the appeal should be dismissed because, since it was taken, and lodged here, the syndic, being appellee, has obtained his discharge. This is clearly a non sequitur. If the syndic represented all the appellees, for the purposes of the appeal, at the time it was taken, and thereafter died, or ceased for some other reason to represent them, the remedy would be, not to dismiss the appeal, but to make proper parties. If, upon the other hand, the syndic should be the sole appellee, representing himself alone,—as, for instance, in a case where the only oppositions are based upon charges of misappropriation of funds by him,—and the opponents choose to take devolutive instead of suspensive appeals from a judgment dismissing their oppositions, and the jurisdiction of this court attaches by reason of the filing of such appeals, it would hardly be claimed that the syndic could defeat the proceedings against him by obtaining a discharge from the court whose jurisdiction over those proceedings had been divested by such appeals. It is clear that, so far as any personal interest which he may have in the matter is concerned, his status, as an appellee, when once fixed in this court, cannot be changed by anything which may take place elsewhere, except his death, and in case of his death his place would be supplied by his legal representatives. The question then remains: Does he, for the purposes of the appeals, represent all the creditors, and does his discharge by the court *a qua* after the filing of such appeals in this court render it necessary that those creditors should severally be summoned and made parties? It is very certain that he does not represent those creditors who appear here as appellants; for, if he did, the appellants and appellee would be united in the same person, and there would be no *contestatio litis*,—an extreme view, which has not been urged. As a matter of fact and of law, each of the appellants represents himself here, as each represented himself in the lower court. But in the lower court these appellants were not the only parties to the litigation. There were

other creditors making claims contradictorily with each other in concurso, the only difference between them, so far as the syndic is concerned, being that he approved the claims of some, and disapproved those of others; but he could prevent no one of them from representing himself. They were all cited and were all before the court, each being at the same time plaintiff and defendant, and the merits of their respective claims were determined by the same judgment, so that when an appeal was taken from that judgment those who were not appellants were necessarily appellees. It is true that they might have been content that the syndic should represent them here, just as they might have been content to have him represent them in the court *a qua*, but they were not obliged to rely upon him for the protection of their interests, nor have they all done so in this case; two of them having appeared by counsel, and one of them having filed a separate motion to dismiss the appeal taken by the city of New Orleans. That the foregoing views import no novelties into our jurisprudence may be seen by reference to the following authorities: "Notification of the filing of an account operates as a citation to all persons concerned." *Succession of Bougere*, 29 La. Ann. 378. "The opponents to a tableau of distribution are all plaintiffs and defendants." *Succession of Gayle*, 27 La. Ann. 553. "All parties interested that the judgment should remain undisturbed must be made parties to the appeal, or it will be dismissed." 1 Hen. Dig. p. 63, No. 7; *Louques* Dig. p. 42, subd. 5, No. 2; *Id.* p. 43, No. 1. "A motion of appeal, and bond in favor of the clerk, make all persons interested parties to the appeal." *Succession of McKenna*, 23 La. Ann. 370. "Since the passage of that act [requiring appeal bonds to be made in favor of the clerk] our predecessors have constantly held, and we think correctly, that when an appeal is granted in open court, and the bond is made payable to the clerk of the court, any persons having an interest are by law parties to the appeal. Those who are not appellants are appellees." *Webb v. Keller*, 39 La. Ann. 58, 1 South. 424.

The remaining proposition urged in support of this motion to dismiss is that, since the appeals were taken, they being devolutive, the fund affected by the judgment appealed from has been distributed, and as the claims of the appellants do not amount, in the aggregate, to \$2,000, this court is without jurisdiction *ratione materiæ*. The fund offered for distribution, and ordered to be distributed, exceeded \$2,000, and the judgment appealed from directed and regulated the distribution of the whole fund. It is not claimed that an appeal did not lie at the moment the judgment was signed, but it is argued that the right to a devolutive appeal was cut off by reason of the subsequent execution of the judgment; this argument being based, to some extent, at least, on the circumstance that the fund in dispute consisted in part of

money, which, being the purchase price of certain effects which were subject to lessors' privileges, was retained by the lessors, to whom the effects were adjudicated, instead of being paid over to the syndic, and, by operation of the judgment, inured to said lessors before the appeals were taken. The answer, as we think, to this, is that the right to a devolutive appeal, if taken within a year after the signing of the judgment, is not affected either by the fact or by the time of the execution of such judgment. It differs from a suspensive appeal only in that it does not suspend the execution of the judgment, and in that, by reason of the possible execution of the judgment pending such appeal, the eventual remedy of the appellant, in case of the reversal of such judgment, may be different from what it would have been if he had appealed suspensively.

It is further said, however, that, as the claim of the appellants *Paul Jones & Co.* is for only \$401.77, the fund to be distributed cannot be affected beyond that amount, and that the jurisdiction of this court is therefore to be determined by the amount claimed. In other words, if we understand the proposition correctly, it is that, no matter what may be the amount of the fund to be distributed, unless the actual amount involved in the appeal or appeals from the judgment ordering the distribution exceeds \$2,000, this court has no jurisdiction. The constitution provides that the appellate jurisdiction of this court "shall extend to all cases, where the matter in dispute, or the fund to be distributed, whatever may be the amount therein claimed, shall exceed \$2,000 exclusive of interest," etc. Const. 1898, art. 85. The constitution of 1879 provided that the jurisdiction "should extend to all cases when the matter in dispute or fund to be distributed, whatever may be the amount claimed, shall exceed \$1,000 exclusive of interest," etc. (article 81); this amount being subsequently increased by an amendment. By the constitution of 1868 the jurisdiction extended "to all cases when the matter in dispute shall exceed \$500," etc. Article 74. Under the constitution of 1868 it was held, although the words, "or fund to be distributed, whatever may be the amount therein claimed," were not used, and the jurisdiction was made to depend upon the amount "in dispute," that when there was a fund to be distributed the amount of such fund represented the amount in dispute. Thus, in *Succession of Cloney*, 29 La. Ann. 327, Grenon was placed on the account as an ordinary creditor for \$350. He filed no opposition, and some oppositions that were filed were subsequently withdrawn, and the account was homologated, whereupon Grenon appealed. It was held, on motion to dismiss, that the amount of the fund to be distributed, and not the amount claimed by him, determined the right of appeal; and there are many other cases to the same effect. Under the constitution of 1879 the question

was presented in the case of *Renshaw v. Stafford*, 34 La. Ann. 1138, where an opponent claimed \$1,000 out of a fund of \$12,500. The court at first held that it was without jurisdiction, and the case was dismissed. Upon rehearing, however, the following views were expressed, by Mr. Justice Todd, as the organ of the court, to wit: "A careful examination of the authorities bearing on this point satisfies us that we erred in our previous decree, dismissing the appeal for want of jurisdiction. By article 81 of the constitution, this court has jurisdiction 'when the matter in dispute, or the fund to be distributed, whatever may be the amount therein claimed, shall exceed \$1,000 exclusive of interest.' That part of the article relating to the 'fund to be distributed' was formulated to correspond with the jurisprudence on the subject, settled by a long line of decisions of this court. These decisions we have diligently reviewed, and find that the question of jurisdiction on this point, in such cases, is controlled by the amount of the fund to be distributed; that this constitutes the object of dispute; that if the entire fund is claimed by one party, and that sum exceeds the amount required to give jurisdiction, that the jurisdiction vests, though only a part of that fund is claimed by the other party, and that part is below the amount which under other conditions is necessary to give jurisdiction. In such a contest it is considered that a question has arisen that involves the distribution of the entire fund; one side demanding the whole of it, and the other denying such right, leaving for decision how the fund is to be divided, and how disposed of. The decisions are uniform in support of this view. *Hart v. Lodwick*, 8 La. 167; *Buckner v. Baker*, 11 La. 462; *Colt v. O'Callaghan*, 2 La. Ann. 190; *Succession of Cloney*, 29 La. Ann. 327; *Picard v. Wade*, 30 La. Ann. 625; *Alter v. O'Brien*, 31 La. Ann. 453. In a recent case decided by us,—*Succession of Duran*, 34 La. Ann. 585,—the majority of the court did not think that the decisions above cited were applicable to that case, inasmuch as, by the effect of a prior judgment, not appealed from, homologating the account and ordering the distribution of the fund wherein not opposed, the dispute had been restricted to a sum remaining, much below the appealable amount. Our previous decree dismissing the appeal should therefore be set aside." The case thus decided is one of the cases referred to by the court in the case of *In re Southern Liquor & Tobacco Co.*, 49 La. Ann. 1455, 22 South. 414, upon which the mover relies; and both cases differ from the instant case, in that in both cases, when the judgments homologating the accounts so far as not opposed became final, there was but one opponent before the courts, respectively, claiming less than the appealable amount, and hence, as it was held, no concurso, whereas, in the case now under consideration, when the judgment ordering the distribution was rendered there were a number of

contestants whose claims affected the entire fund, and amounted to considerably more. We therefore find no good reason for changing the ruling heretofore made upon this motion to dismiss.

Another motion was presented, upon the day upon which the case was called for trial upon its merits, on behalf of Mrs. Widow James Fahey, one of the creditors of the insolvent, to dismiss the appeal of the city of New Orleans, upon grounds which have been already stated. This motion involves a question of fact, which, if we considered that the interests of justice required it, would necessitate the remanding of the case. But as the case has been, in the meanwhile, argued upon its merits, and as, upon the merits, we have reached a conclusion adverse to the appellant, no good purpose could be subserved by remanding the case in order to solve the question, has the appellant acquiesced in the judgment appealed from? This motion to dismiss is therefore denied.

On the Merits.

Paul Jones & Co. claim a vendor's privilege on certain goods which were contained in room N, Hennen Building, and which had been seized by them under a writ of sequestration before the cession. These goods were sold separately, and realized \$401.77. The syndic appears to have accorded to the opponents the rank of privileged creditors to the amount of \$200, without, however, specifying any particular fund upon which the privilege was to bear. The claim which the opponents make is that the privilege should cover the entire proceeds of the property sold by them to the insolvent, that said property consisted of the liquor found in room N and sold separately, and that the proceeds amounted to \$401.77, as stated above. Privileges are stricti juris and can be enforced only when clearly established. The domicile of the opponents is in Louisville, Ky. They appear to have conducted their business here through Mr. C. J. Crawford, and it is claimed that the sale to the insolvent of the whisky in question was a Louisiana contract made by him. The oppositions to the account appear to have been first called for trial in the lower court on December 2, 1897, at which time counsel for Paul Jones & Co. offered to testify as to a conversation which he had at one time had with Mr. Crawford concerning the latter's authority to make binding contracts on behalf of his principals, and as to the contents of a letter which Crawford was said to have written to his principals, presumably upon the subject. This testimony was, however, objected to, and properly excluded, but the judge a quo ruled that time should be given to the counsel to prepare his proof. When, therefore, the case was again called for trial, upon December 16, 1897, counsel for opponents offered in their behalf the testimony of Lawrence Jones, which had been taken, under commission, at Louisville,

Ky., and also examined Charles Morel, a deputy sheriff, as a witness. Morel testified that he was charged with the execution of the writ of sequestration, under which he seized certain whisky pointed out to him by Hamilton before his cession, and that the whisky thus seized was the same that was sold separately by the syndic after the cession. There was no other evidence in the record to identify the whisky thus seized and sold as whisky which had been purchased by Hamilton from Paul Jones & Co. Morel had no personal knowledge of the matter, and Hamilton was not called upon to testify. Lawrence Jones testifies quite fully concerning the sale made by Crawford, though it is evident that he was in Louisville, or elsewhere, when the transaction took place, and Crawford was in New Orleans. Hence, being asked, by the counsel representing the Morris Building Company: "Q. If you know anything of the matters touching which you have been interrogated, state fully how your knowledge thereof was acquired,"—he answers: "My knowledge of the facts stated was acquired through our representative, C. J. Crawford." This answer apparently applies to all the testimony given by the witness, and, taken in connection with the fact that he nowhere states that he is or was a member of the firm of Paul Jones & Co., renders it difficult to attribute any fixed value to his testimony. Aside from that, however, his answers upon the main issue are unsatisfactory. Merchants established elsewhere, and making sales here through agents, ought not to be allowed to hold themselves in a position to do so, and only tentative or conditional agreements, subject to approval, when it will subserve their interests. This witness was asked by the counsel for Paul Jones & Co. the following question, to wit: "State specifically whether or not Paul Jones & Co. reserved themselves the right to reject the sales made by the said Crawford, as their agent, to the said Hamilton, or whether the said Crawford was authorized to bind his said principals absolutely to the sales made by him to the said C. H. Hamilton, and which constitute the indebtedness claimed by the said Paul Jones & Co. of the said C. H. Hamilton." And to this he answers: "C. J. Crawford was authorized by us to sell C. H. Hamilton, and spent considerable money with Hamilton to effect the sale; and, as we had authorized him, we felt legally and morally bound to make the shipment." It will be observed, however, that he does not "state specifically," as he was requested to do, "whether or not Paul Jones & Co. reserved themselves the right to reject the sales made by" Crawford. It will also be observed that the letter upon the subject of Crawford's authority in the premises, as to the contents of which opponents' counsel proposed to testify, was not produced, nor was there produced any answer to such letter, by Paul Jones &

Co., and yet it is apparent that whatever authority Crawford had was conferred upon him by written communications. Upon the other hand, the whisky in question was shipped, not to Crawford, to be by him turned over to Hamilton, but direct to Hamilton, so that the delivery was made in Kentucky. Under these circumstances, we are of opinion that the opponents failed to administer the proof necessary to establish the privilege claimed by them.

The city of New Orleans claims \$50, and a tax privilege therefor, on the proceeds of certain "counters, fixtures, wooden partitions," etc., found in the premises No. 160 Common street. This claim is based on an assessment on "merchandise or stock in trade," and the learned counsel representing the city argues that such an assessment entitles the city to a privilege on the proceeds of the "counters, fixtures, and wooden partitions," which were sold separately at his request. It is true, as he says, that article 233 of the constitution mentions only movables and immovables, as general divisions of property for purposes of taxation, but it does not preclude subdivisions such as are necessary to make an assessment intelligible. And the very bill upon which the opponent sues subdivides movable property as follows, to wit: "Horses, cows, etc.; vehicles; merchandise or stock in trade; money at interest, capital, bills receivable; money in possession; shares of stock; furniture, etc.; statuary, paintings, etc.; diamonds, jewelry, etc.; stock or interest in water craft; trackage, etc., of railroads; judgments, suits, and causes of action; franchises, patents, copyrights, trademarks, privileges, and charters; all canals and other ways of communication; bonds of all kinds." It would hardly be claimed that, upon a bill containing such an enumeration, an assessment upon "horses, cows, etc.," would entitle the city to a privilege upon the proceeds of "vehicles," or that an assessment upon "diamonds, jewelry, etc.," would apply to "bonds of all kinds"; nor, unless we distort the meaning of the very commonplace words "merchandise or stock in trade," do we think that they could be made to apply to either "counters, fixtures, or wooden partitions." If so, then with equal propriety they could be applied to the machinery of a planing mill or sash factory, to the plate-glass show windows of a jewelry store, and, as far as we can see, to the building in which a merchant conducts his business; and the words "merchandise or stock in trade" would lose the value which they now have, in that they distinguish certain things from other things which also have specific names or terms to designate and differentiate them. The estate is entirely insolvent; otherwise, we might change the judgment rejecting this claim into a judgment recognizing it as an ordinary debt, or dismissing it as in case of nonsuit. As the matter stands, we will affirm the judgment appealed from. For these reasons, we are of opin-

ion that the oppositions of Paul Jones & Co. and of the city of New Orleans are not well founded, and that the judgment of the court a qua was correct, and it is accordingly affirmed.

(51 La. Ann. 1028)

LIVERPOOL & L. & G. INS. CO. v. BOARD OF ASSESSORS et al. (No. 12,826.)¹

(Supreme Court of Louisiana. Jan. 9, 1899.)

TAXATION OF NONRESIDENTS—DEBTS—SITUS.

1. Taxes imposed on a nonresident, whose property is not in the state, is null, as tax laws can have no extraterritorial effect.

2. Debt due to a nonresident (still in nonconcrete form) has its situs at the domicile of the creditor, and not at the domicile of the debtor.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Frederick D. King, Judge.

Suit of the Liverpool & London & Globe Insurance Company against the board of assessors and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Francis C. Zacharie, for appellants tax collector and board of assessors. James J. McLoughlin, Asst. City Atty., for appellant city of New Orleans. Saunders & Miller and E. W. Huntington, for appellee.

BREAUX, J. Plaintiff brought this suit to have the assessment of its "credits" canceled for the year 1897. Plaintiff was assessed for money loaned on interest, all "credits," and all bills receivable for money loaned or advanced, or for goods sold, and all "credits" of any description. We understand that the issues now relate to the assessment of "debts" that were due for premiums, and that the other items of property assessed do not give rise to any question for our decision.

The plaintiff corporation has no domicile in this state, but it has a resident board of directors, a resident secretary, and an assistant secretary. The latter is secretary of the board, but not of the company. They are an advisory board to the home board. The resident secretary, it appears, manages the business, and renders his accounts, and makes remittances to plaintiff. The company complied with the requirements of Act No. 245 of 1897, by opening an office in this state for the purposes stated in the article of the Code. The position of plaintiff is that credits due the company for uncollected premiums are only taxable at the domicile of the company. This is controverted by the defendants, who urge, in substance, that the plaintiff's "credits" fall within the grasp of the revenue law adopted in 1890, taxing the property of nonresidents.

The whole theory of taxation, under the constitution of 1879, which governs in this case, was based on the idea that the taxes were a property tax, and that the property assessed should be seized and sold to satisfy the taxes for which it was assessed. The old

method of recovering taxes by suit against the debtor was abolished, and in its place the constitution ordained that the property assessed should be seized and sold for the taxes. No great difficulty should now arise in assessing and collecting the taxes on every item of property stated in the revenue act as subject to taxation.

Now, as to debts: A mere debt—a promise to pay—has no value within the limits of the state, if it be due to one not domiciled in the state. Its value is at the domicile of the creditor, where it has its situs. It is not property, save at the domicile of the creditor. If assessed and sold for taxes, we are inclined to think that the title would be greatly wanting in essentials to a perfect legal title. If treated and considered as a license tax for carrying on business, collection may be effected perhaps, but that would only prove that the proposition is correct; for a license tax is not a property tax. The opinion from which we will quote in a moment is broader in its scope than needful to sustain our view. The facts are in that case an attempt was made to tax foreign creditors. The court decided against it, and held that the debts owed by individuals are not property of the debtor in any sense; that they are promises, obligations, duty, and only possess value in the hand of the creditors, where they are property, and in whose hands they may be taxed. "To call debts property of the debtors is a misuser of terms." "Debts have no situs separate from the domicile of the creditor. This principle might be supported by citations from numerous adjudications, but authorities could not add to the manifest truth." Justice Fields, organ of the court in *Railroad Co. v. Pennsylvania*, 15 Wall. 300. This question of taxing "credits" was considered by Mr. Cooley. He, in language not ambiguous, gives it as his opinion that debts owing to foreign creditors by individuals are not taxable at the domicile of the debtor. Cooley, *Tax'n*, p. 15. Upon the same subject, we extract from the book of another commentator: "A debt not evidenced by negotiable paper, according to our view, may be taxed at the residence of the debtor; according to another view, at the residence of the creditor." "The weight of authority sustains the latter view." Burroughs, *Tax'n*, p. 41. "The situs of the debt is the creditor's domicile." Whart. *Conf. Laws*, § 80. "Debts have no other situs than the residence of their owners." Desty, *Tax'n*, p. 326. The decisions of this court have repeatedly held that "credits" have their situs at the domicile of the creditor, as will be seen by the following extracts: "The tax collector affirms the validity of the tax on the ground that section 10 of Act No. 98 of 1886 directs that movable property shall be assessed in the parish where it is located. This applies to tangible movables, but not to incorporeal rights generally, which follow the person of the owner, and are not susceptible of physical location. It is well settled that the

¹ Rehearing denied May 15, 1899.

situs of a debt, as property, is at the domicile of the creditor,"—citing *Murray v. Charleston*, 96 U. S. 433; *Railroad Co. v. Pennsylvania*, 15 Wall. 300; and *Cooley, Tax'n*, p. 15. Justice Fenner was the organ of the court in the case from which we have just quoted. *Meyer v. Pleasant*, 41 La. Ann. 646, 6 South. 258. It is well to bear in mind that, under the revenue law of 1886, "debt" was included as property subject to taxation. This decision was rendered in June. In December of the same year, Justice Poché, as the organ of the court, in *Barber Asphalt Pav. Co. v. City of New Orleans*, 41 La. Ann. 1015, 6 South. 794, said: "In the case of *Meyer v. Pleasant*, 41 La. Ann. 645, 6 South. 258, hereinabove referred to, it was held, in harmony with settled jurisprudence, that the situs of a debt is at the domicile of the creditor." Also: "And, on that subject, it is beyond question the right of a corporation, as well as of a natural person, to have a legal domicile, and that domicile is in the state where it was incorporated. With the leave of other states, a corporation can extend its operations to other states, but it does not thereby acquire a new domicile in every state in which it does business. It retains the domicile of its birth, and, like natural persons, it is at that domicile that its obligations for, and its liability to, taxation for debts, or other incorporeal rights which it owns, must be tested and settled,"—citing *Railroad Co. v. Koontz*, 104 U. S. 11, and *Yuba Co. v. Mining Co.*, 82 Fed. 163. Again, the court in that case, in substance, says that the corporation was a foreign one, and continued as a foreign corporation, without any change in its status growing out of its compliance with article 236, Const. 1879. The question came up again in 1892. Justice Fenner, whose opinion is entitled to great weight, particularly in view of the fact that he had considered the question in *Meyer v. Pleasant*, cited *supra*, was the organ of the court, and said: "There is no doubt of the legislative power to modify the rule of *comity mobilia personam sequuntur* in many respects. Movables, having an actual situs in the state, may be taxed there, though the owner be domiciled elsewhere. Even debts may assume such concrete form in the evidences thereof that they may be assessed when such evidences are situated in the state, as in the case of bank notes, * * * bills of exchange, or bonds. But as to mere ordinary debts, reduced to no such concrete forms, they are not capable of acquiring any situs distinct from the domicile of the creditor, and no legislative power exists to change that situs, so far as nonresident creditors are concerned. As said by the supreme court of the United States: "To call debts "property" of the debtors is simply to misuse terms. All the property there can be, in the nature of things, in debts, belongs to the creditors to whom they are payable, and follows their domicile, wherever they may be. The debts can have no locality separate from the parties to whom they are due." *Railley*

v. Board, 44 La. Ann. 769, 11 South. 93. In the case of *Clason v. City of New Orleans*, 46 La. Ann. 1, 14 South. 306, this court said: "Under the principles enunciated in these cases, the fact that the plaintiff has a resident clerk acting for it in the city of New Orleans, and that it has an office and pays a license there, is unimportant. For the purpose of a determination of the issue involved herein, we have to deal with the plaintiffs as non-residents, and, in so dealing with them, we are of the opinion that the judgment of the lower court is correct." The court in this case held, substantially, that the credit owing to a foreign firm is not subject to taxation. In *State v. Board of Assessors*, 47 La. Ann. 1545, 18 South. 519, the court held: "But it has never been decided that tangible personal property could not be assessed at the owner's domicile, notwithstanding its actual situs was abroad, in some other state or country,"—a proposition not before us at this time. If it were, it would meet with our entire approval. There is no question here of the situs of personal property which has a visible existence, as stated in the case from which we have quoted. This was not a case involving a "mere ordinary debt" as subject to taxation. The other cases decided by this court, subsequent in date, made no question of the right to assess tangible movables. The court said in one of the cases: "The defendants cite the case of *Clason v. City of New Orleans*, 46 La. Ann. 1, 14 South. 306, to sustain their contention. The decision in *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 44 La. Ann. 760, 11 South. 91, is of more direct application." The decision gave full recognition to the exception from taxation here of debts due the foreign corporations, but maintained the assessment on the cash of the company necessary here for its business purposes. The principle of the decision in *Bluefields Banana Co. v. Board of Assessors*, 49 La. Ann. 43, 21 South. 627, applies to this case.

We cannot hold that cash thus liable to taxation is exempted. There is no question in the case before us for decision of cash, which is undeniably a tangible, movable, subject of taxation.

The defense urges that the doctrine *mobilia sequuntur personam* is subject to so many exceptions that it can be applied only in the simplest cases,—a proposition to which we have not the least objection to offer. It is unquestionably true. None the less it does not apply in the following case: Let us suppose, if a person domiciled in England binds himself to insure an owner of property who has a domicile in this state, on condition that the owner pays him an amount fixed within a stipulated time, the promise to pay of the assured for this insurance would not be subject to taxation in this state. For the same reason, the assured's promise to pay in the case now before us for decision is not subject to taxation here.

The defense also urges that the decisions

of *Meyer v. Pleasant*, 41 La. Ann. 646, 6 South. 258, and *Barber Asphalt Pav. Co. v. City of New Orleans*, 41 La. Ann. 1015, 6 South. 794, do not sustain subsequent decisions, because, under the tax acts of 1886 and 1888, there were no provisions in conflict with the doctrine *mobilia sequuntur personam*. In former law, i. e. law of 1886, all "credits" were subject to taxation due by any "person, company, association, or corporation in and out of this state," and all "credits" held, controlled, or administered by "agents" and others in this state. Section 1 of the act, as in the act of 1890. The revenue law enacted in 1888 is substantially the same, and was not less broad in its scope than the act of 1890. In the law, requiring "debts" owed by the foreigners to be assessed for taxation, as we take it, was intended for all such debts as are evidenced by note or by mortgage, or that are in such other concrete form as render it possible to subject them to taxation under the present laws. No attempt has been made since the cited decisions were rendered to localize "debts," or "open accounts," such as those upon which the taxes are now claimed. The state of Louisiana possesses jurisdiction for purposes of taxation, under present laws, over bonds owned by corporations actively within the state, without regard to the owner's demands; also, judgments,—such bonds and judgments being in themselves property which may have a situs away from the owner's domicile. As to "open accounts" with a foreign company, for such protection as it may offer, the law to date has not localized them so as to render it possible to assess them here and sell them for taxes. While it may be that a domicile in the state as to these accounts may well be required as a condition precedent to a foreign company's business in the state, they cannot, in our view, be assessed here as foreign "credits," under the wording of the present law.

We have reviewed the decisions of the supreme court of the United States of date comparatively recent, which the defense contends shows a change in the jurisprudence since the decision rendered in 15 Wall., before cited. We found in the first case reviewed that the company sought to be taxed was a corporation created by the commonwealth of Kentucky for the purpose of erecting a railroad bridge, with its approaches, over the Ohio river, between the city of Henderson, in Kentucky, and the Indiana shore. The court held that the tax controversy was nothing more than a tax on tangible property of the company in Kentucky, consisting of tax franchise. The company was a Kentucky company, and, under the revenue law of the state, tax is levied on the home company, i. e. "on all property of corporations organized under the laws of the state, whether such property be in or out of the state, including the intangible property of such corporations," which property,—that is, the intangible property,—whether situated in or out of the state, shall

be considered and estimated in fixing the value of the corporate franchise, as we understand all property, tangible or intangible, of home companies. This decision sustains our view. The franchise and other intangible property it holds is subject to taxation at the domicile of the owner,—where it has situs. *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 17 Sup. Ct. 532. Another case of the same court, from which the defense quotes, was an Ohio case. It purports to provide for a tax upon "property within the state of Ohio," and a mode of assessment to ascertain the value of the property in Ohio, and not to assess intangible property, having its situs in another state. *Express Co. v. Auditor*, 165 U. S. 223, 17 Sup. Ct. 305. We take it that the supreme court of the United States, in *Horn Silver Min. Co. v. State*, 143 U. S. 315, 12 Sup. Ct. 403, was concerned with the question of a franchise, and found, under the law of New York, that the company was bound for the tax upon its franchise property, which the courts have repeatedly held has a situs within the limits of the state by which it was granted. We find no error in the judgment. It is affirmed.

NICHOLLS, C. J., absent.

(51 La. Ann. 1197)

STATE ex rel. GRECO v. RIGHTOR, Judge.
(No. 13,115).¹

(Supreme Court of Louisiana. April 3, 1899.)

SALE PENDING FORECLOSURE—EFFECT—
INJUNCTION.

1. Proceedings of foreclosure were pending when the mortgage debtor sold the property mortgaged to relator, who sued out a writ of mandamus to compel the district judge to grant him an injunction on grounds already passed upon by the district court, and from which no suspensive appeal was taken.

2. During the pendency of foreclosure proceedings, the debtor cannot convey the property mortgaged to the prejudice of plaintiff in the proceedings. The injunction prayed for, if granted, would be prejudicial to plaintiff's rights.

3. Relator was without a right of action, as he was not a third person, and, consequently, the refusal of the injunction was within the discretion of the district court. *Bank v. Webre*, 11 South. 706, 44 La. Ann. 1081; *State v. Rost*, 23 South. 978, 50 La. Ann. — (not yet officially reported).

(Syllabus by the Court.)

Application by the state, on the relation of Frank Greco, for writs of certiorari, mandamus, and prohibition. Denied.

Theodore Cotonio, for relator. E. Howard McCaleb and Dinkelspiel & Hart, for respondent.

BREAUX, J. The respondent judge having refused to grant a writ of injunction to relator, and having also refused to grant an appeal, the relator applies for writs of certiorari, mandamus, and prohibition to compel the judge to grant him the application for

¹ Rehearing denied May 29, 1899.

an injunction, and fix the amount of the bond for an injunction; or, in the alternative, to compel the judge to grant to relator an appeal from the order refusing to grant the injunction suspensive, upon relator furnishing bond according to law. He also prayed for a writ of prohibition to restrain and prohibit the judgment creditor from proceeding further in foreclosing her mortgage. Relator sets forth at some length that Mrs. Mary Stempel, guardian, had caused relator's property to be seized, and that she had no right to proceed with the seizure. The relator asserts that he bought this property on the 15th of August, 1898, by act before Theodore Cotonio, notary, from Edward Fulton and others. He avers that his vendors, Edward Fulton and others, received their title from Elizabeth Flynn, from whom they inherited. Relator alleges that the judgment of Mrs. Stempel, guardian, obtained against Edward Fulton and others, was never recorded, and that she never recovered any judgment against Edward Fulton, but that, on the contrary, her claim against Edward Fulton has been dismissed; that his interest exceeded half of the ownership of the property, and that, in addition, he was the usufructuary of the remaining portion; that, in matter of Mrs. Stempel against J. C. Fulton, William F. Fulton, and Edward Fulton, the appeal has been taken by the latter, and that it is still pending; that the claim of Mrs. Stempel, guardian, is prescribed; and, finally, that the judgment was null and void, because rendered without citation. On the other hand, the respondent judge, in his return, sets forth, in substance, that the relator's statement of facts is not correct; and he states specifically that the application for an injunction was frivolous, and made only for delay, and, for that reason, he refused to grant an injunction, and, after the refusal, he declined to sign an order for appeal; that every one of the grounds urged by the relator has, in one way or the other, been litigated, and has been decided against the position taken by relator; that the only remaining issues to be heard (because it may be that they have not heretofore been finally disposed of) are those now pleaded in the case pending upon a devolutive appeal; that in order to obtain delay, relator pleaded for the injunction to which we have just referred.

1. The grounds set forth by the relator are manifestly not tenable, and, in our view, the district judge properly refused to grant the injunction. The record shows that citations were duly served and judgment rendered against relator, and that the plea of prescription was heretofore passed upon also. It appears from this that relator's application is not sustained by the facts. Relator sought to avoid the effect of the decision heretofore rendered contradictorily between Mrs. Stempel, guardian, and the Fultons (the latter, we have seen, are the relator's authors). Stempel v. Fulton, 51 La. Ann. —, 25 South. 270, in re

Fulton applying for certiorari or writ of review. When relator bought the property from the mortgage debtor, proceedings to foreclose the mortgage had already been instituted against the mortgage debtor. The law prohibiting a sale made with a view of thwarting legal proceedings, as here attempted, is quite plain. This case, we think, falls within the terms of the law, which reads: “* * * Nor shall it be lawful for debtors or third possessors of property, subject to mortgage of any kind, to transfer or alienate such property pending an action to enforce the mortgage; and any transfer or alienation made in contravention of the provisions of this article, shall have no effect. * * *” Act No. 3, Acts 1878.

2. If an injunction were granted in this case as prayed for by relator, the only result would be that, temporarily at least, effect would be given to an act which the statute provides shall have no effect. If there was any doubt about the character of the litigation, there might be some room to grant an injunction, but not the least question arises in this case which has not been, in one way or another, heretofore urged by relator's authors and passed upon. Where it is manifest that an injunction has no sufficient grounds to stand upon, it is within the discretion of the trial court to refuse to grant it. *Bank v. Webre*, 44 La. Ann. 1081, 11 South. 706; *State v. Rost*, 50 La. Ann. 995, 23 South. 978.

3. Relator is not in law a third person. It is as if defendants themselves, in the foreclosure proceedings, were attempting to sue out an injunction, and thereby obtain delays in matter of foreclosure proceedings. It is therefore ordered, adjudged, and decreed that the rule nisi heretofore issued in this case, and plaintiff's demand, as set forth in his application for writs of certiorari, prohibition, and mandamus, is rejected.

(51 La. Ann. 1186)

ONG-HILLER CO., Limited, v. FIDELITY & DEPOSIT CO. OF MARYLAND
et al. (No. 12,880.)

(Supreme Court of Louisiana. April 17, 1899.)

APPEAL—JURISDICTION—DISMISSAL.

This court being without jurisdiction, the appeal is dismissed.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

Action by the Ong-Hiller Company, Limited, against the Fidelity & Deposit Company of Maryland and others. Judgment for plaintiff, and defendants appeal. Dismissed.

Purnell M. Milner, for appellant Surety Co. J. Zach Spearing, for appellant Mutual Building & Homestead Ass'n. Saunders & Miller, for appellee. Edwin T. Merrick, amicus curiæ.

BREAUX, J. Plaintiff sued the defendants for building materials sold to builders for use

in the construction of a building for the Mutual Building & Homestead Association. Defendant the Mutual Building & Homestead Association, answering, admits that it entered into a contract with Anderson & Allen, under which they undertook to construct and erect a building for it; that plaintiff served an attested account upon it. Defendant denied that it owed anything to plaintiff, and that plaintiff had any privilege on its building; that it had paid the builders, Anderson & Allen, the full amount due them under the terms of the contract; that to make it responsible for plaintiff's account, or to give him a privilege on its account, would be to impair the obligation of its contract with Anderson & Allen, and to make it liable for the debts of a third person; that, in so far as Act No. 180 of 1894 is invoked to hold it liable for the claim of plaintiff, the act is unconstitutional, for reason stated by it, and on the further ground that the act relates to and embraces more than one object; that they are not expressed in its title; that the act is a local and special law, and that notice of the intention to apply therefor was not published in the locality, as required by article 48 of the constitution; that the Fidelity & Deposit Company signed a contract of suretyship for Anderson & Allen, by which the latter are bound to plaintiff. Defendant the Mutual Building & Homestead Association called the Fidelity & Deposit Company in warranty. The latter filed an exception to the call in warranty, on the grounds that defendant the Fidelity Company, called in warranty, was already a party to the suit, being sued in solido with the Mutual Building & Homestead Association; and, moreover, had already been sued by the Mutual Building & Homestead Association in a different court of concurrent jurisdiction, and for the same cause of action. This exception was overruled, and the demand in warranty was not dismissed. The Fidelity & Deposit Company then answered plaintiff's demand, and pleaded the violation of the terms and conditions of the bond given in favor of the Mutual Building & Homestead Association.

The facts are that plaintiff sold material to the firm of Anderson & Allen; that a balance of \$364.20 is unpaid. This account was served on the owner, and registered. The building was completed and accepted January 28, 1896, and service was made on the surety on the 28th day of April, 1896. The bond furnished by the contractors, in favor of the Mutual Building & Homestead Association, as security for the faithful performance of their contract, including the payment by them of their laborers, artificers employed by them, and the material men who furnished the material used in the work, and the fee of attorney of the insured, was not recorded, as required by Act No. 180 of 1894. The contractor failed to pay the laborers and material men. Plaintiff, a furnisher of material to the contractor used in the construction and

erection of a building for the defendant the Mutual Building & Homestead Association, sued the defendant, as before stated, claiming the price of materials; also, the fee of attorney employed by the Mutual Building & Loan Association. The judge of the district court held that the Mutual Building & Homestead Association was not bound for the payment of plaintiff's claim, based, as it was, exclusively on the failure to record the contractor's bond according to Act No. 180 of 1894, but found that by the terms of the bond the Fidelity & Deposit Company, regardless of Act No. 180 of 1894, was liable to the plaintiff for the amount proved. This did not include the fee of attorney. From that judgment the Mutual Building & Homestead Association appeals, and complains of the judgment being erroneous, in so far as it dismisses its claim for the fee of attorney. The Fidelity & Deposit Company also appealed.

Plaintiff, on appeal, in the brief sets forth that Act No. 180 of 1894 is constitutional, and therefore the judgment of the lower court should be amended by giving plaintiff judgment against the owner as well as against the surety, but that, if the act is held unconstitutional, still the surety and the owner who executed the bond in order to comply with the statute, and who thereby induced the material man to sell his goods under the belief that he was protected by the statutory bond, are estopped, as against the material man, from contesting that he is secured by law. We have already noted that the only amendment of judgment asked for by appellee the building association on appeal is an amendment in order that \$50 may be recovered by it (the Mutual Building & Homestead Association) against the Fidelity & Deposit Company, called in warranty. No constitutional question as to the fee of attorney is here involved. Defendant asks for a fee to be paid by warrantor. The latter denies its indebtedness on other issues. It involves a mere question of fact. The court being without jurisdiction as relates to this claim, the appeal of the Mutual Building & Homestead Association is dismissed. Passing to the argument of plaintiff and appellee, as contained in the brief, claiming that it is entitled to judgment against the Mutual Building & Homestead Association as well as against the Fidelity & Deposit Company, it is not sustained by an answer to the appeal, or any application whatever, in due form, for the amendment of the judgment. This being the case, no amendment of the judgment can be made, in so far as it is concerned. This brought us to an examination of the grounds set forth by defendant the Fidelity & Deposit Company, appellant. After an examination of these grounds, we concluded that, as relates to its pleadings, the Fidelity & Deposit Company is in the same situation in this case as it was in the case of *Central Mfg. & Lumber Co. v. Mutual Building & Home-*

stead Ass'n, 25 South. 638. For reasons assigned in that case, this appeal here is dismissed.

On Application for Rehearing.

(May 29, 1899.)

Appellant applied for a revision or amendment of our decree, that it may be made abundantly clear that the court did not pass upon the merits of the case, but dismissed the appeal for want of jurisdiction. In this case we wrote a complete statement, and immediately after arrived at the conclusion that this court was without jurisdiction of the question presented. The statement of the case may perhaps, on hasty reading, lead to the inference that there was some intention to pass upon the issues on the merits. The following, copied from our opinion, shows, we think, that the inference, if reached, is unfounded: "After an examination of these grounds, we concluded that, as relates to its pleadings, the Fidelity & Deposit Company is in the same situation in this case as it was in the case of Central Mfg. & Lumber Co. v. Mutual Building & Homestead Ass'n, 25 South. 638." That case was dismissed by this court for want of jurisdiction. Our decree in the case here reads: "For reasons assigned in that case, this appeal is dismissed." The syllabus reads: "This court being without jurisdiction, the appeal is dismissed." We can only state now that which we held before, that the appeal is dismissed for want of jurisdiction. No part of the claim was considered on the merits, as the court considered that no part of the case came within its jurisdiction. We, therefore, if need be, revive the judgment by restating that the case was dismissed because the court had no jurisdiction. Rehearing refused.

(51 La. Ann. 1023)

**NEW IBERIA TELEPHONE EXCHANGE
v. CUMBERLAND TELEGRAPH &
TELEPHONE CO. (No. 13,125.)**

(Supreme Court of Louisiana. May 1, 1899.)

**APPEAL—ORDER—NOTICE—JURISDICTION—
DAMAGES—EVIDENCE—DECLARATIONS
OF AGENT.**

1. While, in an order of appeal, it should be made to appear to which court the appeal is returnable, the oversight may be cured by the recital of the bond of appeal and other proceedings.

2. A notice of an appeal, made returnable on the first day of a term, is not violated by the insertion by the clerk of court, in addition, of an erroneous date.

3. The property involved, as made evident by the evidence, uncontradicted, was more than \$2,000.

On the Merits.

1. One claiming damages should, when called upon for proof of the different items, sustain each with sufficient proof, and not rest on the idea that he may recover a round sum without proof of the different items going to make up the round sum.

2. The agent of plaintiff having expressed himself as satisfied, and that after having complained of wrongs done him and repairs made or at-

tempted, the court concluded that there were no grounds upon which to base a judgment for damages.

(Syllabus by the Court.)

Appeal from Twenty-Fourth judicial district court, parish of St. Mary; C. A. Allen, Judge.

Bill by the New Iberia Telephone Exchange against the Cumberland Telegraph & Telephone Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Millington & Sanders, for appellant. Charles A. O'Neill, for appellee.

On Motion to Dismiss the Appeal.

BREAUX, J. Defendant filed a motion to dismiss the appeal on the ground that the order of appeal was defective, for the reason that it did not designate to which court it was taken and the return day of the appeal, and on the further ground that the supreme court is without jurisdiction *ratione materiae*. The record shows that, on motion of plaintiff's counsel, the record was made returnable "to the proper court, according to law." Two days after the appeal had been granted, plaintiff filed a bond of appeal, reciting in the bond that it had obtained an order of appeal from the judgment, which had been made returnable to this court. In our view, this order is scarcely the order required under the statute. We think, in such orders, it should be made to appear to which court the appeal is returnable,—whether to the circuit court or to the supreme court; otherwise, the appellee might have just ground to complain. We do not, however, dismiss the appeal on this ground, as the appeal bond was filed almost immediately after the order of appeal had been granted, as before stated. We will not dismiss this appeal, as the bond and a notice of appeal cure the defect. The ruling, we must say, applies only to the state of facts here.

As relates to the notice of appeal, the second ground urged to dismiss the appeal, and the mistake made as to date, it appears that notice was given to the appellee to appear before this court at its next regular return day. A date was superadded, which was erroneous. It was, however, mere surplusage. It was not misleading. Besides, it was the error of the clerk of the court, and not an error which should prejudice plaintiff's right of appeal, as he had nothing to do with the error.

This brings us to the question of jurisdiction *ratione materiae*, raised by the appellee. Its contention is that the petition prays only for \$500 damages, and therefore the case does not come within the jurisdiction of this court. We have analyzed the petition, as relates to this ground urged for dismissal. Plaintiff alleged that it is the owner and in possession of various telephone exchanges, and is lessee of the Teehe and Vermillion telephone line, running through the parishes of Iberia,

Vermillion, Lafayette, and St. Mary; that the plaintiff corporation has an exchange in the town of Franklin, connected by wire with its other exchanges; that there is another company, known as the "Cumberland Telegraph & Telephone Company"; that it has been reconstructing its wires in the town of Franklin, and that its agents have maliciously and wantonly, against the protest of plaintiff, pulled and dragged the wires belonging to the defendant company over plaintiff's telephone wires, injuring, breaking down, and crossing them, making it impossible for its patrons and customers to get connection with the central station; that these agents have cut guy wires which support the poles of plaintiff; that defendant, in thus crossing plaintiff's wires, has caused plaintiff great damage, resulting in causing its customers and patrons to be displeased with the telephone system; that they in consequence refused to pay their rent in many cases; that the act of defendant will cause it to lose many of its customers; that it has caused great annoyance, trouble, and expense; that these illegal acts have caused damages already to the sum of \$500; and that, if defendant is not restrained, it will result in the loss of all plaintiff's customers, and the entire destruction of its telephone system, in the parish of St. Mary. Plaintiff having alleged that the trespass and injury complained of upon its telephone lines and exchange would result in a total loss if the injunction did not issue, and having shown by evidence of one of its witnesses that this telephone exchange is worth \$3,000, we think that the court has jurisdiction. The motion to dismiss the appeal is therefore denied.

On the Merits.

The facts are that the suit was brought to recover damages and to have an injunction made perpetual to prohibit the injuries complained of. Defendant filed an answer pleading the general denial, and specially averred that one of its agents clipped a guy wire as a matter of necessity, in order to pass their own wires; that, before clipping the wire, they connected the space with wire equally as strong as the wire they had clipped. They made other allegations in their defense, going to deny the charges made by plaintiff against them. The evidence discloses that in some places, in the town of Franklin, plaintiff's wires are suspended on poles immediately above those of defendant's. Plaintiff obtained a franchise from the town, and defendant also held its right from the town. Plaintiff, in so far as the evidence discloses, is not injured by the fact that defendant's line in some places is strung above its own. It complains of the manner the restringing was done. These respective rights are not in dispute. Plaintiff complains of the manner the defendant undertook to reconstruct and restring its lines. It appears that, in rebuilding telephone lines, frequently the wires are

thrown over the wires of other lines, and afterwards they are drawn up and made tight. This usually is not objected to. On this occasion, plaintiff particularly complains of the length of time the line remained loose and touching its own, and thereby interrupted telephonic communication on its lines. There is evidence going to show that, even prior to the days that defendant was engaged with its employes in reconstructing and restringing its lines, customers made complaints similar to those which were made when the defendant's lines were being restringed. The guy wire was clipped, as owned by defendant. There may have been some delay in replacing this wire. Plaintiff, in the course of the trial, objected to evidence going to show that the defendant did not cross the wire of the plaintiff, and to evidence tending to prove that the telephone system of plaintiff did not work well, or was not satisfactory, prior to the construction of the wires by the defendant. For the reason that the defendant company admits having crossed the wires of the plaintiff, it pleads adjustment or settlement of the differences, which waives, it asserts, the general issues and the other pleas. The objection was overruled by the court. The employe Giles, who had charge of the repairs of the lines and instruments of plaintiff, swears that his or plaintiff's exchange is going on the same as before, and that it is considered permissible in telephone, telegraph, and electric light business to throw wires over the wires of other lines. This witness, also, about the time of the crossing of wires and the cutting of a guy wire, held conversation with an agent of defendant, in which the latter claimed that he (plaintiff's agent) only complained of the cutting of the guy wire, and that, upon his assurance that this would be repaired, the witness declared that he had no further cause of complaint. The district court held that there was no proof that the telephone wires of the plaintiff company have either been injured or broken, and, in consequence, he rendered a judgment rejecting plaintiff's demand.

Plaintiff's agent claims a round sum of \$500 as damages. Upon examination, we did not find that the items of damages were proven. While damages may be alleged in globo, yet, when proof of the different items making up the total is called for from those who testify regarding the round sum claimed, it would be reasonable for them to furnish statements of items, and to give needful details, in order that it may be determined with reasonable certainty just how much should be allowed as damages. Unquestionably one claiming damages should prove the different items making up the total claimed. It will not suffice to say that one has lost time and paid expenses because of the acts of which he complains. He should give needful details, when called upon as a witness to give them. When the agent of plaintiff was requested to

state as a witness how much he had spent in traveling from place to place because of the acts of defendant of which he complained, his answer was that he kept no account of it, and that, as a matter of fact, he did not know how much that item of damages would amount to. The testimony of this witness was equally as indefinite in many other respects.

We have given attention to plaintiff's contention that defendant, having pleaded justification, must be held to that plea, and, in consequence, to have waived his general denial. It is quite true, as contended by plaintiff, that the general issue is waived by special plea. We are not convinced that the plea here is special to the extent that defendant abandoned all rights under the general issue. Be that as it may, even in case of a down-right waiver of the general denial growing out of the fact that a defendant has interposed a special plea, he is not thereby precluded from showing in defense, and in endeavoring to meet the issues pressed against him, that the damages adjusted were not as great as claimed. The court's ruling permitting the defendant to make that proof was not, in our view, erroneous. Should we grant all that plaintiff claims in regard to defendant's admissions, and limit the latter's defense to a question of adjustment and settlement vel non, we are greatly inclined to the opinion that the weight of the testimony is with the defendant, and that he has satisfactorily established that defense. From the time that plaintiff's agent, who was present and saw the progress of defendant's work, expressed himself satisfied that no particular harm was done to plaintiff, we think that his claim for damages, not made evident by the testimony at best, was at an end. Parties must be held to their acknowledgments unless made in error. There was no error shown, nor does it appear that plaintiff's agent was not aware of the facts when he, in substance, declared that he was satisfied, and that no damages had been committed of which he should complain. The judge of the district court saw and heard the witnesses, and came to the conclusion that plaintiff had no right to the amount claimed or to a permanent injunction. We have not found error in his conclusion, and must, in consequence, affirm his judgment.

The court, plaintiff urged, having not only dismissed its suit, but rejected its demand, if the judgment became *res judicata*, then the right of plaintiff to sue out an injunction against the defendant to prevent it from trespassing upon, and interfering with, its telephone system, will be lost. We are constrained to differ from counsel in this particular. The effect of the decision will not be so far reaching, as the decree covers only those acts of which plaintiff complained. We do not think that the facts of the case would warrant us in changing the decree to one as in case of nonsuit. For reasons assigned, the judgment appealed from is affirmed.

(51 La. Ann. 1153)

MAUS et al. v. BRODERICK. (No. 13,078.)

(Supreme Court of Louisiana. May 15, 1899.)

NEGLIGENCE—RUNAWAY TEAM.

The fact itself that a team is found running away upon the streets of a city without a driver requires explanation as to how and why this should have been, and if the driver is not produced as a witness, or his absence accounted for, it is fair to presume that no satisfactory explanation could have been given.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Fred D. King, Judge.

Action by Mr. and Mrs. Carl P. Maus against Theodore Broderick. Judgment for plaintiffs, and defendant appeals. Affirmed.

The plaintiffs are husband and wife. They sue the defendant, asking damages to the amount of \$4,100 for personal injuries alleged to have been received by the wife from having been thrown violently onto and against the hard unyielding asphalt pavement with which St. Charles avenue is paved, from a wagon which she was then driving by. The allegations on which the prayer for judgment is based are: That a vicious and strong-bodied horse hitched to a large four-wheeled heavy-covered vehicle, both horse and wagon belonging to the defendant, had been placed by him in charge of an employé. That said employé carelessly and negligently and incautiously left the same standing on Louisiana avenue, unattended and unguarded, and having no one in charge of said horse, contrary to and against the ordinances of the city of New Orleans; the said employé having, in the pursuit of the business in which he was engaged, entered one of the premises on Louisiana avenue for the purpose of delivering goods there. That the horse during the employé's absence started off, dragging the heavy wagon out Louisiana avenue to Dryades, down Dryades to a cross street, and from said cross street to some point on St. Charles avenue unknown to petitioners, which point was reached with the horse at full speed. That Mrs. Maus was proceeding up St. Charles avenue on the swamp or wood side, seated in and driving a milk wagon, intending to cross at Second street, and go towards the river. That she crossed St. Charles avenue to proceed into Second street, when defendant's horse and wagon (coming up the said avenue behind her at full speed before she could avoid it or even know of said horse and wagon) ran into and collided with the wagon which she was then driving. That by so doing, and in consequence thereof, she was thrown out of the wagon onto and against the hard unyielding asphalt with which St. Charles avenue is paved. That on striking the pavement she became and remained unconscious for some time. That from said fall she received severe injuries, which she described, and suffered great pain, which were still continuing, and would continue until her death. That she was confined to her

bed for more than eight weeks, and large amounts had been expended by reason of her injuries for physicians' fees and medicines. That she had been by reason of her injuries rendered incapable of rendering the services and performing the duties which she had been capable of rendering and had rendered before, and said incapacity was permanent. That petitioner had suffered and would continue to suffer loss therefrom. That these were the direct and immediate consequences of the carelessness and negligence of defendant and his employé. That the employé of defendant, having control of and custody of the horse and wagon of defendant, in thus leaving the said horse and wagon standing as he did was violating the ordinances of the city prohibiting him so to do, and it was, in itself, a gross piece of negligence on the part of both the defendant and his employé. That they well knew the character of the horse, and that he should not be so trusted. That she had no reason to believe that the horse and wagon coming behind her was without any one in charge thereof, nor had she any reason to suspect or believe that they would turn to cross St. Charles avenue at the very point she turned, but, on the contrary, she had every right to believe that they would continue up the street. That petitioners were neither of them guilty of any negligence whatever, but, on the contrary, were exercising all the prudence, care, caution, and skill which they were called on to exercise, or which the law of the land or of nature required them. Defendant, after pleading the general issue, averred that if any accident occurred, which was not admitted, same was contributory negligence of Mrs. Maus. The court rendered judgment in favor of plaintiff for \$1,000, and defendant appealed. Appellee, in the supreme court, moved that the judgment be increased to \$3,235.

John B. Fisher, for appellant. E. Evariste Molse, John Wagner, and Giunio F. Socola, for appellees.

NICHOLLS, C. J. (after stating the facts). The defendant has appealed from a judgment against him in favor of the plaintiff for \$1,000 as damages for personal injuries received by his wife by a collision between a wagon in which she was driving and a runaway team belonging to the defendant. In order to reverse the judgment, we would have to be satisfied that the court below erred, and be able to so declare. As usual in such cases, there is a conflict in the testimony. All parties agree: That on the day named in the petition a horse attached to a wagon, both belonging to defendant, was seen running furiously up St. Charles avenue in the rear of a milk cart which plaintiff's wife was then driving. That, upon the latter's attention being drawn to the fact by some one on the sidewalk, she, in order to escape injury, whipped up her own horse, endeavoring to reach

Second street, which she was then approaching, at which she proposed to leave the avenue, and proceed towards the river. Before she had well turned into Second street, she was thrown violently from her cart, and quite seriously injured. One set of witnesses declare that the runaway team did not touch the milk cart at all; that the accident was due, not to a collision between the two vehicles, but as the result of the left wheel of the milk wagon having struck, as Mrs. Maus was turning into Second street, an iron post, such as is placed at the edges of the neutral ground on St. Charles avenue at its intersection with the various cross streets to prevent vehicles from trespassing upon the neutral ground. Another set declare that the milk wagon did not touch the iron post, but it was violently struck in the rear by the runaway team, and thrown to one side, and this it was which caused plaintiff's wife to be thrown out. All agree that defendant's team was without a driver when it was running up the avenue. It is not shown what caused the horse to run away, nor is it satisfactorily shown exactly where the team was when the running commenced, nor whether there was a driver in or around the team at that precise time. One of the witnesses says he saw the driver running after it, but did not pretend to know more of him than this. Broderick himself was evidently not with it, and knew nothing of the facts, for Schultz testified that he himself had gone up to his house and told him that his horse had run away, and Donovan testifies that Schwartz and Broderick tried to stop the horse on its return to the latter's establishment. Broderick's statement, therefore, that the "driver" was "thrown out" obviously was as to a fact not within his own knowledge.

The testimony in the case is by no means as full as would be desirable; but, under the circumstances of this particular case, we think the defendant has failed to show that which the situation of things called upon him to show. There was at one time a driver to the team. He was not produced, nor was his absence accounted for. He, of all others, was bound to know when, where, and under what circumstances the horse ran away. If he was on his seat, or anywhere about the team at the time, it was easy for the defendant to have shown the fact by him. The fact itself that a team is found running away upon the streets of a city, without a driver, requires explanation as to how this should have been, and, if it is not given, it is not an unfair inference that no satisfactory explanation could be made. We do not attach any special value to the statement made by one of the witnesses that the driver had left his team to deliver meat at the house of one of defendant's customers, for we are inclined to think that this witness was testifying more to his belief than to his knowledge. After going through the record, we are not prepared to say that the district judge erred in his conclusions as to

the facts of the case, and, this being the case, we have to adopt them. We do not see any question of law involved in the suit which calls for special reference. For the reasons assigned, the judgment is affirmed.

(51 La. Ann. 1172)

CITY OF NEW ORLEANS v. LOZES.

(No. 13,079.)¹

(Supreme Court of Louisiana. April 3, 1899.)

MUNICIPAL ORDINANCE—MEAT INSPECTION—CONSTITUTIONAL LAW.

1. Ordinance No. 14,807, C. S., which provides a meat-inspection service, and a precedent observance thereof, as a condition of the right to either expose same for sale, or to sell the same, in the city of New Orleans, is legal, valid, and constitutional, and same evidences a proper and legal exercise of police power, for the protection and preservation of the public health and sanitation of the municipality.

2. In this regard, the city has ample warrant of law to pass ordinances requiring ante mortem inspection of animals intended to be slaughtered for use as human food, as well as those requiring post mortem inspection of the meat of such animals before same is placed upon the market for sale.

(Syllabus by the Court.)

Appeal from recorder's court of New Orleans; Edward Finnegan, Judge.

Lucien F. Lozes was convicted of violating a city ordinance, and appeals. Affirmed.

Barnard B. Howard, Henry O. Hollander, and Augustus M. Aucoin, for appellant. James J. McLoughlin, Asst. City Atty., and Samuel L. Gilmore, City Atty., for appellee.

WATKINS, J. An affidavit was made against the defendant to the effect that on the 4th day of December, 1898, at about the hour of 4 o'clock a. m., in the Ninth Street Market, in said city, he did violate Ordinance 14,807, §§ 1, 2, by selling, or offering for sale, meat, without same having been first inspected, marked, or tagged, whereupon he was charged with having been guilty of an offense for which he should be arrested and dealt with according to law. To this charge the defendant tendered the following demurrer, viz.: (1) That the pretended Ordinance No. 14,807, C. S., is illegal, ultra vires, null and void, and of no effect, for the reason that the city council of the city of New Orleans is and was without authority to pass same. (2) That said pretended ordinance is unconstitutional, because it seeks to impose a tax which has already been imposed by the state of Louisiana, and the same is illegal, null, and void, being in conflict with the provisions of Act No. 118 of 1860, Act No. 144 of 1877, Ex. Sess., and Act No. 87 of 1888. (3) That said ordinance is illegal, because by the enactment of said laws, with regard to the inspection of meats intended for consumption as human food within the parish of Orleans, the entire subject-matter "has been entirely and completely placed under the power and juris-

diction of the state board of health of the state of Louisiana." (4) That said ordinance is illegal, because it seeks to set aside and render of no effect the provisions of Act No. 87 of 1888, under and in pursuance of which his meat had been already inspected, and a proper certificate issued to him, and for which he had already paid the necessary and legal fees therefor; and hence this is an attempt on the part of the city of New Orleans, through its board of health, "to exact a dual fee for one and the same service," in violation of the constitution and law. This demurrer was overruled, and the defendant was tried, upon the introduction of evidence was convicted, and sentenced to pay a fine of \$15, and, in default of payment of same, to suffer imprisonment in the parish prison for a period of 15 days, and from that sentence he prosecutes this appeal.

The case comes to us on the ground that the recorder erred in overruling the defendant's demurrer. As explanatory of the situation, we make the following extract from the brief of defendant's counsel: "The defendant was a butcher, doing business in the city of New Orleans, and having his cattle slaughtered in the parish of St. Bernard, under the supervision and regulations of the state board of health, paying for the inspection, and receiving a certificate therefor, to the effect that the cattle inspected were healthy, and fit for human food, and had been slaughtered at the Crescent City Slaughter House. The cattle are slaughtered, and the city seeks to collect from him, under Ordinance 14,807, C. S., another fee for the same service, through the inspector of the municipal board of health of the city of New Orleans. Said board inspected the meat, but refused to tag the same, because the defendant declined to pay the second fee for said inspection, and he was arrested under the charge of selling meat which had not been inspected, and thereupon he entered the demurrer on the grounds stated."

The first contention of defendant's counsel is that said pretended Ordinance 14,807, C. S., is illegal, null, and void, because the city was without power to pass the same, it being in conflict with Act No. 192 of 1898, and Act No. 87 of 1888, and Act No. 118 of 1860; said legislative enactments having vested the exclusive power and authority in the state boards of health specially provided for therein, and repealed all laws, or parts of laws, in conflict or inconsistent therewith. The second contention is that said ordinance is unconstitutional because it seeks to impose a tax that has already been imposed by the state of Louisiana for the same service, and for that reason it is in direct conflict with the provisions of the legislative acts referred to. Or, in other words, that those respective acts especially impose an inspection fee for meat slaughtered at the Crescent City Slaughter House, to be brought into the city of New Orleans for human consumption, and that

¹ Rehearing denied May 20, 1899.

hence the city of New Orleans is without power to impose another tax for exactly the same service. Defendant's further contention is that, by laws enacted for the regulation and inspection of meats intended for sale in the parish of Orleans for human consumption, the entire matter is exclusively in the hands of the state authorities, and that the city of New Orleans has nothing to do therewith.

Counsel for the defendant makes the following statement of the facts on which these contentions are founded: That the defendant in this case had his meats inspected under Act No. 87 of 1888 and Act No. 192 of 1898 by the officers of the state board of health; that the city board of health is only auxiliary to, and a branch of, the state board, and is specifically prohibited from acting independently of the state board, but, on the contrary, is compelled to act under the supervision and advice of the state board of health, and to do no act in conflict with the powers and duty of the state board. This ordinance, therefore, provides that the second fee herein sought to be collected shall be paid practically to the same health authorities, which is in violation of the said constitution. Counsel further contend that the only inspection that was offered to the accused was within the limits of the parish of St. Bernard, and therefore outside of the parish of Orleans, and consequently not within the limits prescribed by the ordinance,—that is, the city of New Orleans; that no inspection is offered or attempted in the city of New Orleans under said ordinance. Restating and combining the foregoing objections, counsel for the defendant submits that the ordinance in question is illegal, unreasonable, unnecessary, and serves no good purpose whatsoever; but, on the contrary, it places an unnecessary burden and tax upon the people and upon the accused, in violation of the tenor and spirit of said laws.

The contention of the city attorney is that Ordinance 14,807, C. S., imposes a penalty upon any person offering untagged and uninspected meat for sale, and that the defendant, as a butcher, is charged with having offered for sale, in a public market of the city of New Orleans, meat intended for human food, which had not been inspected by the inspectors of the city board of health, the meat having no tag or stamp showing that such inspection had been made; that consequently the question presented is of the power of the city to pass said ordinance, because the power of inspecting meats was exclusively vested in the state board. The city attorney further says: "There is no question of the power of the city to pass any ordinance to protect the health of its citizens, nor can it be disputed that an ordinance providing for the inspection of meat which is to be consumed in New Orleans is a health ordinance. Now, unless the state has divested the city of the right to protect its inhabitants from bad meat, then the power to protect resides in the council.

But we need not go that far. The very act which the defendant cites (Act No. 192 of 1898) not only divests the state board of health of any supervision whatever over meat which is to be consumed by the people of New Orleans, but expressly confers it upon the city board of health exclusively. The constitution of 1898 (article 296) reads: 'The general assembly shall create for the state, and for each parish and municipality therein, boards of health, and shall define their duties and prescribe the powers thereof.' Act No. 192 of 1898 is entitled 'An act to carry into effect article 296 of the constitution of 1898,' and section 9 of the act says: 'The municipal board of health of the city of New Orleans shall have the exclusive right to the collection of all fees and charges, now being made by the present state board of health within the city of New Orleans, other than those accruing from coal oil inspection and the registration of physicians, midwives and dentists. The municipal board of health of the city of New Orleans shall have the exclusive supervision or authority over meat inspection service and sanitary regulations at the slaughtering pens, or abattoir, in the parish of St. Bernard, with regard to all meat intended for human consumption within the city of New Orleans.' The same section (section 9) repeals all laws, or parts of laws, inconsistent with, or in conflict with, this act of 1898; from which it is plain that the entire and exclusive control of the inspection of meats in the parish of St. Bernard, at the slaughtering pens, is conferred upon the city board of health, in so far as meat intended for human consumption in New Orleans is concerned. Such being the case, any other inspection is irregular, ultra vires, null, and void. It is admitted in this case that the meat offered for sale by the defendant was intended for consumption in the city of New Orleans, and came from animals slaughtered at the slaughtering pens in the parish of St. Bernard. Such being the facts, it is incompetent for any other inspector than the inspector of the city board of health to issue any certificate of inspection of meats slaughtered in St. Bernard for New Orleans consumption; and the attempt of the defendant to introduce in evidence a certificate of the inspection of certain live cattle issued by a person not the inspector of that board was properly objected to by counsel for the city, and the ruling of the court admitting such evidence was incorrect.

* * * That said certificate related solely to live cattle, whereas the city board's inspection is of dressed meat only." His contention is, further, that defendant's case rests upon the provisions of the act of legislature above referred to, which refer exclusively to cattle on the hoof, and not at all to dead meat; and, if they did refer to dead meat, they would be superseded and repealed by the provisions of Act No. 192 of 1898, above referred to.

Summing up all these various contentions,

and the question comes to this, whether the city, in the exercise of its police power, or under the terms of the constitution and law of 1898, has the power to regulate the inspection of meat at the slaughter house, or in the city of New Orleans, which is intended for use as human food, or whether the same are inoperative by reason of the fact that said former laws confer upon the state board of health the power of inspecting live cattle intended to be slaughtered for use as human food. The general rule governing the construction of statutes, as well as precepts of the constitution, is that apparently conflicting provisions of either or both shall rather receive that construction which will render them harmonious than one which will render any portion inoperative and void. The several acts referred to and relied upon by counsel for the defendant relate, exclusively, to the slaughtering of live cattle,—that is, those on foot or on the hoof,—which slaughtering is and was, in contemplation thereof, to be done outside of, and beyond the territorial limits of, the city of New Orleans. Ordinance No. 14,807, C. S., provides, among other things, that "It shall not be lawful for any person, firm or corporation, restaurant or hotel, to sell or offer for sale, or deliver the meat of any animal, not considered game or fowl, intended for human food, within the city of New Orleans, without same has been first inspected and passed upon and approved by the officers appointed and empowered for such duty by the municipal board of health of the city of New Orleans," etc. It further provides "that such meat, when so inspected, passed upon and approved, shall be properly marked and tagged by said inspectors, and same shall not be allowed upon the stalls of any market, whether public or private, or exposed in any other way, or at any other place, or delivered to any hotel, restaurant, person or persons, unless so tagged and marked, after having been inspected by the inspectors of said board of health." It further provides "that for the purpose of meeting the costs of said inspection, the owner of the meat inspected, or the person in possession of the meat inspected, shall pay the following inspection fees to the board of health,"—enumerating them in detail. This ordinance, in terms, includes the case presented by the defendant, and brings him within the penalty therein provided for a violation thereof. It appears quite evident that the ordinance deals exclusively with the inspection of meat or flesh of animals already slaughtered, and which is intended for use as human food within the city of New Orleans; and that it is an essentially different subject-matter from that with which the general assembly dealt in the statutes quoted,—the inspection of live cattle, although intended for human food. For, notwithstanding the live cattle, upon proper and careful inspection, are found healthy and suitable for the purpose of being slaughtered for human food, non constat that,

when slaughtered and prepared for market, the meat is suitable for human food, when subsequently put upon the market for sale. Were no restraint put upon a subsequent sale of fresh meats, by means of contemporaneous inspection by the proper officers of the city board of health, great abuse of the privilege might result, and great and incalculable injury be inflicted upon the community thereby, notwithstanding a rigid and careful inspection had been made prior to the slaughter of the animals. But, if this were not so, we are of opinion that the ordinance is fully authorized by the law of 1898, and that the statute is constitutional. Act No. 192 of 1898 was passed for the express purpose of putting into operation article 296 of the constitution of 1898, which requires the general assembly to "create for the state, and for each parish and municipality therein, boards of health, and to define their duties and prescribe the powers thereof." Its further object is to provide for the protection and preservation of the public health, and for "a general sanitation of the state, and a local sanitation of parishes and municipalities," etc. That act provides "that the council or legislative body of each and every incorporated municipal government in the state shall establish and organize a town or city board of health," indicating the particular method of the establishment and organization thereof. It specially authorizes and requires said municipal boards "to appoint a sanitary officer, whose duty it shall be to enforce the requirements of said board in all matters of sanitation," etc. Id. § 5. It further specially provides "that said parish and municipal boards shall have power and authority to pass health and sanitary ordinances for defining and abating nuisances, dangerous to public health; * * * to regulate the carrying on of trade and business injurious to public health; * * * and generally [to pass] all health and sanitary ordinances necessary and incident to the proper local sanitation of the parish, city or town in which they exercise their powers." It further provides, *ex industria*, that it is the object and purpose of this act "to intrust full power and authority to such local boards to establish, control and administer all matters of strictly and purely local sanitation, not affecting other portions of the state." Id. § 7. A comparison of the foregoing provisions of the statute with those of Ordinance No. 14,807, C. S., will show them to be perfectly harmonious and consistent. It is of no material consequence that a municipal board of health now existing, or which may be hereafter created, would possess a similar power to pass ordinances upon the same or like subjects; as the city is primarily charged with the duty of protecting and preserving the public health, and of maintaining the municipality in a proper sanitary condition. In furtherance of that idea, we are referred to the provisions of several ordinances prior in date to that of No. 14,807, C. S., which was adopted on No-

venember 10, 1898. The first is Ordinance No. 13,487, C. S., bearing date July 6, 1897, which provides that "it shall be unlawful for any person, firm, or corporation to sell, or offer for sale, or deliver the meat of any animal not considered game, intended for human food, within the city of New Orleans, without same having been first inspected and passed upon and approved by the officers appointed and empowered for such duty by the board of health." It provides further "that such meat when so inspected, passed upon, and approved, shall be marked or tagged by said inspectors, and same shall not be allowed upon stalls of any market, whether public or private, unless so tagged or marked after having been inspected by said inspectors of the board of health." It further provides for the punishment of persons who violate its provisions. That ordinance was afterwards supplemented by the passage of Ordinance No. 13,689, bearing date October 5, 1897, which dealt with the counterfeiting of any tag or stamp provided for in the original ordinance, and affixing a penalty for such an act. The particular significance of the foregoing ordinances is that they precede in date both the constitution and statute of 1898, and appear never to have been assailed or questioned, as either illegal or unconstitutional, on the grounds now stated for the first time, notwithstanding they are precisely similar in terms to those of Ordinance No. 14,807. But there is an additional ordinance, No. 14,548, bearing date August 31, 1898, and which appears to have been adopted intermediately between the passage of the act of 1898 and Ordinance No. 14,807, which specially deals with "the slaughtering of cattle and other animals at the abattoirs, and providing a system of inspection of meats." That ordinance provides, among other things, "that all meats brought into the parish of Orleans requiring inspection under Ordinance 13,487, C. S., must bear evidence of having undergone previous inspections, i. e. must bear the stamp or certificate of some specially accredited state, municipal, or United States official, attesting the fact that the animal has passed both an ante and post mortem inspection." Section 10, Ordinance No. 14,548. This ordinance puts the proposition of the city council in a very plain light, by requiring that all meats brought into the city, which are intended for use as human food, shall bear evidence of having undergone previous inspection; that is to say, that same have passed "both ante and post mortem inspection." This ordinance conforms the inspection of meats to the idea hereinbefore outlined, and it seems to us to be a most reasonable regulation, and one tending to the protection of the public health. It shows clearly that, in the appreciation of the city council, a single inspection of cattle on the hoof, before being slaughtered, was insufficient and inadequate, and in that opinion we concur. We find nothing in either the constitution or statute of 1898 contrary there-

to. In our opinion, Ordinance No. 14,807, C. S., is legal, valid, and constitutional. Judgment affirmed.

MONROE, J., takes no part, as he was not a member of the court when the case was submitted.

(N. La. Ann. 1190.)

MIRANDONA v. BURG. (No. 13,032.)¹

(Supreme Court of Louisiana. April 17, 1899.)

CONTRACT—ACTION FOR BREACH—DAMAGES—INTEREST—PROSPECTIVE PROFITS.

1. Damages actually shown, growing out of the breach of contract, were allowed.

2. Claim for interest on money borrowed by plaintiff to carry out the contract was not allowed, for the reason that it was not made clear that plaintiff borrowed the amount for the purpose alleged. If it was borrowed for that purpose, it was never tendered to defendant; on the contrary, a large part of the money referred to was used by plaintiff in his own business.

3. Future profits are generally too remote to furnish a basis for damages. Amount claimed for probable and speculative profits was not allowed.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Fred D. King, Judge.

Action by J. P. Mirandona against Nicholas Burg. Judgment for plaintiff. Defendant appeals. Modified.

William S. Benedict, for appellant. William O. Hart and Frank B. Thomas, for appellee.

BREAUX, J. Plaintiff brought this suit against the defendant for damages that he alleged grew out of the failure of his vendor to complete his contract of sale in accordance with agreement. He averred that on the 13th day of January, 1896, he entered into a written agreement with the defendant, in which the latter bound himself to sell to him the stock in a grocery store in this city at market value, to be appraised by the appraisers, one to be selected by him, and the other by the defendant; and that he deposited \$100 current money. The agreement between these parties further shows that the defendant was to lease the place in which he carried on his grocery business at \$60 per month for five years, with privilege of renewal at the end of that time. He alleges that on February 4, 1896, defendant refused to carry out the terms and conditions of the agreement,—that is, refused to sell his stock or lease his premises; that he placed him in default, and brought suit to compel him to a specific performance, which resulted in a judgment refusing to decree a specific performance, but giving to him the right to claim the damages resulting from defendant's refusal to complete the sale. He alleges that his profits would have been large if he had gotten possession of the property as he expected when he made the purchase. He

¹ Rehearing denied May 29, 1899.

claims for the profits \$10,000. He sets forth that he was informed by the defendant that the stock of groceries would amount to \$6,000, and, in order to be prepared to pay the price, he borrowed that amount at 8 per cent. interest for a term of years, upon which he will have to pay \$960 interest, and that the sum remained in deposit, unused by him. He also alleges that the sale put him at the expense of employing a clerk at a cost of \$150, and that the fee of an attorney employed by him to advise and act for him was \$250; making a total of \$11,360, for which he asks judgment. Defendant filed an exception, charging that plaintiff's petition was vague, and that it was necessary, in order to enable defendant to answer, that plaintiff should aver from whom and when he borrowed the \$6,000, to whom and when he paid the \$960 interest, the name of the clerk and his legal adviser. The exception was overruled. Defendant, reserving his exception, then filed an answer pleading the general denial. Plaintiff swears that the agreement was entered into as he alleged, and that he exerted his best endeavors to carry it out; that he made arrangements to have the funds to pay the price; that he executed a mortgage on the 12th or 18th day of February, 1896, to get the loan, for which he had no use save to complete his purchase; that he also employed a clerk at \$5 per week and board, an employment he deemed necessary during five months in matter of his purchase, and that the fee of counsel employed by him to see to his interest in the matter of the purchase was \$250, as alleged; that defendant, at the time of their agreement, gave him an idea of the daily sales in his grocery, and that it showed a handsome return on the amount invested. Plaintiff also swore that 10 per cent. was a fair percentage of profit in a retail grocery business. On cross-examination it was said by a witness that defendant had sent him word on the 3d or 4th of February, 1896, that the agreement was at an end, and that he would not sell. Other witnesses for plaintiff testified that the profits of the retail grocery business is from 5 to 6 per cent. The court a quo during the trial ruled that defendant could show in mitigation of damages that a mere offer to compromise was made prior to the filing of plaintiff's petition in the case brought for specific performance, which did not succeed. Evidence was admitted to prove the offer. The district court rendered judgment for the plaintiff against the defendant, in the sum of \$537.50, with legal interest from the date of the judgment. Plaintiff and defendant each appeals.

1. The only question, in a strict sense, now before the court, is a question of damages resulting from the nonperformance of the contract, as reserved by the supreme court in the case of *Mirandona v. Burg*, 49 La. Ann. 656, 21 South. 723. In the cited case the court concluded that no redress could be had by plaintiff save for damages, and that, for

reasons stated, it was not proper to compel the defendant to perform the contract. A second examination into the facts as made to appear in the case now before us for decision confirms us in the correctness of the views expressed. There were facts connected with the negotiations between the parties that would have rendered difficult the enforcement of a judgment requiring specific performance.

Passing to the question of the amount of damages, we find that the sum allowed was more than should have been allowed for damages actually shown. It covers the hire of the clerk which plaintiff employed, and the fee of plaintiff's attorney. There were mitigating circumstances in the case, and for that reason we think that the damages awarded should be \$45 for clerk hire and \$150 fee of attorney.

2. The claim made by plaintiff for interest, we think, was properly rejected by the court. While there was, perhaps, no absolute necessity that plaintiff should have informed the defendant that he had borrowed the amount to pay the price of his purchase from defendant, yet it is not entirely without significance that no mention was made by plaintiff of money that he had borrowed, when plaintiff was informed that the contract looking to defendant's sale to plaintiff would not be consummated by delivery. Moreover, the loan of the amount of \$6,000 was made to plaintiff by one of the banks a few days after defendant had informed plaintiff of his unwillingness to continue the negotiations. No one would readily infer that money would be borrowed to pay the price of a sale after the seller's recall of his promise, unless, to make certain his position regarding the sale, he desired it to make a tender and deposit of the amount. Here nothing of the kind was done. Not only no tender and no deposit were made, but it appears that the amount borrowed, or a goodly portion of it, at least, was used by plaintiff in the course of his own business. Defendant could scarcely be held for interest on money used by plaintiff, or not actually deposited, or in any manner tendered to complete the sale.

3. This brings us to a consideration of the claim for profits he would have made if the defendant had carried out his agreement, and sold his business to plaintiff. This court has not long since, in a well-considered case, in substance held that the profits upon a contract depending upon uncertain future results could not be, with any degree of certainty, fixed, inasmuch as the calculation would necessarily be conjectural. There must be uncertainty as to whether plaintiff would have succeeded at all in realizing profits. The defendant and his son swore that no profit was realized from the business for a year after the contemplated sale by defendant to the plaintiff was recalled by the former. It would be difficult to believe that such was, in fact, the case. At the same time it would not be possible to find an amount of profits realized without any evi-

dence showing how much it was. In *Schleider v. Dielman*, 44 La. Ann. 462, 10 South. 934, the syllabus, indicating the principle passed upon, reads: "As a general rule, the future profits of a contract cannot be included in the injury suffered by its breach, mainly for the reason that they depend upon so many and various contingencies that it is impossible for a court or a jury to arrive at any definite determination of the actual loss by any trustworthy method. They are open to the objection of remoteness, as well as of uncertainty." Plaintiff's claim for damages, based on future profits of the business he would have realized, is as uncertain as it was in the case cited. Anticipated profits cannot always be recovered. *U. S. v. Behan*, 110 U. S. 344, 4 Sup. Ct. 81. At best, defendant's profits, we infer, were small. Plaintiff was not acquainted with the former's customers, and with the business as conducted in the locality in which defendant's grocery was. There was great uncertainty and contingency as to whether gain would have been derived at all. The questions presented were orally argued. No briefs were filed. For reasons assigned, the judgment appealed from is amended by reducing the amount of damages to \$195, making, with the "earnest money," the sum of \$295, with legal interest thereon from October 19, 1898, and, as amended, the judgment is affirmed, at cost of plaintiff in the supreme court; i. e. plaintiff pays cost of appeal.

MONROE, J., takes no part.

(51 La. Ann. 1194)

STATE v. HARRIS. (No. 13,161.)

(Supreme Court of Louisiana. May 15, 1899.)

JURORS — EXAMINATION — DISCRETION OF TRIAL COURT—APPEAL—STATEMENT OF TRIAL JUDGE.

1. The authority of the trial judge to control the examination of jurors on their voir dire, as relates to the mode of examination, has always, when apparently reasonable, been recognized.

2. The court, as relates to the character of the questions propounded to a juror, is vested with a large discretion, with which an appellate court will not interfere, save in case of manifest disregard of the rights of the accused.

3. Under repeated rulings, the statement of the trial judge, incorporated in the bill of exception, is accepted as correct, in the absence of evidence showing that it is not correct.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Grant; M. F. Machen, Judge.

Annie Harris was charged with murder. She was found guilty of manslaughter, and appeals. Affirmed.

William O. Roberts, for appellant. Milton J. Cunningham, Atty. Gen., and A. B. Hundley, Dist. Atty., for the State.

BREAUX, J. The accused, Annie Harris, was charged, with her husband, each as principal, on the 24th day of September, 1898, with the murder, on the 18th day of the

month of May, 1898, of Jessie Brown. On her motion, the court granted her a severance in the trial. She was tried, found guilty of manslaughter, and sentenced to serve at hard labor in the penitentiary for 10 years. From the verdict of the jury and the sentence of the court she appealed.

The defendant excepted to the court's refusal to permit her counsel, in cross-examination of six of the jurors on their voir dire, to propound the following question: "If the evidence on the trial should establish that the accused on trial and Andy Harris, who was indicted jointly with her, who has been tried, are married, and that they were both present and participated in the act which caused the killing, and if the evidence should establish that whatever the wife did was done under the direction and coercion of her husband, and if the court should instruct you, if you should so find, you should acquit her, would you do so?" The jurors to whom this question was propounded were peremptorily challenged by the defendant. They had answered that they knew nothing of the case. The narrative of the bill of exception, made part of the bill by the judge, sets out that the question only had a tendency to confuse or mislead, and to uselessly take up the time of the court. It is well settled, we think, that the juror's incompetency may be proved upon examination on his voir dire, and every question needful to show his disqualification may be propounded; but it is also equally as well settled that the trial judge may, in his discretion, decline to permit the examination to be extended indefinitely and uselessly. The examination of a juror, both as relates to time and mode, is to be exercised under the supervision of the district judge. Messrs. Thompson and Merriam, in their book on Juries, say: "The court must be vested with considerable discretion in determining the character of the questions to be proposed and the limits of the examination. The questions must be pertinent, and from their nature calculated to show that the person offered is not sufficiently free from bias to sit as an impartial juror." Section 243. The judge, in the exercise of proper discretion, may see that the examination is properly limited, and that the questions are not such as to mislead or confuse the juror.

The trial judge further stated, in an incorporated statement in the same bill of exception, that the state, in the examination of the jurors, asked the following: "If you should be selected as a juror, you will be instructed by the court, and it is your duty to take the law from the court and the testimony from the witnesses, and from that you will make up your verdict; will you do that?" That the answer was in the affirmative. We understand that the accused, through counsel, propounded similar questions to the jurors as that which had been propounded by the state, as just mentioned. To meet the objection of defendant, the trial judge states that, similar "questions having

been propounded by counsel for defendant to the jurors, the court declined to permit them to answer them." The court thought the matter had already been sufficiently passed upon. We deem it sufficient to say that here again we have not found in the ruling any denial of a right. The question had been propounded and answered, and it was not one which should give rise to an extended examination of a juror; for, under their oath, they were, in the nature of things, if in other respects competent jurors, bound to receive the law and to construe the facts as just stated.

The second bill of exception relates to an asserted ruling of the district court permitting a witness to testify, over defendant's objection, that the defendant had had some trouble some time prior to the homicide with other persons than the deceased. The defendant contended that this evidence was not part of the *res gestæ*; but the judge of the district court informs us, by the statement incorporated in the bill of exception, that the evidence was taken out of the hearing of the jury. It appears that the court did rule that the evidence relating to the previous difficulty, as well as the threats made to the witness in question, was admissible for the purpose of showing malice, but, after the jury had returned, in accordance with the court's order the witness was not examined; the state did not press the question. It follows that the ruling was of no effect. It was the decision of a question in the abstract, as the prosecution did not avail itself of it to introduce testimony. The court directly states "that the jury returned from their room of deliberation." The witness was not asked anything about the previous difficulty or threats, nor did the evidence go before the jury. This being the case, the defendant could not, in any manner, have been prejudiced.

As relates to the statement of the judge, it has been repeatedly decided that it must control, even if it conflicts with the statement of counsel for the accused. We therefore take it entirely as correct. As the testimony was never heard by the jury, it renders it unnecessary to pass upon the question of law that would have arisen if it had gone to the jury. *State v. Broussard*, 39 La. Ann. 671, 2 South. 422; *State v. Young*, 40 La. Ann. 483, 4 South. 481. The verdict, sentence, and judgment are therefore affirmed.

(51 La. Ann. 937)

KOCKE et al. v. THEIR CREDITORS. (No. 13,060.)

(Supreme Court of Louisiana. May 1, 1899.)

INSOLVENCY—ELECTION OF SYNDIC—DISCHARGE OF INSOLVENT—OBJECTIONS.

The election of a syndic at a meeting of the creditors of an insolvent, and the discharge of the insolvent, will be sustained, when the same are sought to be set aside on objections urged for the first time in an opposition to the *procès verbal* of the notary filed in the district court, when the grounds urged are that the notary received votes without proper evidence, and it is

shown on the trial of the opposition that the votes so received were legal, and cast in conformity to the wishes of the owners of the claims. *Pandelly v. Creditors*, 9 La. 387; *Gwartney v. Creditors*, 13 La. Ann. 189; *Conant v. Millandon*, 5 La. Ann. 542; 26 N. E. 637.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Thomas C. W. Ellis, Judge.

In the matter of the insolvency of Kocke, Hernandez & Depass. Dodd and Frele filed opposition. Judgment for insolvents, and opponents appeal. Affirmed.

Kocke, Hernandez & Depass made a voluntary surrender of their property. It was accepted by the court, and a meeting of creditors called before Zengel, notary public. The meeting was held before the notary, who returned a *procès verbal* declaring that a majority in number and amount of creditors had voted in favor of accepting the cession; of having Henry Kocke, one of the insolvents, appointed as syndic, and of discharging the insolvents. After the *procès verbal* had been filed in the district court, Dodd and Frele, creditors, filed an opposition to the homologation of the proceedings. On the trial thereof it was dismissed, and the opponents appealed. The opposition on the trial was narrowed down to a contest over the votes cast with the majority in the meeting of creditors in the names of Charles Mansion and P. E. G. Plasworth, whose names appeared on the schedule as creditors of the insolvents. The opposition to the vote in Mansion's name was upon the ground that he was dead when the power of attorney and the affidavit in his name which appeared in the record were made; that no legal representative had been appointed for his succession; that proof of said claim should therefore be rejected by the court. The opposition to the vote in the name of Plasworth was that he was not the real owner of the claim at the time of the meeting of creditors, as it had been compromised by him, and he had been paid. The vote both upon the Mansion and the Plasworth claims was cast by Henry Kocke, he declaring himself to be agent and attorney in fact of each of said parties, and that they were creditors for the amounts for which they had been respectively recognized on the list of creditors. In support of his right to so appear and vote, Kocke, presented—First, a power of attorney to him, signed "C. Mansion, per H. Mansion," to which was annexed an affidavit of H. Mansion to the fact of the indebtedness of the insolvents to Charles Mansion; and, second, a power of attorney to him, signed "Peter E. Plasworth, F. C. K.," to which was an affidavit, signed "Peter E. G. Plasworth. F. O. K.," to the fact of the indebtedness of the insolvents to Plasworth. On the trial of the opposition, Henry Mansion and Plasworth were placed upon the stand by opponent. Henry Mansion testified that he was the person who had signed the power of attorney to Kocke, and made the

affidavit annexed thereto; that Charles Mansion was his brother; that he was one of his heirs; that his succession had never been opened, but the heirs had simply taken possession as such; that the insolvents were indebted to his brother, Charles Mansion, as stated in the affidavit; that he (the witness) had charge of all the business before and at the time of his death, and still continued the management, with the consent of all the heirs; that he knew personally of the existence of and of the amount of the debt sworn to; that his co-heirs had not authorized him to sign for them the power of attorney before he had done so, but that, after having signed the same, he informed them of what he had done, and they said it was all right. Plasworth testified to the fact of the existence of and the amount of the indebtedness of the insolvents to himself as stated in the list of the creditors, but he declared that he had sold his claim to F. C. Kocke; that the written power of attorney to Henry Kocke to vote upon that claim in his name was presented to him for signature, but he said he had no interest in it, that he had sold the same; that his vendee could sign it, if he wanted to; that it was not his signature, but "P. E. G. Plasworth, per F. C. K." It was admitted on the trial that "at the time it came to the question of voting on the \$1,500 for which Mr. Plasworth was put on the bilan that F. C. Kocke notified the notary that he had purchased that claim, and that he owned it, and that under instructions from the notary a power of attorney was executed as offered in evidence simply for the reason that Mr. Plasworth's name was on the bilan, and that it was done in that way to make connection with the bilan." The district judge, in his reasons for judgment, said that his judgment was that both claims were legally voted, and that, as there was no fraud or concealment, the votes must stand; that he did not think that on the mere technicalities urged the proceedings should be avoided; that the Plasworth claim was voted by its owner; that the fact that he chose to appear as the agent of his vendor, and in his name, the said vendor being consulted and agreeing thereto, did not invalidate the act or the vote; that in the Mansion case, all the heirs, being of full age, after full information acquiesced in the act and vote of the co-heir, who was the manager of the affairs of the deceased, and their own business manager; that he understood the jurisprudence to be that mere irregularities, in the absence of fraud, and where all the notices had been given, and all the delays had been observed, and a proper order of court based, all would not suffice to avoid the proceedings and set aside the election; that honest claims due by the insolvents were honestly cast and counted, and he did not think, for mere irregularity, where no one was injured, or illegally deprived of any right, he should subject the estate and its creditors to the expense and delay of another meeting; that what had been

beneficially done with substantial compliance with the directions of the law should stand.

Frank D. Chrétien, for appellants. Frank Zengel, for appellees.

NICHOLLS, C. J. (after stating the facts).

1. Through the evidence adduced on the trial of appellants' opposition it was established that the debts placed by the insolvents upon their bilan as due to Charles Mansion and to Plasworth were really owed by them, though the former claim belonged at the time to the heirs of Mansion, he being then dead. It was further established that the vote cast upon those claims was cast in conformity to the wishes of those parties owning the same at the time of the meeting. Finding, as we do, that as a matter of fact the cession of the insolvents was accepted, their discharge consented to, and the selection of Henry Kocke made by the majority of the actual creditors in number and amount, we would not be justified in setting aside the results reached at the meeting of creditors simply because the evidence submitted to the notary as to the existence of the Mansion and Plasworth claims, and the authority of Henry Kocke to vote upon the same, was such as might have justified him in refusing to receive such votes. The controlling factor in reaching a decision in this case is, under the conditions and circumstances in which the issues were raised and presented, the verity of the declarations made by the notary, not the sufficiency or insufficiency of the evidence upon which he acted. It would be a vain and useless act to send the parties back to reach the same result which has already been reached merely to have the evidence (which the record shows could have been produced before) placed properly before the notary. In *Conant v. Millaudon*, 5 La. Ann. 542, the plaintiff sought to have an election of directors of a bank set aside because the commissioners of election received votes without proper evidence; but this court refused to grant this prayer, it having been subsequently shown that the votes so received were legal votes. It said: "It is claimed that the vote should have been rejected by the commissioners because they had not before them legal evidence [of the right of the voter to vote], and that the legality of the vote must repose solely upon the evidence offered before the judges of election. We are not prepared to say that for the purposes of an election the evidence was insufficient; but, however that may be, it is now fully established that the vote was one which the voter was legally entitled to give. It would be against reason to set aside an election affected by legal votes because full proof of their being legal was not laid before the commissioners, and we are aware of no precedent for such a course. The plaintiffs cite the Case of *Mohawk & H. R. R. Co.*, 19 Wend. 135, but there the question was whether the election should be set aside because, as al-

leged, a vote had been improperly rejected. In determining whether the rejection was legal, the court intimates that it could not look beyond the evidence presented to the commissioners. The want of analogy between the two cases is obvious. If a party neglects to present proper evidence to the commissioners, and his vote is rejected, it is his own laches, and he has no equity in asking a court to relieve him from its consequences. But when the commissioners, on insufficient evidence, have received a legal vote, why overthrow an election when the same vote would, on proper evidence, be received again?" Asking ourselves the same question, we must answer it in the same manner as did our predecessors. The case does not come before us on objections made by appellants before the notary to the acceptance of the votes on the evidence adduced, and the overruling of the same by the officer, but upon objections urged for the first time through an opposition filed after the procès verbal of the proceedings of the meeting of creditors had been returned to the court by the notary. The time at which objections are urged frequently controls not only the decision of issues, but determines the character of the issues themselves. See, on this subject, *Pandelly v. Creditors*, 9 La. 395; *Gwartney v. Creditors*, 13 La. Ann. 189. We think the principles announced in *Conant v. Millaudon* find proper application here. For the reasons assigned, it is hereby ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, affirmed.

(51 La. Ann. 1200)

BAGNETTO v. BAGNETTO. (No. 12,968.)

(Supreme Court of Louisiana. May 15, 1899.)

APPEAL — REVIEW — FINDINGS — DISSOLUTION OF PARTNERSHIP — POWERS OF PARTNER.

1. The rule that the finding of the trial judge on a question of fact will be reasonably followed, unless clearly shown erroneous, reaffirmed and given application herein.

2. The mere filing of a suit seeking dissolution and settlement of a partnership does not, *ipso facto*, operate its dissolution.

3. It is the duty of a partner, in charge of a valuable partnership asset, when dissolution is sued for, to preserve it, to prevent its deterioration or destruction, and in this behalf he may make reasonable expenditures on behalf of the partnership.

(Syllabus by the Court.)

Appeal from civil district court, parish of Orleans; Fred. D. King, Judge.

Action by A. R. Bagnetto against R. S. Bagnetto. Judgment for defendant, and plaintiff appeals. Affirmed.

Frank Zengel, for appellant. Charles E. Claiborne, for appellee.

BLANCHARD, J. Plaintiff and defendant, brothers, conducted as partners an eating house and coffee stand at stall No. 69, in the Poydras Market, New Orleans, under the firm

name of "Sam Bagnetto," the name of defendant, who managed the business. This partnership began in 1892. Prior to its formation, defendant, in his own name and for his own account, had conducted the same business at the same stall for seven or eight years. He had purchased the stall and business in 1885 from one Callac for the price of \$1,650. When he associated his brother (plaintiff herein) with him in the business, the latter put in no capital, though he was admitted to a full partnership. For some years after the formation of the partnership the business was profitable, but latterly it had not been. About the time they became associated in business, these brothers purchased, and likewise held in common, some real estate. In February, 1898, this suit was brought. The petition sets forth the partnership and the ownership in common and in indivision of the real estate, describing it. The allegation is made that plaintiff is not willing longer to continue the business, desires the partnership terminated and liquidated, and wishes to have the real estate sold to effect a partition thereof. Defendant was averred to be in possession of the business, and it was suggested that, pending the settlement and liquidation, a receiver should be appointed. An inventory of the partnership effects, as well as of the real estate held in common, was prayed for, and a rule was taken on defendant to show cause why a liquidator and receiver should not be appointed to carry on and conduct the business pending its settlement. Judgment was asked dissolving and liquidating the partnership, and ordering the sale of its effects, as well as the sale of the real estate owned in indivision. An inventory and appraisal were ordered and taken. No order was ever made for the appointment of a liquidator and receiver. Instead, some five weeks after the suit was filed, on the joint application of the parties litigant, defendant agreeing to dissolution and liquidation, the court ordered the sale at auction of the stand in the Poydras Market, its contents and good will, and also of the real estate. The order, at the instance of the litigants, directed that the proceeds of the sale be placed in the hands of the notary, for division between the partners after the differences between them should have been determined and settled by the court. At the sale which followed, the Poydras Market stand brought \$502. It was purchased by the plaintiff, who continued the business. The real estate brought \$4,500, making a total of \$5,002 subject to liquidation, settlement of debts, and distribution. Of the debts which showed up against the concern, there was no dispute as to the larger portion thereof being liabilities of the partnership. The claims thus admitted to be debts of the partnership aggregated \$1,508.45. Plaintiff took a rule on defendant to show cause why this amount of \$1,508.45 should not be decreed to be the only debts due by the partnership, and to be paid out of the partnership funds, and why

the remaining bills should not be decreed to be the individual liabilities of defendant, subject to payment only out of the balance found to be due him after settlement of the partnership debts and the expenses of the liquidation. Defendant, answering the rule, set out a list of bills aggregating \$990.70, which he averred to be debts also due by the partnership, and which should be paid out of its assets. The trial of this rule resulted in a decree adverse to plaintiff, and he appeals.

Of the disputed claims, \$811.10 represents money borrowed by defendant from P. B. Callac. Both defendant and Callac testify to the loan, and the former swears that he used the money in the payment of debts which had been incurred in the conduct of the partnership business. All the bills were made out against defendant. But this is explained by the fact that his was the firm name, and that he managed the business and made the purchases. The trial judge, who saw and heard the witnesses called to the stand in regard to this indebtedness, came to the conclusion it was a claim for which the partnership should be held. The question was one of fact, as to whether the money was used for the partnership or not. Our examination of the evidence does not justify us in disturbing his finding.

The remaining items on the disputed list represent claims for wages due assistants and waiters around the coffee stand, and furnishers of supplies. The contention of plaintiff is that, these liabilities having been incurred subsequent to the filing of the suit, defendant alone, and not the plaintiff, should be charged with the same. He insists that the partnership must be held dissolved from the time of service of citation upon defendant in this suit, and that after dissolution one partner cannot incur liabilities chargeable against the partnership assets. True it is that, after dissolution, one of the parties to the defunct partnership may not contract ordinary debts binding upon the others who had been associated with him, or upon the assets of the partnership. But the error of plaintiff's position is in not discerning that this partnership was not dissolved at the moment this suit was filed. He would have defendant, in charge of the coffee stand, close it up, and quit business altogether, as soon as service of process was made upon him. This necessarily would have resulted in injury and loss to both partners, for the evidence shows that, if this had been done, the market lessees would have disposed of the stall to other parties, and, later, when the sale of the partnership effects was ordered, there would have been no going concern—stall, coffee stand, and eating house—to dispose of. Besides, the petition served on defendant notified him that a liquidator and receiver of the business had been appointed for.

Thus confronted with a suit for dissolution and liquidation, and for the appointment of another to conduct the business pending the

litigation, what was the duty of defendant, under the circumstances? Why, to continue the business,—keep it going. The stall—the business conducted there, its good will—was a valuable asset of the partnership. It was incumbent on defendant, in charge of this asset, to preserve it, to prevent its deterioration or destruction, and to do this he must keep the stall open,—its business conducted as usual. In this behalf he is considered as having had authority to make reasonable expenditures on behalf of the partnership. The stall could not be run without cooks and waiters and without supplies. These were had, and must be paid for, and the debt is that of the partnership, and not of the one partner.

After the filing of the suit, these partners came together, and agreed on a dissolution and sale of the partnership effects. A time was fixed for the sale, and it took place then. Until this sale the partnership is considered not to have been dissolved. The sale and transfer of the coffee stand and its business to plaintiff ended the partnership. Up to that time the stand, its business and fixtures, remained assets of the partnership, and the debts contracted in behalf of the same partnership liabilities. The court *qua* was correct in so holding. No books, it seems, were kept in conducting the business of the coffee stand. Plaintiff was aware of this. Defendant could not, therefore, render an account of receipts and disbursements, but enough is gathered from the record to support the conclusion that plaintiff has not been injured by this. During the time intervening between the filing of the suit and the sale of the coffee stand, the business was conducted at a small loss, as it had for some time prior to the suit. It is not considered that the question of the inability of a commercial partnership to buy and sell real estate arises in this case. Nor the question that, the partners being joint owners of the real estate purchased, one cannot alienate or encumber the property without the assent of the other. All the effects—real estate and all—held in common by these litigants were, by consent, sold, and the proceeds placed in a notary's hands, there to await the action of the court in determining the question of liability of these partners *inter se*, and, after such determination, settlement to be made accordingly. Agreements have the force of law on those entering into the same. The judgment appealed from does substantial justice between these brothers, is supported by the law, and is affirmed.

(51 La. Ann. 1204)

WEBSTER v. POLICE JURY OF PARISH OF RAPIDES. (No. 13,145.)

(Supreme Court of Louisiana. May 15, 1899.)
PARISH—KEELY CURE—EXPENSE OF TREATMENT—LIABILITY.

Article 202 of the constitution of 1879, while properly construed to mean that the taxing power was to be exercised by the general as-

sembly for state purposes, by parishes for parish purposes, and by municipal corporations for the purposes of such corporations, is also to be construed with article 183 of the same constitution, which provides that "the general assembly shall make it obligatory upon each parish to support all infirm, sick and disabled paupers residing within its limits," etc., and, when so construed, did not affect the power of the general assembly, by the adoption of Act No. 157 of the Acts of 1894, to require the parishes to pay the expense of treatment at the Keely-Cure Institute of persons contemplated by said act, and as therein provided.

Blanchard, J., dissenting.
(Syllabus by the Court.)

Appeal from judicial district court, parish of Rapides; J. B. Thornton, Judge ad hoc.

Action by R. R. Webster against the police jury of the parish of Rapides. Judgment for defendant, and plaintiff appeals. Reversed.

J. C. Blackman and J. C. Ryan, for appellant. Andrews & Hackenyos, for appellee.

MONROE, J. Plaintiff, proceeding under Act No. 157 of 1894, obtained an order from the judge of the court a qua that "Robert Webster be treated for drunkenness, and the expenses of his treatment, at the Keely Institute at New Orleans, La., be paid by Rapides parish, provided said expenses do not exceed one hundred dollars, and said institute will receive and treat him with this understanding, as provided by Act No. 157 of the Acts of 1894." It appears that Robert Webster was the plaintiff's brother, and that, after obtaining this order, plaintiff applied to the Keely Institute to receive and treat him, but was informed that the \$100 must be paid in advance, whereupon he borrowed from different persons amounts aggregating the sum required, and paid the same to the institute, and his brother was received, treated, and discharged as cured; and the claim of the institute, if any it had, was assigned to plaintiff, and by him presented to the police jury for payment, and, payment having been refused, plaintiff brought this suit to recover the amount. It also appears that the judge of the district court, having recommended the police jury to make the payment, was recused, and J. R. Thornton, Esq., a member of the bar, was selected to act in his place.

Several matters were set up by way of exception and answer, which were overruled or decided adversely to the defense, and the final judgment in defendant's favor was based upon the ground that Act No. 157 of 1894 is unconstitutional, for the reason that, under article 202 of the constitution of 1879, "the taxing power may be exercised by the general assembly, for state purposes, and by parishes and municipal corporations, under authority granted to them by the general assembly, for parish and municipal purposes," from which it is deduced that the general assembly has no constitutional authority to impose upon a parish an obligation requiring the expenditure of funds derived from taxation levied under parish authority; such expendi-

ture, it is said, being a matter entirely within the discretion of the parochial authorities, and beyond the control of the general assembly. From this judgment the plaintiff appealed to this court, under that provision of article 85 of the constitution of 1898 which gives jurisdiction where a law of the state has been decreed unconstitutional, and declares that "the appeal on the law and the facts shall be directly from the court in which the case originated to the supreme court."

Act 157 of 1894 is entitled "An act to provide for the treatment and cure of habitual drunkards or inebriates, or other persons addicted to the intemperate use of alcohol, morphine, cocaine or other narcotics; and to provide for the payment thereof by cities, parishes and municipalities in this state." It provides, in substance, that any relative or friend of a drunkard, joined by three taxpayers, may petition to the court to have him sent to an institution for treatment; and if it appears to the judge that the facts are as stated, and that the person named is an inebriate, and has been a resident of the parish or city for a year, and is willing to be treated, and that neither he nor his petitioning kin are able to bear the expense, the judge may order that the expense of such treatment, not to exceed \$100, "shall be paid out of the treasury of the parish or city in the same manner that other claims against such parish or city for the administration of justice are paid." The learned judge ad hoc reached the conclusion that this act is unconstitutional with reluctance, and, as he states, under a sense of obligation to be guided by the opinion of this court in the case of *State v. Police Jury*, 47 La. Ann. 1244, 17 South. 792. A comparison of that case, however, with the instant case, will, we think, disclose such a difference in the purpose and effect of the respective statutes under consideration as to render the opinion mentioned inapplicable here. In that case the questions to be determined were whether article 202 of the constitution of 1879 should be construed as authorizing the parish to collect taxes for the purposes of the parish, and also for the purposes of municipal corporations within the parish, or whether that article meant that the parish should levy and collect parish taxes for parish purposes alone. And, the court having reached the conclusion that the article meant that the parish should collect taxes for parish purposes alone, the next and only remaining question was whether it was competent for the general assembly, in view of such a constitutional provision, to require that parish taxes thus collected for parish purposes should be turned over to a municipality for municipal purposes, which question was decided in the negative. Whether the general assembly could require that taxes levied and collected by a parish for parish purposes should be devoted by the parish to the discharge of obligations imposed upon the parish by the constitution itself, or which

the general assembly was required by the constitution to impose upon the parish, was not involved in the case, and was not decided. That question is, however, presented in the case under consideration, and must be determined. Article 163 of the same constitution in which article 202, which has been quoted, is to be found, reads as follows, to wit: "The general assembly shall make it obligatory upon each parish to support all infirm, sick and disabled paupers residing within its limits: provided, that in every municipal corporation in a parish where the powers of the police jury do not extend, the said corporation shall support its own infirm, sick and disabled paupers." It would be an extreme case which would justify a court in reading such an article, or any article, entirely out of the constitution; and yet, if it be held that article 202 precludes the general assembly from exercising any control whatever over funds collected by a parish by means of a taxing power vested in such parish by the general assembly, and derived from no other source, article 163 is stricken with nullity,—a result unnecessary, and therefore inadmissible, according to the familiar canon of construction, that a law should be so construed as to give the greatest possible effect to all its provisions. Long before the constitution of 1879 was adopted, we had upon our statute books laws imposing upon the different parishes and municipalities the expense of the judicial inquiry necessary to send an insane person to the asylum, and to provide for his transportation (Rev. St. §§ 1768, 1769), and imposing upon the parishes and municipalities these very criminal expenses which are referred to in the opinion in the case of *State v. Police Jury*. Act No. 92 of 1878. It has never, however, been thought that article 202 of the constitution of 1879, in providing that the taxing power should be exercised by parishes for parish purposes, "under authority granted to them by the general assembly," had the effect of relieving the parishes of these obligations; and there is no reason that we have been able to discover why such obligations should be distinguished from the obligation to make provision with regard to a person who, in the language of the statute, "has acquired the habit of using spirituous, malt or fermented liquors, cocaine or other narcotics, to such an extent or degree as to deprive him of reasonable self-control." He is equally a weakling as a lunatic or a criminal, and may become either the one or the other. This view of the matter has been taken by the supreme court of Maryland in *City of Baltimore v. Keely Institute*, 81 Md. 106, 31 Atl. 437. And we think it not only correct as a matter of interpretation, so far as the constitution of this state is concerned, but also humane and reasonable. The facts have been found against the defendant by both the judge whose duty it was first to inquire into the matter, and the judge ad hoc, by whom the case was tried, and we think

that finding fully sustained by the evidence in the record. The suggestion that the plaintiff is not entitled to recover because he is not the person who was treated, we presume, is not seriously urged. The plaintiff is shown by the evidence to be a poor man, who did all that the law required should be done in order to impose upon the parish of Rapides the obligation to pay this \$100. He had the right, under the circumstances, to place his brother in the institute for treatment, and to look to the parish to pay the bill; and if, as between himself and the institute, and in order that the purpose of the law might not be defeated, he borrowed the money and paid the fee required by the institute in advance, he still has the right to look to the parish to pay the bill. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there be now judgment in favor of the plaintiff, R. R. Webster, and against the defendant, the police jury of the parish of Rapides, in the sum of \$100, together with all the costs of this suit; the same to be paid in the same manner as other claims against said parish for the administration of justice are paid.

BLANCHARD, J., dissents.

(51 La. Ann. 1181)

STATE v. ANDERSON. (No. 13,142.)

(Supreme Court of Louisiana. May 1, 1899.)

CRIMINAL LAW—PLEA OF PRESCRIPTION—
BURDEN OF PROOF—FUGITIVE
FROM JUSTICE.

1. The averment stated in an information in order to negative prescription was limited to the allegation that the defendant fled from justice.

2. The affirmative of the question at issue was assumed by the state. The defendant was not bound, in order to sustain his plea of prescription, to prove that he was not a fugitive from justice, as charged.

3. Relative to the averment negating prescription on the ground that knowledge of the crime was not given to an officer having authority to direct the prosecution, the court heretofore held that the burden was on the defendant, who could easily prove the affirmative that an officer at least was aware of the charge.

4. As relates to the averment that defendant was a fugitive from justice, there is no direct interchangeable expression under which a negative might be changed to an affirmative, and proof required of the affirmative proposition. Either he was a fugitive, or he was not. If he was a fugitive, it was for the state to prove it, and not for the defendant to prove that he was not a fugitive.

On Rehearing.

1. A defense being prescription, based on the face of the indictment, the burden of proof is on the state to rebut the plea by evidence.

2. Failing to discharge the same, the prosecution is terminated, and the defendant is released from further custody.

Blanchard, J., dissenting.
(Syllabus by the Court.)

Appeal from judicial district court, parish of Lafourche; Louis P. Caillouet, Judge.

Allen Anderson was convicted of shooting with intent to kill, and appeals. Reversed.

Beattie & Beattie, for appellant. Milton J. Cunningham, Atty. Gen., and Leonard C. Moise, Dist. Atty., for the State.

BREAUX, J. The accused was indicted for shooting with intent to murder. He was found guilty of shooting with intent to kill.

The serious question of the case grows out of the refusal of the court to charge that, where the averment in an information negatives prescription, the burden is on the state to prove the averment. As it is a matter of some importance, we copy the two bills of exceptions taken on this point in extenso. The defendant having pleaded that the offense charged was prescribed, and that no conviction could be had upon the information here presented, for the reason that more than one year had elapsed before the filing of the information for the offense, and it being shown to the court that no evidence or testimony had been introduced to prove any fleeing from justice, the defendant asked the court to charge as follows: "Fleeing from justice is an affirmative fact, which it was possible for an incumbent on the state to prove, and not on the defendant to disprove, as he cannot be held to prove a negative." Which charge was refused, and a bill reserved. The court reated its refusal on the authority of *State v. Robinson*, 37 La. Ann. 673, and charged, as shown by another bill of exception, No. 3: "If the indictment on the face shows the crime is prescribed, it then becomes necessary for the indictment to set out the exception which takes it out of prescription, and, if the indictment does this, then the burden of proof is on the accused to disprove this exception." To this part of the charge a bill of exceptions was reserved. The information contains the following, inserted in order to negative the plea of prescription: "And the said Allen Anderson did, at the time of the commission of said offense, flee from justice, and remained a fugitive from justice up to his incarceration in the parish jail of Lafourche, on the 4th day of February, 1899." The foregoing averment, all that is contained in the information regarding the plea of prescription argued, shows that the information contains no averment that any knowledge of the offense charged was ever given to any officer having authority to direct the prosecution.

The only question before the court is whether the defendant was a fugitive, and whether from that one fact it is to be assumed that prescription was suspended. It follows that the fact of the suspension of prescription, as relates to a crime unknown to the officers before the information was filed, is not before us for decision. As relates to the charge that the defendant was a fugitive from justice until a short time before the information was filed, we think that the affirmative of the issue was assumed by the state. We must hold that the state was bound by

her averment that the accused was a fugitive. We have naught to do in this case with the naked question of prescription. We only have to deal with the one fact that the state alleged that the defendant was a fugitive. We must hold that to this extent the state assumed the burden of proof. "*Semper necessitas probandi incumbit illi qui agit.*"

In the case of *State v. Barrow*, 31 La. Ann. 695, the averments were interchangeable. There was possibility of alleging as to the burden of proof so as to shift it from the state to the defendant, and vice versa. The court said that the state could not, under the circumstances, be held to prove a universal negative; but, "if the onus is on the defendant, he need only prove that knowledge was brought to one of such officers. He need only prove a particular affirmative." Here it is different. The state did not have to prove a universal negative. It only had to prove that the defendant was a fugitive. In view of this, we do not think that it devolved upon the defendant to prove that he was not a fugitive. There is no interchangeable expression from negative to affirmative, as relates to one who may have been or may not have been a fugitive. If we were to make an attempt to draft a proposition in that direction, we would have to assume, in order to give it the color of an affirmative, that the defendant should have proven that he remained at home during the whole time that he was charged with having been a fugitive, or that he was always prepared to vindicate his innocence. These are not interchangeable expressions. They would only be strained efforts to convert a negative into an affirmative. We feel quite confident that, as relates to the one fact charged,—fugitive from justice,—the onus of proof was with the state, and that refusal to give the instruction requested was error. Proof of an absolute negative cannot very reasonably be required. There must be evidence admitted strong enough to establish, at least, a *prima facie* case of absence as a fugitive from justice. *State v. Foster*, 7 La. Ann. 255. It follows from the foregoing that the proceedings in this case are null and void, and that the defendant must be discharged from further prosecution under the information filed. For reasons assigned, it is ordered, adjudged, and decreed that the information filed in this case is a nullity, and it is ordered and decreed that the verdict, sentence, and judgment of the court are annulled, avoided, and reversed, and that the defendant be released from custody, not being subject to prosecution under the information filed.

On Application for Rehearing.

(May 29, 1899.)

WATKINS, J. On the part of the state, an application for rehearing is filed. It stands on four propositions: (1) That, under

Act No. 73 of 1898, prescription does not lie when the jury finds a verdict for a lesser offense than the one charged. We think that the terms of that statute do not include the case brought against the accused. The statute reads: "Nor shall the prescription and exemption hereinbefore provided apply to any case of a lesser crime or offence under an indictment for murder, robbery, forgery or counterfeiting." The accused was not charged with any offense before stated. (2) That the supreme court has jurisdiction in criminal cases on questions of law alone. We think that the question growing out of the refusal of the court to instruct the jury as requested was a question of law, and not one of fact. The question of the onus of proof in matter such as that decided by us has always been considered a question of law. The decision cited in our original opinion is to the effect that it has always been so treated by this court. The third proposition, that the supreme court cannot take cognizance of facts relative to the question of prescription, we consider is included in the second proposition, and for that reason we pass it without comment. And, lastly, as the fourth proposition on behalf of the state, it is stated that where the question grows out of the refusal to give a special instruction, and the request is erroneously refused, "it is only an error, and the case should be remanded." We are informed by the recital in the bill of exceptions, and this is not denied by the learned judge of the district court, that no evidence went to the jury proving that the accused was a fugitive from justice. The ruling in that respect was stated in our original opinion. The averment of the information that the defendant was a fugitive was not proven. It follows that the state did not negative the plea filed by the defendant that more than 12 months had elapsed between the commission of the offense and the bringing of the information. The accused cannot be tried for the same offense in order to enable the state to prove an allegation negating the plea of prescription. Had the onus of proof been with the defendant, instead of with the state, and he failed to prove that he was not a fugitive, he would not have been entitled to another trial. The same rule governs the state. In declining to remand the case, we deem it proper to state that the defendant cannot be placed in jeopardy, and cannot again be prosecuted for the offense, and reiterate that the defendant is entitled to be discharged and released; and it is so ordered. Although it is not of any practical importance, we desire to cancel and take out of our former decree the words, "that the information filed in this case is a nullity," and we leave the remainder of the decree undisturbed and in full force. Applications for rehearing refused both as relates to the state and to the accused.

BLANCHARD, J., dissents.

(21 Ala. 410)

BREWER v. ATKEISON.

(Supreme Court of Alabama. May 18, 1899.)
MORTGAGES—EQUITABLE ASSIGNMENT—FORECLOSURE—CANCELLATION.

Where the payee of three notes secured by mortgage assigns one, and on payment of the two others by the mortgagor, with knowledge of the assignment, cancels the mortgage, the assignee cannot sue him as for money had and received; such cancellation not affecting the assignee's right to foreclose the mortgage to pay his note.

Appeal from circuit court, Mobile county; William S. Anderson, Judge.

Action by Robert W. Atkelson against Emma O. Brewer. There was a judgment for plaintiff, and defendant appeals. Reversed.

This action was brought to recover for money had and received by the defendant for the use of the plaintiff. The defendant pleaded the general issue and a special plea of estoppel, in which she set up that the plaintiff could not recover in this action, because he was not entitled to the money collected by the defendant from B. W. Goodwin, or any portion thereof, for the reason that the said plaintiff acknowledged and stated to the defendant before the bringing of this suit, and before the collection of the said money by the defendant, that the note here sued on had been paid by Goodwin.

On the trial of the cause, it was shown: That Emma O. Brewer was the duly appointed and qualified executrix of the will of Leroy Brewer, deceased. That Leroy Brewer sold a certain tract of land to B. W. Goodwin, and for the deferred payment of the purchase money he executed three promissory notes, which were secured by a mortgage on said land. One of these notes was held by the plaintiff, to whom it had been transferred and assigned. That prior to the institution of the suit, B. W. Goodwin paid the other two notes, which were secured by the mortgage, and which were held by Emma O. Brewer, as executrix of the will of Leroy Brewer, deceased. That said mortgage was not foreclosed, but, upon the payment of these two notes held by her, Emma O. Brewer, marked the same satisfied. The evidence for the plaintiff tended to show that his note had not been paid.

Upon the introduction of all the evidence, the court gave to the jury the general affirmative charge in favor of the plaintiff, to the giving of which charge the defendant duly excepted.

The defendant requested the court to give to the jury, among others, the following written charges: (1) "If you believe the evidence in this case, you must find for the defendant." (2) "Unless it is proved that the money collected by Mrs. Brewer from Goodwin was proceeds of a sale of the mortgaged property included in the mortgage which secured the three notes given by Goodwin, or unless it is shown that that property was turned over to Mrs. Brewer and treated as money, then you must find for the defendant." The court re-

fused to give these charges and the defendant separately excepted.

There were verdict and judgment for the plaintiff. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

John W. McAlpine and R. P. Roach, for appellant. R. H. & N. R. Clarke, for appellee.

HARALSON, J. Action for money had and received, tried on pleas of the general issue, and a special plea of estoppel.

The principle is well understood with us, that the transfer of one of several notes secured by mortgage, clothes the transferee with the right to be first paid out of the mortgaged property. *Knight v. Ray*, 75 Ala. 383; *Preston v. Ellington*, 74 Ala. 133. In the first case cited, the mortgagee, Knight, held three notes secured by mortgage, one of which, for a valuable consideration, he transferred to Ray, retaining the other two. The mortgagor made partial payments to Knight, the mortgagee, but left unpaid on his notes \$400. Thereupon, Knight, after due advertisement, sold the lands under the power in the mortgage, and, through another, became the purchaser of them at \$350, a sum in excess of the amount due Ray, on his note. No money was paid, but the mortgagee entered a credit on the mortgage, of the sum realized on the sale. Ray filed a bill and sought thereby to trace her money into this land and to charge it with its reimbursement. The court held that the sale under the mortgage was in effect, an investment by Knight, the mortgagee, of the funds realized from the sale, in the lands sought to be subjected by the bill. They said of the transaction: "While all the notes remained the property of Knight, the mortgaged lands were equally bound for the payment of each. When, however, Knight traded and transferred one of the notes to Mrs. Ray, retaining the others, although the transfer was by mere delivery, he clothed her with the right to be first paid out of the proceeds of the property mortgaged. *Doe v. McLoskey*, 1 Ala. 708; *Cul-tum v. Erwin*, 4 Ala. 452; *Wallace v. Nichols' Adm'r*, 56 Ala. 321. When Knight made the sale the proceeds of right being primarily due to Mrs. Ray, it was his duty to pay, first, her demand, before applying any of the proceeds to his claim. Failing to do so, an action for money had and received lay in her favor; and when, instead of paying the money to her, he invested it in lands, he armed her with the right to have a lien declared on the land thus purchased for the payment to her of her money thus improperly invested."

The principle underlying this and our other decisions to the same effect is, that an assignment by the mortgagee of one of the mortgage notes operates as an assignment pro tanto of the lien upon the lands, and entitles the assignee to payment in priority of the note

retained by the mortgagee out of the funds arising out of the mortgaged property—the lien extending through the property mortgaged, to the money for which it may have been sold. But, the principle has no application to money paid by the mortgagor to the mortgagee on the remaining note, when, so to speak, the money so paid never saw the mortgaged lands, was independent and not the legitimate offspring of them. Such money could in no wise be imbued or infected with the mortgage-lien security. Code, § 1040 (1844); *Knight v. Ray*; *Preston v. Ellington*, supra.

The evidence in the case shows without conflict, that the money paid by Goodwin, the mortgagor, to the defendant, was not the proceeds of the sale of the mortgaged property, and that the property was not turned over to her on account of such payment.

The contention of appellee's counsel is,—to express it in their own language,—that "the payment by Goodwin, the mortgagor, of two of the three notes secured by the mortgage, and securing thereby a full satisfaction from the mortgagee of the mortgage debt and a reconveyance by the mortgagee of the legal title standing in her to the lands covered by the mortgage, we submit, was in effect a foreclosure of the mortgage, and entitled the appellee to his action for money had and received."

But in this insistence we apprehend counsel are in error. We have seen that the assignment by the mortgagee of one of the secured notes operated as an assignment pro tanto of the mortgage lien upon the lands, authorizing the assignee to foreclose the same under the power in the mortgage. Code, § 1040; *Hartley v. Matthews*, 96 Ala. 224, 11 South. 452. Goodwin, the mortgagor, knew when he paid the two notes to the defendant,—the executrix of the mortgagee,—that there was another mortgage note outstanding, in the hands of the plaintiff, who claimed the same. When the defendant, therefore, upon the payment to her of the two notes she held, executed to the mortgagor a quitclaim to the mortgaged lands, she did not thereby destroy the mortgage security the plaintiff held on these lands for the payment of his debt. She was without authority to satisfy the mortgage as to plaintiff's debt, and, between the plaintiff and the mortgagor, the mortgage remains, as for anything appearing to the contrary, a valid security for the payment of the note held by the plaintiff, if, and to the extent, the same remains unpaid. 1 Jones, *Mortg.* §§ 814, 818; *Wildsmith v. Tracy*, 80 Ala. 258; *Johnson v. Beard*, 93 Ala. 96, 9 South. 535.

From the foregoing it will appear that under the plea of the general issue charges 1 and 2 requested by defendant and refused, should have been given.

Reversed and remanded.

(121 Ala. 361)

Ex parte BROMBERG.

(Supreme Court of Alabama. May 10, 1899.)

SECURITY FOR COSTS—MANDAMUS.

Code, § 1347, provides that "all suits commenced by or for a nonresident must be dismissed on motion if security for costs be not given within such time as the court may direct." Section 20 provides that, where a suit is brought in the name of the person having the legal right for the use of another, the beneficiary must be considered as the sole party on the record. Section 1330 provides that, when judgment is rendered against a plaintiff in a suit brought in the name of a nominal plaintiff for the use of another, judgment for costs must be rendered against the beneficiary or his personal representative. *Held*, that defendant is not entitled to mandamus to compel the dismissal of a suit brought by a resident administrator of the estate of a nonresident, when the distributees of the estate are nonresidents, nor need he give security for costs.

Application by Frederick G. Bromberg for mandamus to compel dismissal of suit for failure to give security for costs. Application denied.

This was an original application for mandamus, addressed to the judges of this court, in which the following facts were averred and disclosed: On December 12, 1898, R. M. Sands, as administrator of John Nardin, deceased, brought a suit against Frederick G. Bromberg in the circuit court of Mobile county for the sum of \$224.85. John Nardin, at the time of his death, was a nonresident of the state of Alabama, and the administrator brought said suit solely for the use of nonresidents of said state, and failed to give security for the costs of said suit when it was commenced, and has never given such security since. Said Frederick G. Bromberg, appearing specially and for the purpose only of making said motion, moved the court to dismiss said suit because the plaintiff had failed to give security for costs thereof, as required by law, or also to require the plaintiff to give security for costs. The court overruled this motion, and refused to grant it. The said Frederick G. Bromberg then filed the present petition in this court, asking the court to grant him the writ of mandamus directed to the judge of the circuit court of Mobile county, commanding him to dismiss said suit, or to require the plaintiff therein to give security for costs of said suit.

Chas. L. Bromberg, Jr., for petitioner.

SHARPE, J. The petitioner bases his right to mandamus upon section 1347 of the Code, which requires that "all suits at law or in equity commenced by or for the use of a nonresident of this state must be dismissed on motion if security for costs be not given by such nonresident when the suit is commenced, or within such time thereafter as the court may direct." The meaning of the provision, in respect of the kind of suits mentioned as suits commenced "for the use of a nonresident," and likewise the reason for requiring security for costs in such cases, is found

by reference to section 29 of the Code, whereby, "in all cases where suits are brought in the name of the person having the legal right for the use of another, the beneficiary must be considered as the sole party on the record," together with section 1330 of the Code, which requires that "when judgment is rendered against the plaintiff in any suit brought in the name of a nominal plaintiff for the use of another, judgment for costs must be rendered against the beneficiary or his personal representative." The statute having thus changed the common-law rule, and established the use plaintiff's relation to the suit as that of a principal party, and having placed him upon the same footing with other plaintiffs in reference to his liability for costs, the same necessity existed for requiring him to secure costs when residing out of the jurisdiction as existed in the case of other nonresident plaintiffs. It is apparent that the requirement in question has reference only to those suits which are brought pro forma by a nominal plaintiff in behalf of a nonresident for whose benefit the recovery, if any, directly inures, and who may become directly liable for costs, and not to the case of a resident administrator suing to recover assets of the estate he represents, though the decedent may have been a nonresident, and the distributees of the estate may reside out of the state. In such a suit the administrator is the actual and the only plaintiff. In his representative capacity he is entitled to recover whatever may be recovered, and in his hands it is subject to legal charges before it can be claimed by distributees of the estate. Though the distributees may have a beneficial interest to be obtained through the process of administration they are in no sense parties to suits brought by the administrator to recover assets of the estate. Nor is such a suit brought for their use within the meaning of the statute referred to. The application for mandamus must therefore be denied.

(121 Ala. 602)

BRIGHTMAN et al. v. MERIWETHER et al.
(Supreme Court of Alabama. May 11, 1899.)

TRIAL OF RIGHT OF PROPERTY—BURDEN OF PROOF—EXECUTION—VALIDITY—VERDICT.

1. On a trial of right of property levied on, the burden is on the plaintiff in the process to show that the execution is valid.

2. An execution issued on a judgment, which is merely a copy of the judge's bench notes, is void.

3. On a trial of right of property, it is error to receive a verdict which fails to assess the value of the property.

Appeal from circuit court, Lowndes county; D. K. Middleton, Judge.

Action by W. T. Brightman & Co. against S. R. Meriwether and others for the trial of right of property. Judgment for defendants, and claimants appeal. Reversed.

S. R. Meriwether and J. D. Reese brought a suit against J. E. Bandy in the circuit court

of Lowndes county. On August 18, 1897, there was entered what purported to be a judgment in said cause. This entry, after stating the parties to the suit, was as follows: "August 18. Judgment by default. Writ of inquiry. Damages assessed at \$77.65. Waiver of exemptions as to personal property." The clerk of the circuit court, treating this entry as a judgment, issued an execution in favor of the plaintiffs therein against J. E. Bandy, which execution was placed in the hands of the sheriff of Lowndes county on September 18, 1897, and on December 14, 1897, the sheriff levied said execution on certain cotton and corn in the possession of said J. E. Bandy. Thereupon the appellants, W. T. Brightman & Co., made an affidavit of their claim, and instituted the present suit for the trial of the right of property in and to the property so levied upon. The facts as above stated were proven by the plaintiffs in execution, S. B. Meriwether and J. D. Reese. The claimants introduced in evidence a mortgage which was executed on October 15, 1897, by J. E. Bandy to W. T. Brightman & Co., which mortgage conveyed the crops raised by said Bandy during the year 1897; and the claimants proved that, at the time of the execution of said mortgage, the crop of corn and cotton upon which the execution in favor of Meriwether and Reese was levied was ungathered at the time of the execution of the mortgage, and was the same that was conveyed to the complainants by said mortgage, and that nothing had been paid on said mortgage. This was substantially all the evidence in the case. The court gave the general affirmative charge in favor of the plaintiffs, and to the giving of this charge the claimants duly excepted. The claimants also duly excepted to the court's refusal to give the general affirmative charge requested by them. There were verdict and judgment for the plaintiffs in execution. The claimants appeal, and assign as error the giving of the general affirmative charge for the plaintiffs, and the refusal to give the general affirmative charge requested by the claimants.

Crum & Weil and Richardson & Whitten, for appellants. Watts, Tray & Caffey and George E. Gordon, for appellees.

McCLELLAN, C. J. Trial of right to property which had been levied on at the suit of Meriwether and others against Bandy, and claimed by Brightman & Co. under a mortgage executed to them by Bandy. The burden was on the plaintiffs to show the levy of a valid execution on the property. *Jackson v. Bain*, 74 Ala. 323. This they failed to do. To the contrary, it affirmatively appeared by the transcript of the record in the case of Meriwether and others against Bandy, the execution upon a supposed judgment in which was levied on this property, that no judgment was ever entered therein. What is claimed to be a judgment is the mere copy of the judge's bench notes, stating the parties to the case,

and the following: "August 18. Judgment by default. Writ of inquiry. Damages assessed at \$77.65. Waiver of exemptions as to personal property." This, of course, was no judgment (*Park v. Lide*, 90 Ala. 246, 7 South. 805; *Baker v. Swift*, 87 Ala. 530, 6 South. 153; *Morgan v. Flexner*, 105 Ala. 356, 16 South. 716; *Pickering v. Townsend* [Ala.] 23 South. 703), and the execution issued upon it was void. Upon this the court should have given the affirmative charge for the claimants, as requested by them. The same conclusion may be rested on the further ground that the lien of claimants' mortgage attached to the crops here involved before the lien of the alleged execution. The court also erred in receiving the verdict, which did not assess the value of the property. Reversed and remanded.

(121 Ala. 450)

STEVENS et al. v. ALABAMA STATE LAND CO.

(Supreme Court of Alabama. May 17, 1899.)

CONTRACTS—RESCISSION—FALSE REPRESENTATIONS.

To support a defense of false representations in the sale of land, the purchaser testified that the vendor's agent said "they considered the land one of the finest sections they had on the mountain," and, when asked how it compared with land they were on, said, "If there is any difference, it is better than this;" and, when witness objected to buying it without seeing it, he said witness "could trust his word"; that he was well acquainted with the land, and witness would be well satisfied with it. *Held* an expression of opinion, merely, and not a positive representation of fact.

Appeal from chancery court, Blount county; Thomas Cobbs, Chancellor.

Bill by the Alabama State Land Company against John L. Stevens and another. There was a decree for plaintiff, and defendants appeal. Affirmed.

The bill in this case was filed by the Alabama State Land Company against Margaret A. Stevens and John L. Stevens to enforce a vendor's lien upon certain lands sold by the plaintiff to Margaret A. Stevens, the wife of John L. Stevens. John L. Stevens indorsed on the notes which were given for the purchase money of said lands his consent that his wife might enter into said contract. It was averred in the bill that John L. Stevens was cutting the timbers from the lands, which were principally valuable for timber, and rendering the same of less value than the purchase-money notes of his wife, Margaret A. Stevens; and he was made a party to the bill, and enjoined from cutting the timber. Although John L. Stevens was not in any way interested in the purchase of said lands, he joined with his wife in the cross bill. The other facts of the case are sufficiently stated in the opinion. Upon the final submission of the cause upon the pleadings and proof, the chancellor decreed that the complainant in the original bill was entitled to relief, and ordered a reference to the register to ascer-

tain the amount due, and, further, that the complainant in the cross bill was not entitled to relief, and the cross bill was ordered dismissed. From this decree the respondents appeal, and assign the rendition thereof as error.

Inzer & Ward, for appellants. J. A. W. Smith, for appellee.

PER CURIAM. Bill by appellee against appellants to enforce vendor's lien and mortgage on lands for purchase money. Defense, false representations inducing the purchase; cross bill for rescission. The bill was filed 18 months after the purchase, and prior to maturity of some of the notes; and some four months after it was filed the respondents filed their answer, admitting the facts, and that complainant was entitled to a decree for the matured note, but insisted that it had no right to enforce a lien for the notes not due when the bill was filed. Two months afterwards they filed a further answer, making it a cross bill for rescission, setting up said defense of false representations. The answer states that respondent John L. Stevens negotiated the purchase for his co-respondent—his wife—with one Crandall, acting as agent for vendor. The cross bill states the alleged false representations, and respondents' reliance on same, etc., in the following language: "That the purchase of said lands was made by the said John L. Stevens late one evening when it was raining, and the said John L. Stevens was not on or near the lands in section 15; and the said E. A. Crandall represented to him that all of the lands in section 15 purchased by respondent, amounting to about 600 acres, were well timbered, with timber suitable for saw logs, such as was the best part of the lands purchased in section No. 21. And respondent, relying on said statement, purchased said lands, when in truth and in fact there is not more than 10 acres of saw timber, or timber suitable to make lumber, on said 600 acres of land. Respondents further allege that relying on the statement of the said E. A. Crandall as to the statements made to him as to the value of the lands in section 15, and believing said statements to be true, they never made any investigation as to said 600 acres of land in said section 15 until since the filing of the first answer in this cause; and it only came to their knowledge within the last few days, of the true condition of said 600 acres of land. Respondents further aver that said 600 acres of land in section 15 is almost entirely worthless. Respondents further allege that they were misled and induced to purchase said lands by the false and fraudulent misrepresentations of the said E. A. Crandall, agent of complainant, in his statement as to the timber on the lands in section 15, and as to where the same was situated, and this was not known to respondents until within the last few days. And, at the time of making said purchase, respondents had no opportunity of examining

said lands, being at a distance from where the same was situated, and were forced to rely on the statements of said agent through whom respondents purchased, as before stated. Respondents further allege said 600 acres of land in section 15 constitute a material part of the lands purchased by respondents from complainant, as shown by the conveyance referred to in the original bill; and the same not being as represented by said agent affects very materially the value of all of said lands, as the principal part of the value of said lands is the timber situated on the same."

It will be observed from the foregoing that the case made by the answer and cross bill is one of false representations of matters of fact, inducing the purchase, and not the statement of opinion touching the subject of the contract, known by the declarant to be false, and made with the dishonest intent to mislead and deceive the other contracting party, and having that effect. Representations of the first class—the class stated in the answer—are, in legal contemplation, fraudulent; when drawn in question in proceedings of this character, without regard to the honesty or dishonesty of the declarant in making them. He may really and honestly believe that the fact is as he represents it, yet, if it be in fact untrue, and the other party be misled by it to his injury, it is, by construction of law, a fraud against which relief may be had. It is not actual fraud,—fraud dishonestly perpetrated,—but constructive fraud only. If the answer sets up representations of existing facts, simply denominating them "false and fraudulent," alleging no actual knowledge of the falsity and actual intent to defraud on the part of the declarant, as in the present case, the case made will be treated as one of constructive fraud only,—not sufficient to authorize relief if the proof shows expressions of opinion, merely, howsoever dishonest those opinions may appear to have been. The statement that the representation was false and fraudulent may well consist with honesty of purpose, and taking the bill most strongly against the pleader, as well as applying the principle that the law presumes honesty in the conduct of the citizen until the contrary is alleged, and so it will be regarded. In order to relief, there must be a correspondence of proof to allegation.

The evidence of Stevens as to the representations made to him, as copied from the brief of appellant's counsel (which the record verifies), is as follows: "Stevens states further in his testimony, on page 41 of transcript, that he and Crandall were going back home through section 21. 'There was considerable rain on us all day. As we went back through section 21, he [referring to Crandall] asked how about taking other land. I told him I would not have time to look at them; that I would have to go home. Then he said he would insist on me taking section 15, as they considered it one of the finest sections they

had on the mountain. We were then on the raise of section 21, and I asked him how it would compare with this; and he said, "If there is any difference, it is better than this." I told him, if it was, it was good enough then, but still I did not like to take it without seeing it. He said that I could trust his word; that he was well acquainted with the land, and I would be well satisfied with it. I told him I was buying the land for saw timber, but wanted land that would be worth something after the timber was taken off, and was buying with a view to both. It was about three or four o'clock in the evening. I left then, and went to Maj. Crandall's, but had seen no part of section 15.'" And the brief goes on to argue, from the whole premises, that these statements were knowingly false, and made for the purpose of inducing Stevens to buy the land. It is too apparent for argument that this testimony shows nothing but expressions of opinion by Crandall, not within the allegations of the bill. The allegations and proof do not at all correspond. Crandall's honesty of purpose was not in issue, nor were any expressions of his opinions concerning the land in issue. The issue made was that he positively represented a thing to be an existing fact, not that he dishonestly pretended to believe that such was a fact. The evidence is in sharp conflict as to the truth of even this testimony of Stevens, but, taking it to be true, the chancellor decided the case correctly. Affirmed.

NOTE. The foregoing opinion was prepared by Hon. J. B. HEAD while a justice of this court, and has since been adopted by the court.

(121 Ala. 512)

LALLANDE v. BROWN.

(Supreme Court of Alabama. May 11, 1899.)

EVIDENCE—COMPETENCY—ACCOUNT STATED—WRITING—NECESSITY—HARMLESS ERROR.

1. Where one rendering services claims that an account has been stated, evidence of a conversation with the debtor's brother, had during the absence of the debtor, in which the brother stated that he and the debtor would pay the amount of the bill, is inadmissible.

2. The admission of illegal evidence is reversible error if the remaining evidence on a material issue is conflicting, though the trial was by the court without a jury.

3. Where a physician claims that an account had been stated for services rendered, evidence of a conversation with the patient's brother while in the sick room, during which the bill was mentioned, is competent, though the patient was very sick, and perhaps did not hear or understand the conversation; the objection going merely to the weight of the evidence.

4. To create an account stated, it is not essential that the statement be in writing.

Appeal from city court of Birmingham; W. W. Wilkerson, Judge.

Action by George S. Brown against P. H. Lallande. From a judgment for plaintiff, defendant appeals. Reversed.

This was an action brought to recover an amount alleged to be due for medical and

surgical treatment to the defendant by the plaintiff. The complaint contained three counts. The first count was upon an account, the second was upon an account stated, and the third was for work and labor done. The defendant pleaded the general issue, and by special plea to each of the counts of the complaint he set up that the cause of action was barred by the statute of limitations of three years. The plaintiff demurred to the special plea in so far as it replied to the second count, and alleged as ground of the demurrer that "said plea is no answer to the count." This demurrer was sustained. The plaintiff, as a witness in his own behalf, testified that there was due him from the defendant, for medical and surgical treatment, a balance of \$350; that the services were rendered in July and August, 1893, the last item charged being August 22, 1893; and that for the services rendered the plaintiff charged the defendant \$500, and the defendant had paid \$150. The plaintiff further testified that statements of his account were repeatedly mailed to the defendant, and that the latter had never denied the account. The plaintiff further testified that in a conversation had with the defendant in the latter's office, in the spring of 1896, he told the defendant that if he would settle the account he would reduce the bill to \$200, such offer to reduce being on condition that it would be settled within a month or two, and that the defendant made the impression upon him that he would take advantage of such offer. The defendant, as a witness in his own behalf, testified that he had never received, through the mail or otherwise, any statements of the account from the plaintiff, and that in the conversation with the plaintiff in his office he did not agree to pay the plaintiff the \$200 to which he offered to reduce the account. The defendant was then asked the following question: "Did not your brother, Gus Lallande, tell you what the amount was that Dr. Brown charged you?" To this question the defendant objected upon the ground that it was immaterial and called for immaterial and irrelevant evidence, and that the statement by his brother did not demand of the defendant any dissent, and such knowledge could have no tendency to prove an account stated. The court overruled this objection, and the defendant duly excepted. The witness answered that his brother told him that Dr. Brown had said that he charged him on his books \$500, but he did not expect the defendant to pay him that much. The plaintiff, being recalled as a witness, was asked the following question: "State the conversation you had with Gus Lallande." To this question the defendant objected on the ground that it called for immaterial and irrelevant evidence, and such conversation was not binding on the defendant, and could have no tendency to prove the account stated. The court overruled this objection, and the defendant duly excepted. The witness answered that, upon Gus Lallande asking him what

his bill would be, he told him what the account was, and, although said Lallande said that it was too much, he further stated that he and his brother would pay it. The defendant moved to exclude this answer upon the grounds set forth in the objection to the question. The court overruled this motion, and the defendant duly excepted. The plaintiff, as a witness, further testified that when he was in the sick room of the defendant he had a conversation with Gus Lallande, who was by the bedside of the defendant, and in that conversation the bill of \$500 was mentioned. On cross-examination of the plaintiff, he said that P. H. Lallande was, at the time of said conversation in the sick room, very sick, "as sick as a man could be and be alive," and that he did not know whether P. H. Lallande heard the conversation or not. The defendant then moved the court to exclude the evidence of the witness as to the conversation that occurred in the defendant's sick room upon the grounds that it was doubtful whether said defendant heard it or understood what was said, and that his physical condition was such that his failure to dissent could not tend to prove an account stated, and that such testimony was immaterial and irrelevant. The court overruled this motion, and the defendant duly excepted. Upon being recalled as a witness, the defendant testified that, if any such conversation as testified to by the plaintiff occurred in his sick room, he (the defendant) was ignorant and unconscious of it. The cause was tried by the court without the intervention of a jury, and the court decided that the evidence showed that the account between the parties had been stated to be at \$200, and thereupon the court rendered judgment for the said sum, together with the interest. To the rendition of this judgment the defendant excepted. The defendant appeals, and assigns as error the rulings of the court to which exceptions were reserved.

Geo. A. Evans, for appellant. C. W. Hickman and E. W. Hamill, for appellee.

DOWDELL, J. This was an action on the common counts brought by the appellee, George S. Brown, against P. H. Lallande in the city court of Birmingham, and was tried by the court without the intervention of a jury. The complaint contained three counts, the second count claiming on an account stated between the parties. On the undisputed evidence the plea of the statute of limitations of three years was sustained as to the first and third counts. The court rendered judgment in favor of the plaintiff for \$227.70, and this finding necessarily rested upon the evidence under the second count. The plea of the general issue was interposed to this count, and of course the burden of proof was upon the plaintiff to prove an account stated. On this issue, the testimony of the plaintiff tended to show an account stated between the parties, while that of the defendant was a denial of it. The evidence in the case was

such as would have authorized a judgment for or against the plaintiff, according as the trial judge determined upon its credibility, and would have remained undisturbed by this court but for the admission of illegal evidence. The conversation between plaintiff and the defendant's brother testified to by the plaintiff, and which was had in the absence of the defendant, was clearly illegal, and not admissible against the objection of the defendant. It has recently been decided by this court in the case of *Bank v. Chaffin*, 24 South. 80, that the admission of illegal evidence, although the trial is had by the court, and without the intervention of a jury, is a reversible error, where there is a conflict in the remaining evidence upon a material issue, as it is impossible in such case for this court to know or say how far the illegal evidence may have influenced the mind of the trial judge in arriving at his conclusion. There was no error in the admission of the testimony as to the conversation had in the defendant's room during his illness in regard to plaintiff's charges. This was in the presence of the defendant, and relevant to the matter in issue, and therefore competent. The objection urged goes to the weight which should be accorded such evidence, rather than to its competency. As the cause must be reversed and remanded for another trial, for the error pointed out, and the question having arisen on the former trial as to whether a writing was necessary to convert an open account into an account stated, and which is likely to again arise, we now here decide that, to create a stated account, it is not essential that the statement of the account should be made in writing. *Pinchon v. Chilcott*, 3 Car. & P. 236, 14 E. C. L. 545; *Knowles v. Michel*, 13 East, 249; *Watkins v. Ford*, 69 Mich. 357, 37 N. W. 300. The judgment of the city court is reversed, and the cause remanded.

(121 Ala. 575)

LOXLEY v. DOUGLAS.

(Supreme Court of Alabama. May 18, 1899.)

CANCELLATION OF INSTRUMENTS—OFFER TO DO EQUITY—SET-OFF.

Offer by a grantor, seeking to cancel a deed of homestead because of imperfect execution, to set off against the price received, which he should return, a claim against the grantee for timber cut on the land, in the absence of agreement for such set-off, or of intervening equity requiring it, is not a sufficient offer to do equity to entitle him to the relief sought.

Appeal from chancery court, Mobile county; Thomas H. Smith, Chancellor.

Suit by James Douglas, Sr., against John H. Loxley. There was a decree for plaintiff, and defendant appeals. Reversed.

The bill in this case sought to have canceled and set aside, as a cloud upon the complainant's title to certain described lands, a deed which was executed by the complainant and his wife to the defendant, upon the ground that the property conveyed constituted homestead of the grantors, and said con-

veyance did not contain the separate acknowledgment of the wife, and was therefore void. The bill averred these facts, and the certificate of acknowledgment, attached to the deed, which was made an exhibit to the bill, showed that there was not a separate acknowledgment of the wife. The bill, as originally drafted, contained no offer whatever to refund the purchase money, which was averred to have been paid to the complainant by the defendant in part payment for said conveyance; but the bill was subsequently amended by adding thereto the averments which are copied in the opinion. To the bill, as amended, the complainant further prayed that an accounting be had between the complainant and the defendant of the timber alleged to have been cut from the said lands, and the value thereof, and that if said accounting, after giving the defendant credit for said money paid to complainant as purchase money, shows a balance to complainant's credit, said balance be paid to the complainant by the defendant. To the bill, as amended, the defendant demurred upon the following grounds: (1) Because said bill, as last amended, contains no sufficient offer to do equity; (2) because said bill of complaint does not sufficiently show under what circumstances complainant cut timber from the lands described therein to enable this court to say whether the defendant is accountable therefor or not; (3) because said bill of complaint, as last amended, does not show that the said timber was cut from said lands without the consent of the complainant, nor under such circumstances as to enable the complainant to recover therefor; (4) because the damages for the cutting of said timber to which the complainant may be entitled, if any, are recoverable at law, and not in equity, and this court has no jurisdiction to compel the defendant to account therefor as a condition precedent to the return of his purchase money upon the cancellation of such deed of conveyance described in the said bill of complaint; (5) because it appears by the original bill of complaint, as last amended, that the complainant received and still retains \$37 paid to him by the defendant for the purchase money of said lands, and has not offered in his said bill of complaint, as last amended, to do equity by refunding said purchase money to this defendant; (6) because it appears from said original bill of complaint that the said purchase money was paid for the entire tract of land described in said conveyance, together with the timber thereon, and this court has no jurisdiction to appropriate a part of said purchase money to the payment of the timber alone, but the complainant must either ratify or repudiate said contract as a whole, and upon its repudiation in whole must offer to surrender the entire benefits thereunder received by him, before the cancellation of said contract, as against this defendant, can be decreed at his instance; (7) because this court has no jurisdiction to enforce the claim set up in said amended bill for timber cut upon

said lands; and (8) because said bill is multifarious in seeking to join a bill to remove a cloud from the title of the complainant with a bill for accounting for timber cut, and this defendant demurs to so much of said bill as seeks an accounting for timber cut from said land, because as to such matters the complainant has an adequate remedy at law; also because it does not appear from said bill of complaint whether the defendant is liable to the complainant for said cutting of timber or not; also because it does not appear from said bill whether complainant was in possession of said land at the time of the alleged cutting of timber or not. Upon the submission of the cause upon this demurrer, the court rendered a decree that it was not well taken, and ordered it overruled. From this decree the defendant appeals, and assigns the rendition thereof as error.

Gregory L. & H. T. Smith, for appellant.
Richard W. Stoutz and Leslie Hall, for appellee.

SHARPE, J. Upon the principle that one seeking equity must do equity, it has been held that one coming into equity to avoid and have canceled a deed upon the ground of its imperfect execution as a conveyance of the homestead will, as a condition to equitable interference, be required to refund whatever of value he has received as a consideration for the deed. *Grider v. Mortgage Co.*, 99 Ala. 281, 12 South. 775; *Pounds v. Clarke* (Miss.) 14 South. 22. This requirement is upon the consideration that to allow one to retain the benefits of an agreement which he repudiates, when by doing so he derives an advantage, while the uncomplaining party is subjected to loss, would be plainly inequitable. It appears from the bill that the complainant received a part of the purchase money of the land for which he gave the deed he now seeks to have declared void. Instead of offering to return the money, the complainant presents a charge against the defendant for timber cut upon the land. Respecting this claim the statements of the bill are "that, since the alleged execution of said deed, said Loxley, however, cut from said lands therein described much valuable timber, which was then and is now worth about two hundred and fifty dollars, and which said Loxley appropriated to his own use; that in equity and good conscience said Loxley is justly indebted to complainant in said sum of two hundred and fifty dollars for said timber so cut from said lands; and that by way of doing equity complainant hereby sets off or offers to set off against and on account of said sum so due for said timber so cut by said Loxley the money so paid by said Loxley to complainant as and on account of the purchase money of said lands." The bill further proposes that, in case the value of the timber is found to be less than the money received, the complainant will pay the excess, and prays that, in case the timber value exceeds the money received,

a decree be rendered in favor of complainant for such excess of value. Whether the obligation upon the complainant to do equity could under possible circumstances be less than the actual return of the purchase money received we need not inquire. Here he seeks to avoid such return simply by presenting a claim against the defendant, and offering to extinguish it pro tanto with the money he received, when it does not appear that there was any agreement for such mutual extinguishment, or that there is any intervening equity requiring it, unless by the assumed right of set-off, as asserted in the bill.

It is true that equity may require cross demands to be set off against each other where, from the nature of the claim or the situation of the parties, justice cannot otherwise be done. A set-off, however, does not exist until there is a counterclaim, and in a case like the present the defendant asserts no claim, and the principles upon which set-off may be enforced are without application. The return of the purchase money by the complainant is not made obligatory upon him, except as a condition to the relief which he seeks and which the defendant resists. The design of the equitable requirement is the restoration of the parties, upon the granting of the relief, to as nearly as practicable the status quo they occupied before the transaction assailed was had, in respect of matters incident to and growing out of it. Such object would not be accomplished by thrusting upon the defendant the necessity of submitting to or defending against a claim which, though for timber cut from the land embraced in the deed, is yet wholly extraneous to and independent of the transaction involving the making of the deed in question. To give the court jurisdiction to decree the return of the purchase money upon declaring the deed void, it was necessary that the bill should have contained an offer to so refund, and, because of its failure to do so, the demurrer should have been sustained. The decree appealed from will be reversed at appellee's cost, and the cause will be remanded. Reversed and remanded.

(121 Ala. 21)

HOWARD v. STATE.

(Supreme Court of Alabama. May 18, 1899.)

RESISTING ARREST—INDICTMENT—REQUISITES—THREATENING BREACH OF THE PEACE—OFFENSE—WARRANT OF ARREST—VOID ON FACE.

1. Under Code, p. 334, form 73, prescribing the form of indictment for resisting an officer in attempting to execute a writ or process,—the offense defined by Code, § 5463,—and providing that the process may be described generally, an indictment for resisting an officer attempting to execute a warrant of arrest need not state the offense named in the writ, its date of issuance, or for whom issued.

2. Under Code, § 5468, making it an offense for any one to resist a person, not an officer, who is acting in obedience to the lawful command of an officer, with a knowledge of such command, an indictment for resisting a person, not an offi-

cer, in attempting to execute a warrant of arrest, need not state the offense named in the warrant, its date of issuance, or for whom issued.

3. Code, § 5162 et seq., authorizes a magistrate to issue a warrant for the arrest of one who has threatened or is about to commit an offense on the person or property of another, and provides that, if there is reason to fear the commission of such offense, defendant must give security to keep the peace. Held not to make threatening a breach of the peace an offense, and that a warrant of arrest reciting that complaint had been made that the offense of threatening a breach of the peace had been committed, and charging a person named with the commission of such offense, was void on its face.

4. If a warrant of arrest is void on its face, the person named therein is under no legal obligation to submit to its execution.

Appeal from city court of Montgomery; A. D. Sayre, Judge.

Jack Howard was convicted of resisting an officer in attempting to execute a warrant of arrest, and he appeals. Reversed.

The appellant was indicted, tried, and convicted for resisting an officer in executing process. The indictment contained three counts, and was as follows: (1) "The grand jury of said county charge that before the finding of this indictment Jack Howard did knowingly and willfully oppose or resist W. B. Gilmer, a constable of said county, in attempting to serve or execute a writ of arrest, called a 'warrant,' issued by one B. H. Screws, a justice of the peace in and for said county." (2) "The grand jury of said county further charge that before the finding of this indictment Jack Howard did resist a certain person, not an officer, to wit, G. W. Keating, in attempting to serve or execute a writ of arrest, called a 'warrant,' issued by one B. H. Screws, a justice of the peace in and for said county; the said Keating then and there acting in the matter of said arrest in obedience to the lawful command or summons of one W. B. Gilmer, a constable of said county, to aid said Gilmer in the execution of the said process; the said Jack Howard having at the time a knowledge of said command or summons." (3) "The grand jury of said county further charge that before the finding of this indictment Jack Howard did knowingly and willfully oppose or resist G. W. Keating, a special constable of said county, in attempting to serve or execute a writ of arrest, called a 'warrant,' issued by one B. H. Screws, a justice of the peace, in and for said county. Against the peace and dignity of the state of Alabama." To each count of this indictment the defendant demurred upon the following grounds: "First, it fails to charge for what offense the warrant or writ of arrest mentioned therein was issued; second, it fails to aver or charge when the writ of arrest or warrant mentioned therein issued; third, it fails to charge for what person or persons the writ of arrest mentioned in the indictment was issued." This demurrer was overruled, and the defendant duly excepted. Upon the trial of the cause the constable who held the warrant issued by the justice of the peace for

the arrest of the defendant testified to his attempting to arrest the defendant, and to the fact of the defendant's resistance to said arrest. This warrant is copied in the opinion. Upon the state offering to introduce said warrant in evidence, the defendant objected upon several grounds, the substance of which was that the warrant was void on its face, and charged no offense known to the law, and that the justice of the peace issuing it had no jurisdiction to do so. The court overruled this objection, and allowed the warrant to be introduced in evidence, and to this ruling the defendant duly excepted. These facts present the only questions reviewed by the court on the present appeal.

Hill & Hill, for appellant. Charles G. Brown, Atty. Gen., for the State.

TYSON, J. The indictment contained three counts. Two of them were framed under section 5463 of the Code, and the other under section 5466. Each count was demurred to. The assignments of the demurrer raised the question that the warrant or writ of arrest was not sufficiently described. The contention was insisted upon that the indictment should have averred the offense mentioned in the warrant or writ of arrest, its date of issuance, and the name of the person for whom issued. No such particularity is prescribed by the form for the indictment under section 5463. In fact, it is there expressly declared that describing the process generally is sufficient. Form 73, p. 334, Code. No form is found for indictments under section 5466. The count in the indictment under consideration follows the language of this section, and no more particularity in the description of the warrant or writ of arrest is required in an indictment under this section than is required under section 5463. There was no error in overruling the demurrer.

The warrant or writ of arrest introduced in evidence against the objection of defendant describes the offense as, "threatened a breach of peace." There were several objections urged against its introduction in evidence. Those worthy of consideration may be stated to be that it was void upon its face, in that it charged no offense known to the law, and that the justice of the peace issuing it had no jurisdiction to do so. Section 5162 of the Code authorizes the institution of proceedings before magistrates to keep the peace. The purpose of the statute is to prevent the commission of an offense against the person or property of another, and to this end a warrant may issue for the arrest of the person who has threatened or is about to commit an offense on the person or property of another; and, if there is just reason to fear the commission of such offense, the defendant must be required to give security to keep the peace, etc. Sections 5163, 5168. It is a preventive measure which the magistrate is authorized to set in motion to restrain the defendant from the commission of an offense against the

person or property of another, and not a proceeding to try the person charged with the commission of a criminal offense. To threaten an offense on the person or property of another is not an offense against the law for which a person may be punished. At most, as we have said, he may be restrained from so doing by proper proceedings, but not punished by fine or imprisonment. True, should the defendant fail to give the security required by the magistrate, it is the duty of the magistrate to commit him to jail until he enters into the undertaking with sufficient sureties for the time he is required to keep the peace,—not more than 12 nor less than 6 months. But this commitment to jail is predicated upon his failure or refusal to give the security required by the order of the magistrate, and not as the punishment for the commission of an offense.

The warrant issued for the arrest of the defendant in the case under consideration was in these words: "Complaint on oath having been made before me that the offense of threatening breach of peace has been committed in said county, and charging Jack Howard with the commission of said offense, you are therefore commanded to arrest said Jack Howard and bring him before me instantler." The gist of this warrant is that the defendant had committed the offense of threatening a breach of the peace. This is emphasized by the language following, "charging Jack Howard with the commission of said offense." Howard had committed no offense, as shown by the language in the warrant. Had the warrant read that he has threatened an offense on the person or property of another, he would have been apprised that he was required to appear for the purpose of having the question adjudged as to whether or not he would have to give security to keep the peace, and that he was not charged with a criminal offense. When this warrant was shown him or read to him, he doubtless believed, and had a right to believe,—nor was there a clear inference deducible from the language to the contrary,—that the attempt to arrest him was for an offense, for which he was to be punished, which designated offense was unknown to the law, and not punishable. The warrant was void upon its face, and the defendant was under no legal duty to submit to an arrest. *Noles v. State*, 24 Ala. 672. This renders it unnecessary to review the other questions raised in the record. The judgment of conviction must be annulled and reversed, and the cause remanded. Reversed and remanded.

(121 Ala. 516)

PARKER v. EUFAULA NAT. BANK.

(Supreme Court of Alabama. May 18, 1899.)
ADMINISTRATORS—PRESENTMENT OF CLAIMS
—PLEADING—VARIANCE.

1. Where an administrator delivers his intestate's pass book to a bank, to be balanced, which is done, showing a balance struck between depos-

its and checks, against the decedent, and it, with the checks and vouchers, is returned to the administrator, and the bank presents an unitemized but verified claim for the balance, receipt of which is acknowledged by the administrator as a claim against the estate, this is a sufficient presentment of the claim, under the statute of nonclaim.

2. Where a count in an action against an administrator is for a certain sum, and the claim filed exceeds the sum by the amount of interest due, the claim is not incompetent evidence, as not conforming to the complaint.

Appeal from circuit court, Barbour county; J. W. Foster, Judge.

Action by the Eufaula National Bank against O. H. Parker, administrator of the estate of S. A. Holt, deceased. There was a judgment for plaintiff, and defendant appeals. Affirmed.

This action was brought by the appellee, the Eufaula National Bank, against O. H. Parker, as administrator of S. A. Holt, deceased.

The complaint contained seven counts. In the first count the plaintiff claimed as due it from the estate of the intestate \$81.80, and each of the remaining six counts were common counts upon the different items respectively entering into the plaintiff's demand as declared on in the first count.

On the trial of the cause, it was shown that S. A. Holt died intestate in November, 1895; that in December, 1895, O. H. Parker, the defendant, was appointed administrator of the deceased's estate; that after his appointment as such administrator, he delivered to the plaintiff his intestate's bank pass book, with the request that it should be balanced; that said book was balanced in the manner in which such books are usually balanced, and it was shown that the defendant's intestate was due the plaintiff for overchecks the sum of \$81.80, which, with interest, made \$88.68; that after said book was thus balanced, it, together with the checks and vouchers, was turned over to Parker as administrator of the estate of S. A. Holt, deceased. It was further averred that on September 24, 1896, less than 18 months after the appointment of the defendant as administrator, the plaintiff presented to the defendant a demand against the estate of the intestate for \$88.68, in the shape of an account due by account rendered. This statement was sworn to by the president of the plaintiff, and the defendant acknowledged, by letter, its receipt. It was further shown that the account, as stated, was the total amount of the plaintiff's claim against the defendant's intestate's estate, with interest added, and that the same was unpaid. The defendant objected to the introduction in evidence of said account, upon the ground that it was illegal and incompetent, and that it did not correspond with any count of the plaintiff's complaint. The court overruled this objection, allowed the count to be introduced in evidence, and to this ruling the defendant duly excepted. This is the only question presented on the present appeal. From a judg-

ment in favor of the plaintiff the defendant appeals, and assigns as error the rulings of the court upon the evidence as stated above.

G. L. Comer, for appellant. S. H. Dent, Jr., for appellee.

HARALSON, J. By construction of the statute of nonclaim, the rule is settled in this state, that while in the presentment of the claim which may be made to the executor or administrator in person, technical accuracy or such certainty of description as is essential in pleading is not required to be observed, yet the statement must, of itself, inform the personal representative, on an inspection of it, of the nature, character and amount of the liability it imports, and must distinguish it with reasonable certainty from all similar claims. *Floyd v. Clayton*, 67 Ala. 265; *Bibb v. Mitchell*, 58 Ala. 657. If the presentation informs the administrator of the nature and amount of the demand, and that the claimant looks to him for payment, it is sufficient. *Pollard v. Scears' Adm'r*, 28 Ala. 484, 487. Unless otherwise required by statute, a balance struck in an account between the parties, may be presented as a claim against the estate of one of them without specifying the particular items. *In re Swain*, 67 Cal. 637, 8 Pac. 497. Especially would this be true where the administrator, as here, had in his hands his intestate's bank pass book, on which were entered all the debits by the bank to him for deposits he made in his lifetime, which book, after his death, his administrator took to the bank, and requested it to be balanced, and the same was balanced, the credit to the bank for all checks drawn by the intestate being entered on the credit side of the book, and a balance struck between the deposits and checks drawn, showing intestate's indebtedness for overchecks, and the book and checks were thereupon surrendered to the administrator. After this, in making out its claim against the intestate for presentation under the statute, the bank might very well, under those circumstances, have made the same out in the shape of an account rendered, all the items composing it having been furnished to the administrator in the balancing of the pass book, and appearing thereon. The administrator was thereby thoroughly informed, in what had been done at his request, of all the items composing the balance. This account thus made out was presented to and so marked by the administrator, within the time for presentation of claims, and he also by letter to plaintiff acknowledged the receipt of the account as a claim against his intestate's estate. The defendant objected to the introduction of this account, thus marked by the administrator, on the ground that it did not correspond with any count in plaintiff's complaint, which objection was overruled. There was no dispute as to the correctness of the account, for it was proved without conflict of evidence.

It reasonably enough appears, the objection

to the proof was without merit. The first count in the complaint is for \$81.80, to which, if interest, not included therein, be added,—as that item appears on the pass book, amounting to \$6.88,—we have the sum of \$88.68, the amount of plaintiff's demand as presented to the administrator for payment, as the balance owing by his intestate. Under this count the proof was clearly admissible. Besides this first count, there were six other common counts added, on the different items entering into plaintiff's demand as declared on in the first count. This was the only error complained of. Affirmed.

(121 Ala. 594)

NATIONAL GUARANTEE LOAN & TRUST CO. v. YEATMAN.

(Supreme Court of Alabama. May 18, 1899.)
BUILDING ASSOCIATIONS—SHAREHOLDERS—LOSSES—WITHDRAWALS—ULTRA VIRES.

1. A loan association certificate provided that any deficiency from losses, after application of profits thereto, "might" be charged to the shares. The by-laws, made a part of the contract, specifically stated how this should be done. *Held*, in an action by a shareholder for the amount due him, that proof of an attempt to charge such losses in a manner not provided by the by-laws was properly excluded.

2. Where a shareholder in a loan association asks for and is given a statement of his account on withdrawal, the by-laws providing for payment of the withdrawal value on 30 days' notice, which is given, and there are sufficient withdrawal funds to pay him, the undertaking to pay such value is unconditional, and the shareholder may recover it by action.

3. The question of ultra vires of a corporation will not be considered where it is not raised by the pleadings, and no objection is made to proof of the acts claimed to be ultra vires.

Appeal from city court of Birmingham; W. W. Wilkerson, Judge.

Action by John T. Yeatman against the National Guarantee Loan & Trust Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

This action was brought by the appellee, J. T. Yeatman, against the appellant, the National Guarantee Loan & Trust Company, and was instituted on June 21, 1897. The complaint contained three counts,—for money due by account, for money due by account stated, and for money had and received. The defendant pleaded the general issue and payment and two special pleas. In the third plea the defendant averred that the demand sued on arose out of the issuance to the plaintiff by the defendant, on February 9, 1893, of a certificate of stock in the defendant corporation for 20 shares of the value of \$50 each, by which certificate the complainant became and was a stockholder in the defendant, which was and is a corporation organized under the general laws of the state of Alabama providing for the incorporation of building and loan associations; that said plaintiff accepted the certificate of stock, and thereby became bound by the by-laws of the defendant; and that the certificate issued to

the plaintiff contained the following, among other provisions: "(6) Stock can only be transferred or withdrawn as provided by the by-laws." The eighth stipulation of the certificate, which was copied in said plea, provided that a member desiring to withdraw stock not matured shall give the company 30 days' notice in writing, and that shareholders who had borrowed money on their shares could not withdraw them until the loan was repaid, and, further, that the company "shall not be required to use in the payment of withdrawing stock, in any month, more than one-half as much money as is received from the monthly payments during the month." The other averments of said plea, including the ninth stipulation contained in the certificate of stock, are copied in the opinion. By the fourth plea, the defendant offered as a set-off to the plea of the plaintiff the sum of \$47.25 due by plaintiff to defendant, on February 3, 1897, on account of losses on real estate sustained by the defendant and by the shareholders of defendant. On the trial of the case, the plaintiff showed that on January 2, 1897, he asked the secretary of the defendant to give him a statement of account, showing the amount due the plaintiff from the defendant upon the withdrawal of his stock, and the plaintiff introduced in evidence a paper which he testified was given him by the defendant, showing that the defendant was due him, after allowing all credits and charges against his stock, the sum of \$120.09, and that thereupon he filed his stock for withdrawal on January 3, 1897. It was shown by the evidence that the plaintiff had subscribed for 20 shares of the stock of the par value of \$50, that this subscription was made on February 9, 1893, and that subsequent to the subscription he had borrowed \$150 on said stock. The by-laws of the defendant corporation were incorporated as a part of the defendant's subscription for stock, and there were introduced in evidence in this case those by-laws which were applicable to the present suit. Among them were the following: "Art. 23. The company shall not be required, without consent of the board of directors, to use more than half of the money received from monthly payments to the loan fund, in any one month, in the payment of withdrawing stock. Art. 24. Every six months, on the 20th of April and the 20th of October, or as soon thereafter as practicable, the board of directors shall declare such dividends as may accrue from the earnings of the loan fund, and such dividends must be divided and credited to the shares in good standing pro rata. If losses shall occur to the loan fund, such loss shall be paid out of the profits of said fund when the next semiannual dividend is declared, and, if the profits are not sufficient to pay such loss, then the balance shall be charged to the shares in good standing pro rata, and, if a share is withdrawn, the amount so charged shall be deducted from the amount due on such share." The sec-

retary of the defendant corporation testified that there had been a general financial depression for several years, and that the defendant had incurred considerable losses on real estate owing to being forced to buy real estate on which it had taken mortgages, and said real estate having depreciated in value; that these losses had never been adjusted nor separately ascertained at any regular meeting of the stockholders or directors, nor at the time provided for by the by-laws of the defendant corporation; that after the many notices of withdrawal, including the plaintiff's, had been given, to wit, some time in February, 1897, and before the expiration of 30 days from the time the plaintiff filed his notice of withdrawal, the directors of the defendant held a meeting, and appointed the witness and one Brown, another director, to ascertain and adjust the losses of the defendant; that he and said Brown did as they were instructed, and ascertained the losses, and placed the amount of such losses against each stockholder in proportion to his stock; and that the amount of such loss chargeable to the plaintiff was \$47.26, which adjustment and entry of charge against plaintiff were made after February 3, 1897. The plaintiff moved the court to exclude from the jury all the evidence in regard to or concerning the losses and their adjustment, and the charge of the pro rata share thereof against the plaintiff, on the ground that such losses had not been properly adjusted or ascertained as provided by the by-laws of the defendant, and on the further ground that such ascertainment and adjustment of the losses had not been done at the regular semiannual meeting of the defendant's directors, as required by the by-laws. The court granted this motion, excluded all of such evidence from the jury, and to this ruling of the court the defendant duly excepted. The evidence showed that, after the expiration of 30 days from the filing of the notice of withdrawal, the defendant had paid the plaintiff \$50 on his said stock, and that no other amount had been paid him. The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "If the jury believe the evidence in the cause, they must find for the defendant." (2) "If the jury believe from the evidence that the plaintiff was indebted to the defendant for a loan made by defendant to plaintiff on his stock, and that he had not paid this debt before withdrawal or before suit brought, then they must find for the defendant." (4) "That plaintiff, being a stockholder in defendant, must bear his proportionate share of all losses sustained by the company prior to his withdrawal, and, if the evidence satisfies the jury that defendant sustained losses prior to notice of withdrawal, then, if plaintiff recovers at all, such recovery must be only for the amount due subject to his proportionate share of such losses." (5) "If

the jury believe from the evidence that directors of defendant, by a resolution made and entered on the 24th day of February, 1897, instructed that the losses of the company be ascertained and charged against the stockholders by two persons appointed for that purpose, and such persons actually made an investigation, and ascertained that there were losses amounting to 17 per cent, and the proper proportion of such losses was charged to plaintiff before the 2d day of March, 1897, then the jury must allow the amount so found against the claim of plaintiff in any finding they may make in favor of plaintiff, if they should so find." (6) "If the jury believe from the evidence that plaintiff was a stockholder in defendant, then he was bound to bear any losses incurred by the defendant, in proportion to his stock in the company." (7) "The evidence shows that plaintiff was a stockholder in defendant, and, if the jury believe from the evidence that defendant suffered loss while plaintiff was a stockholder, plaintiff must bear his proportionate share of such loss." (8) "Defendant asks the court to charge the jury that the plaintiff as a stockholder in the defendant, in withdrawing, must bear his proportionate share of the losses sustained prior to notice of the withdrawal, and if the evidence shows to the satisfaction of the jury that, prior to the time of the notice of withdrawal, defendant sustained losses, then, if the plaintiff ought to recover at all, from that amount must be deducted his proportion of the losses sustained by defendant prior to notice of withdrawal." (9) "If the jury believe from the evidence that plaintiff had borrowed on a pledge of his stock of defendant one hundred and fifty dollars (\$150), and that he had not paid the debt, independent of the sums paid in by him as dues before suit brought, then the jury must find for the defendant." (10) "The court charges the jury that the undisputed evidence in the case being that the plaintiff borrowed of defendant \$150, pledging his stock in the defendant as security therefor, and that plaintiff did not, before he gave notice of his intent to withdraw his stock, repay the money he borrowed by a payment, independent of dues and assessments paid by him, the plaintiff cannot maintain this suit, and your verdict must be for the defendant." (11) "The court charges the jury that the burden is on the plaintiff to show by a preponderance of proof that, when he brought this suit, there was money in the treasury of defendant, which (under the by-law that defendant could be required to appropriate, to wit, not more than one-half of monthly payments to payment of withdrawals) could be appropriated to payment of plaintiff's claim, and, unless this is shown to your satisfaction by the evidence, the jury must find for defendant." There were verdict and judgment in favor of the plaintiff in the sum of \$80.10. The defendant moved the court to grant it a new trial upon the ground that the verdict of

the jury was contrary to the law and the evidence, and that the court erred in refusing to give the written charges requested by the defendant. This motion was overruled, and the defendant duly excepted. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Ward & Houghton, for appellant. Z. T. Rudolph, for appellee.

MCLELLAN, C. J. The third plea filed by the National Guarantee Loan & Trust Company, defendant in this action, avers, in respect of the losses chargeable against shares of stock, that the certificate of stock issued to plaintiff contained the following provision: "Ninth. Once in six months the profits arising from interest and premiums shall be apportioned among the shares in good standing. When the monthly dues paid on any share, together with the profits apportioned to such share, amount to fifty dollars, such share will be matured, and monthly payments shall cease. If losses occur, they shall be deducted from the undivided profits, so far as possible. Any deficiency may be charged to the shares in force." And defendant says it has no money which can be legally applied to the payment of said stock of plaintiff, because defendant says that, under the provisions of the contract contained in said certificate, and also in the by-laws of the defendant, there were losses incurred which were deducted from the undivided profits of plaintiff's shares and deficiency charged to such shares while in force, because of which fact defendant is not indebted to plaintiff as alleged in said complaint." The plea, by incorporation as to the stipulation in the certificate and by reference as to the by-laws, thus makes both a part of itself, and it follows that the losses chargeable against plaintiff's shares must be so chargeable under the stipulation and under the by-laws. And in the first place it is to be noted that under the stipulation contained in the certificate the surplus of losses, so to speak, remaining after the appropriation of undivided profits to that account, is not ipso facto charged to the shares, but the contract is that such surplus may be so charged. The company is authorized to so charge such losses, but it has to be done by some act or proceeding on the part of the corporation. And the by-laws, made a part of this plea, provide how this charging of losses against the stock must be done. We say must because the contract of the stockholder embraces the provisions of the by-laws, and he consents to such charge to be imposed only in the way specified in the by-laws. Unless he is so charged in respect of his stock, he is not charged at all. Now article 24 of the by-laws confessedly provides that the losses

shall be charged upon the shares of stock by the board of directors when dividends are declared on the 20th days of April and October in each year. Confessedly, also, the losses which are now sought to be charged on plaintiff's shares were not so charged by the board of directors at said times or at all, in fact; and the court properly excluded the testimony offered by defendant tending to show an abortive attempt to charge certain losses against plaintiff's shares. The common-law doctrine with reference to the payment of losses out of the capital of corporations and appropriating the balance only to shareholders on dissolution has been displaced in respect of this corporation, its capital, shares, and losses by the expressed stipulations of the parties. It has no operation in this case.

There was a positive agreement on the part of the defendant to pay the plaintiff the withdrawal value of his stock upon 30 days' notice of his purpose to withdraw. The evidence shows that this notice was given by the plaintiff more than 30 days before this suit was brought, and that when it was given—on January 3, 1897, the evidence largely preponderates to show—the defendant stated an account between it and the plaintiff showing the amount coming to the plaintiff. There was a provision of the by-laws that withdrawals were payable out of a certain fund, and that not more than one-half of such fund should be available for that purpose. Whether there was a sufficiency of the fund available to pay plaintiff the amount of the stated account was a controverted issue of fact, which was properly left to the jury by the court, and determined by them in favor of the plaintiff. So that at the time this suit was brought there was an unconditional undertaking, on the part of the defendant, to pay the plaintiff the amount due on the statement of account made between them. We do not hesitate to say that as to that amount, and hence for all other purposes of this suit, the plaintiff stood in the relation, not of stockholder, but of creditor to the defendant. It is argued here that the withdrawal feature of the contract between plaintiff and the defendant was ultra vires the defendant corporation. The plaintiff did not declare upon the contract. His complaint contains only the common counts. It is said in plea 3 that plaintiff's claim is based upon a contract as shareholder of the corporation, and so it is; but no plea asserts that the contract was ultra vires in any respect, and no objection was made to the proof made by the plaintiff of this contract or of its withdrawal stipulations. The question of ultra vires vel non, in other words, is not presented by this record, and we decline to consider it. All the rulings of the court below are in harmony with the foregoing views, and its judgment is affirmed. Affirmed.

(121 Ala. 131)

MONTGOMERY LIGHT CO. et al. v. LAHEY et al.(Supreme Court of Alabama. May 10, 1899.)
SUIT BY STOCKHOLDERS IN BEHALF OF CORPORATION—OWNERSHIP OF STOCK—LACHES.

1. A stockholder, to maintain a bill in his own name against the officers and directors of a corporation to recover misappropriated funds, must allege that he has demanded that the managing board of the corporation bring the suit, and that they have refused; that he then applied to the stockholders as a body to cause the suit to be brought, but without success; or facts must be alleged which would show that such applications would be refused if made, or be unavailing for the reason that the persons applied to are interested in preventing the action from being brought, or are the wrongdoers, or that an application cannot be made to the stockholders in time to be availing.

2. In a suit by a stockholder in his own name and on behalf of all stockholders who may become parties thereto to recover funds misappropriated by the officers of the corporation, it is not necessary that he should aver when and from whom he obtained his stock.

3. An officer cannot, when charged with misappropriation of corporate funds, plead laches on the part of the corporation or its stockholders, where they show a right to bring an action in their own name, for mere delay in filing the bill.

4. In an action by a stockholder in his own name to recover misappropriated corporate funds, he is entitled to an accounting as to matters not barred by the statute of limitations, though some of the matters may be barred, where the misappropriations have continued over a series of years, and down to the time of the commencement of the suit.

Appeal from city court of Montgomery; A. D. Sayre, Judge.

The bill in this case was filed by Lucy W. Lahey and Sallie G. W. Thorington against the Montgomery Light Company, F. M. Billing, I. Pollak, S. Roman, J. W. Dimmick, W. W. Coghill, J. O. Cheney, W. L. Pelzer, and Josiah Morris & Co. From a decree overruling demurrers to bill, defendants appeal. Reversed.

The bill avers that the complainants are the owners of an undivided two-thirds interest in and to 58 shares of the capital stock of the Montgomery Light Company, a corporation chartered and doing business under the general laws of Alabama; and then charges that the defendants, while acting as the directors and in other fiduciary capacities and relations for the Montgomery Light Company, joined in many and permitted the perpetration of many other wrongs to said company, which resulted in the waste and conversion of a large amount of the company's assets, and in the deterioration in value of the shares of the capital stock owned by the complainants. The specific statements and the various acts of wrongdoing and breaches of trust by the several defendants are set out in detail in the bill, and are alleged to have taken place at various times in the year 1889 up to the time of the filing of the bill, which was on January 7, 1898. After averring the doing of the several acts and the commission of the wrongs complained of, the bill then avers:

That "complainants further show that they have looked in vain to the board of directors of the Montgomery Light Company to right the grievous wrongs to their company above complained of. That over three weeks before the filing of this bill, complainants, through their attorney, addressed a communication to the president and directors of the Montgomery Light Company, calling to their attention, as the governing body of said company, the specific wrongs and collusive acts hereinabove set forth, and demanding that they proceed, in the name of the company, to right the same, and to call to account the negligent and wrongful acts, and the others who, so acting with them, had wrought these great injuries to said complainant's company. But said president and board of directors have wholly failed to institute proceedings, or to do anything to right said wrongs. That, owing to the failure caused by the aforesaid wrongful and grossly negligent acts of the directors of said company, acting with such other persons, to pay the interest due on said bonds for the past year and more, or to pay anything into said sinking fund, the Farmers' Loan & Trust Company, the trustee under said mortgage or deed of trust, has filed its bill in the circuit court of the United States for the Middle district of Alabama for a foreclosure of said mortgage or deed of trust on the grounds of said failure to pay the said installments of said annual interest due, as aforesaid, on said bonds. That no serious attempt has been made to resist said suit. That, without an objection on the part of the complainants' said company, a receiver of all the properties and assets of said company has been appointed by said court, and said receiver is the said F. M. Billing; and he has been required to give, and has only given, a bond for \$5,000 for the performance of his duties as such receiver. That the said court has decreed a sale of all the properties, privileges, and franchises of said company, which sale will take place in the near future. Complainants further say: That there have been a number of directors of complainants' said company during the time in which the wrongs herein mentioned were done. That repeatedly, as the exigency of the occasions might require, one or more of the directors would resign, either for the purpose of bringing some suit against the company, and obtaining judgment against it, or to temporarily let in other members; and, when the particular occasion was passed, would again be elected, and continue as such directors. That in May, 1894, the said Billing resigned, and remained out of the directory to consummate said wrongful acts, and make said wrongful and unjust charges against complainants' company, so as to lend an appearance of fairness and mere similitude to such a transaction, and within about four months after this injury was accomplished and entered on the company's books he again secured his election by such board of directors by the use of

said Pollak's (his debtor) holding the said majority of stock, which stock was, some time about the latter part of 1894, or perhaps later, turned over by said Pollak to said Billing, or said firm of Josiah Morris & Co., in satisfaction or part payment of said debt due by said Pollak. Complainants charge that by reason of the failure and refusal of said board of directors of said Montgomery Light Company to take any steps to right the many wrongs aforesaid inflicted on the said company by them and those with whom they acted in the company's name they and the said company are remediless in the premises unless aided by your honor's court." The prayer of the bill was to hold the said defendants liable for alleged misappropriation of alleged corporate funds, and for the other wrongs alleged to have been committed against the Montgomery Light Company. All of the defendants demurred to the bill. The court sustained the demurrers interposed by J. C. Cheney and J. W. Dimmick. The defendants F. M. Billing, Josiah Morris & Co., W. L. Pelzer, and S. Roman moved to dismiss the bill for the want of equity, and also demurred to the bill upon the following grounds: "(1) That the said bill of complaint is without equity. (2) That the said bill of complaint is vague and indefinite, in this: that it does not appear from the allegations thereof at what time, or from whom, the said complainants acquired the undivided two-thirds interest in and to the fifty-eight shares of the stock of the defendant corporation alleged to be owned by them. (3) That said bill of complaint is insufficient, in this: that it does not appear but that the said complainants acquired the two-thirds interest in the said fifty-eight shares of the stock of the defendant corporation alleged to be owned by them since the alleged wrongful acts complained of in said bill, and from some of the parties guilty of the said alleged wrongful acts. (4) Said bill of complaint is insufficient, in this: it does not appear but that the said complainants acquired their alleged interest in the shares of stock of the defendant corporation alleged to be owned by them after the commission of the alleged wrongful acts complained of in said bill of complaint, and with knowledge and notice of the same. (5) That it appears in and by the allegations of said bill of complaint that the said complainants are guilty of laches, which bars them of any remedy against these defendants. (6) It does not appear in and by the allegations of said bill of complaint when the said complainants acquired knowledge or information of the said alleged acts complained of in said bill of complaint. (7) It does not appear in and by the allegations of said bill of complaint but that suit would have been instituted in the name of the corporation to redress the alleged wrongs had proper application been made to the stockholders of the said company. (8) It does not appear by the allegations of the said complaint that the complainants ever

sought to have the said alleged wrongs redressed by the corporation, as required by law." On the submission of the cause upon these motions to dismiss, and upon the demurrers of these defendants, the chancellor overruled both the motions and the demurrers. From this decree the said defendants appeal, and assign the rendition thereof as error.

Watts, Troy & Caffey, for appellants. Gordon Macdonald, for appellee.

DOWDELL, J. The bill in this case is filed by complainants as minority stockholders in the Montgomery Light Company, a body corporate, in behalf of themselves and any other stockholders who may come in and join in the suit. The purpose of the bill is to hold certain directors and other parties dealing with them liable for alleged misappropriation of the corporate funds. Demurrers were interposed to the bill by the respondents Pollak, Roman, Pelzer, Billing, and Josiah Morris & Co.; also, motion to dismiss the bill for want of equity. From the decree of the court overruling the demurrers and motion this appeal is prosecuted by the above-named respondents.

The vital question in the case is raised in the seventh and eighth grounds of the respective demurrers of these defendants. Do the averments of the bill sufficiently show a right in the complainants to maintain the suit in their own names as shareholders? The theory of the bill is that complainants' company has been injured and damaged by the alleged wrongful acts of the defendants. The damage to the complainants is a resultant damage through the wrong and injury done the corporation in which they are shareholders. The wrongs complained of are alleged to have been committed in some instances by certain officers of the company, and in others by certain officers in conjunction with outside parties or strangers. Ordinarily,—and it is a well-established rule,—a corporation should bring its own suit against its officers for misconduct or negligence in the management of its business affairs, or for the recovery of its funds wrongfully converted or misapplied, or for its property illegally conveyed or delivered to a stranger. The rule also seems to be well established by former decisions of this court that, before the individual stockholder can begin suit in his own name for the wrongful conversion of corporate funds or misappropriation of the corporate assets by its officers, he must first make demand upon the managing officers or governing board of the corporation to correct the wrongs complained of, by legal proceedings or otherwise, and, meeting with failure or refusal in this regard, he must next seek redress through the stockholders as a body. Such demand or request must not be simulated, but an earnest and honest effort and endeavor on his part, through such governing board, to have the wrongs redressed, and this should be clearly shown by the aver-

ments of the bill and the proof to the satisfaction of the court. *Steiner v. Parsons*, 103 Ala. 215, 13 South. 771; *Manufacturing Co. v. Cox*, 68 Ala. 71; *Nathan v. Tompkins*, 82 Ala. 437, 2 South. 747; *Roman v. Woolfork*, 98 Ala. 219, 13 South. 212; *Planters' Line v. Waganer*, 71 Ala. 581; *Hawes v. Oakland*, 104 U. S. 450. There are, however, exceptional cases where this demand on the directors or governing board of the corporation is not required. If it is made clearly to appear that such demand would meet with refusal, or that the litigation following would necessarily be under the control of the persons opposed to its success, or where the persons constituting the governing board, or a majority of them, are themselves the wrongdoers, or under their control, and that any effort to obtain redress through the stockholders would be unavailing for want of time or other cause, in such cases the authorities sustain the doctrine that the minority shareholders may maintain the suit in their own name, without any previous demand or refusal on the directors or other governing officers. *Steiner v. Parsons*, *supra*, and other authorities cited above. Also see *Dodge v. Woolsey*, 18 How. 331; *Heath v. Railway Co.*, 8 Blatchf. 347, Fed. Cas. No. 6,306; *Crumlish v. Railroad Co.*, 28 W. Va. 633; *Peabody v. Flint*, 6 Allen, 52; *Brewer v. Boston Theater*, 104 Mass. 378. Do the averments in the present bill as to distinctness and clearness meet the requisite standard of pleading in such cases? The authorities are uniform that the averments in a bill filed by a shareholder in his own name to show his right to maintain the suit, whether in a case where a demand and refusal is alleged or where a demand is not required, must be clear and distinct, and shown to the satisfaction of the court. "Matters essential to complainant's right to relief must appear, not by inference, but by clear and unambiguous averment." *Railroad Co. v. Lancaster*, 62 Ala. 562; *Duckworth v. Duckworth's Adm'r*, 35 Ala. 70. While it is shown by the allegations of the bill that a demand was made upon the board of directors of the Montgomery Light Company by a communication addressed to them and the president of said company, calling their attention to the wrongs complained of, and asking that proceedings be taken to right said wrongs, and a failure on their part to act, yet it is nowhere averred that any effort was made to obtain redress through the stockholders. Nor are the averments sufficient to dispense with an application to the stockholders as a body before filing the bill as an individual stockholder. The bill avers that the respondent Pollak, complained of in the bill as one of the wrongdoers, at one time owned and controlled a majority of the stock in said light company, and that in 1894 he sold and transferred his stock to respondent Billing, who is also charged as a party to the wrongs complained of; but it is nowhere averred that said Billing, either at the time of the de-

mand made upon the board of directors or at the filing of the bill, owned or controlled a majority of the stock. For aught that appears from the averments of the bill, at the time of the filing of the bill a majority of the stock may have been owned by parties from whom relief could have been had upon proper application. The averments as to these matters are too vague and indefinite to confer upon the individual stockholder the right to bring suit in his own name.

It was not necessary for the complainants to aver when and from whom they obtained their stock in the defendant company. The decisions by the federal courts on this question are based on rule 94,—a rule of practice adopted by the United States supreme court. "The rule is not a general principle of law, applicable to pleadings in all the courts, and has never been applied to the courts of this state." *Parsons v. Joseph*, 92 Ala. 403, 8 South. 788.

It is contended by counsel for appellants that complainants' bill shows them to have been guilty of laches, and for that reason they are barred of any right of recovery. The wrongs complained of in the bill, according to its averments, extended through a series of years down to within a short time of the filing of the bill. Laches is defined to be such neglect or omission to assert a right as, taken in conjunction with lapse of time more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity. 12 Am. & Eng. Enc. Law, 533. The rule that the enforcement of a right may be barred by laches is an application of the maxim, "*Vigilantibus, non dormientibus, subvenient legis.*" *Id.* Mere delay in the assertion of a right, without more, does not in itself constitute laches. Long delay, however, is strong evidence of acquiescence; and, when parties have acted or acquired rights by reason of such delays, courts of equity will hold the party delaying barred of his right of action by such delay or acquiescence. Courts of equity also act by analogy; as, where in other cases, under similar conditions, a demand would be barred by some statute of limitation, a court of equity would apply the doctrine of laches on account of the failure to act within the period fixed by the statute as a bar, or, in the absence of a statute from which to draw an analogy, after long and unreasonable delay would treat the claim as a stale demand. The doctrine of laches, when not applied by analogy to some statute creating a bar, or upon the theory of a stale demand, must rest upon the doctrine of estoppel, where rights have arisen upon presumed acquiescence from unreasonable delay. Much, of course, depends upon the relation the respective parties to the suit bear to each other in the application of this doctrine. The defendant directors occupied a fiduciary relation towards the stockholders and the corporation of which they are directors. In the control of the assets and

funds of the corporation, and in the direction and management of its business affairs, they are trustees. *Bent v. Priest*, 86 Mo. 478; *Parker v. Nickerson*, 112 Mass. 195; *Butts v. Wood*, 38 Barb. 188; *Abbot v. Rubber Co.*, 38 Barb. 578; *Perry, Trusts*, § 207. When called upon to account by the corporation, or by the shareholder when he is authorized to maintain suit in his own name, the unfaithful director cannot cover his mala fides with the plea of laches on account of mere delay in calling him to account. As stated above, the wrongful acts complained of in the bill extended through a series of years down to within a short time of the filing of the bill; and even though, as to some of the acts complained of, having occurred more than six years prior to the commencement of the suit, and therefore barred by the statute, still this would not defeat the complainants in having an accounting on all matters not within the bar of the statute. The seventh and eighth grounds of assignments of the several demurrers interposed by the appellants to the bill we think were well taken, and should have been sustained. The decree of the city court is reversed, and the cause remanded.

(121 Ala. 613)

CITY OF EUFAULA v. SPEIGHT.

(Supreme Court of Alabama. May 17, 1899.)

APPEAL—BILL OF EXCEPTIONS—EVIDENCE—QUOTIENT VERDICT—NEW TRIAL—AFFIDAVITS.

1. If the bill of exceptions does not purport to set out all the evidence, the appellate court cannot find that the verdict was not supported by, or was contrary to, the evidence.

2. On appeal from a judgment for plaintiff in an action for personal injuries, defendant cannot insist that the evidence shows contributory negligence, where no issue was made thereon.

3. The fact that a verdict in an action for personal injuries is for \$720.80 does not show that the jury agreed that the quotient obtained by dividing the aggregate amounts which each juror thought plaintiff entitled to by 12 should be the verdict.

4. Where an affidavit by defendant's attorney and two others, not jurors, that the jury agreed to a quotient verdict is positive, and does not show the source of affiants' knowledge, the court may presume that the information came from some of the jurors, so that the affidavit cannot be considered on a motion for new trial; it being mere hearsay, and consideration of the statements of the jury being against public policy.

Appeal from circuit court, Barbour county; J. W. Foster, Judge.

Action by Emma E. Speight against the city of Eufaula. From a judgment entered on a verdict for plaintiff, defendant appeals. Affirmed.

This was an action brought by the appellee, Emma E. Speight, against the city of Eufaula, to recover damages for personal injuries sustained by her as the result of alleged defects in a street of the defendant corporation. There was verdict for the plaintiff, assessing her damages at \$720.80. Thereupon the defendant moved the court to set aside the verdict, and grant her a new trial, upon the fol-

lowing grounds: "(1) That the verdict is contrary to law; (2) that the verdict is contrary to the evidence; (3) that the verdict is excessive; (4) that the defendant has discovered additional and new testimony since the trial, which could not have been discovered by diligence prior to trial; (5) that said verdict was improperly reached." In support of this motion for a new trial, there was filed the affidavit of the defendant's attorney and two other persons, the substance of which is stated in the opinion. The motion for a new trial was overruled, and the defendant duly excepted. There was judgment in favor of the plaintiff in accordance with the verdict. From this judgment the defendant appeals, and assigns as error the overruling of the motion for a new trial.

P. B. McKenzie, for appellant. A. H. Merrill, for appellee.

MCCLELLAN, C. J. The bill of exceptions does not purport to set out all the evidence; hence we cannot find that the verdict was not supported by the evidence, or was contrary to the evidence. Moreover, the insistence in this connection is based on the supposed contributory negligence of the plaintiff. The defendant did not plead contributory negligence, and there was no such issue in the case.

The fifth ground of the motion for a new trial is, in effect, that the jury brought in a quotient verdict. In support of this there is the affidavit of defendant's attorney and two others, in terms direct and positive, that the jury agreed that each one of them should write down on a slip of paper the amount which he thought plaintiff was entitled to recover; that all the slips should be put in a hat together; that they should then be drawn out, and the amounts shown by them added together, and this aggregate should be divided by 12, the number of jurors; and that the result, this quotient, should be the verdict of the jury. This affidavit does not state that it is made upon information and belief, nor does it give the sources of the affiants' knowledge. There are only three possible ways for the affiants to have come by this knowledge. It is in the first place possible, but not probable, especially in view of the fact that one of the affiants was an attorney of the court, that these affiants were in the room with the jury. In the next place, it is in like manner possible, but improbable, that the affiants were eavesdroppers of the jury's deliberations and discussions. And, in the third place, it is highly probable that the affiants were informed by some members of the jury that the verdict was arrived at in the manner stated in the affidavit, and that upon that assurance, together with such indication of the fact as the verdict itself afforded, they felt justified in deposing as is set forth in the affidavit. The trial judge had a right to reach this conclusion: that the affidavit was based solely on the indication furnished by the verdict, together with the statement of jurors. Indeed,

it may well be that he knew as a fact that the affiants were not with the jury, and that they did not hear what transpired in the jury room, and, whether he so knew or not, he had a right to presume, in the absence of anything to the contrary, that these affiants were not guilty either of intruding themselves into the jury room or of eavesdropping the jury's deliberations. On this assumption he had nothing before him tending to show that the verdict was a quotient one, except the verdict itself; and the tendency of the verdict to establish that fact was not sufficiently strong to require or even to justify his finding it to exist. That the verdict should have been for \$720.80 in a case like this furnishes an indication that the amount was reached by some trick of figures, but the mode of calculation may not have been agreed on beforehand as the means of ascertaining and fixing the amount for which the verdict should be rendered, and this would therefore not authorize the court to conclude that such prior agreement had been made. Besides this, he had only the affidavit that a juror or some of the jurors, or, if you please, all of the jurors, had informed affiants, McKenzie and others, that the verdict was reached in the way they depose. This was, in the first place, the merest hearsay, and, in the second, had it been the testimony of the jurors themselves, public policy forbade the circuit judge to consider it. So it appears to us, without reference to the affidavits of plaintiff and her husband, which, indeed, amount to nothing; and we feel impelled to say, at the least, that error in overruling the motion for a new trial is not shown. Affirmed.

(121 Ala. 77)

EDWARDS et al. v. BENDER et al.

(Supreme Court of Alabama. May 10, 1899.)

VENDOR AND PURCHASER—NOTICE—DESCRIPTION—WILLS—CONSTRUCTION—POWER—PERSONS ENTITLED TO TAKE—GRANDCHILDREN—LIMITATIONS OF ACTIONS—REMAINDER-MEN.

1. One owning land on Bogue Chitto creek, in a certain county, devised it to another for life, with remainder to the latter's children; the will describing it merely as a certain number of acres on Bogue Chitto, in said county. The life tenant sold the land, the deed purporting to convey a fee simple. *Held*, that the description was sufficient to charge subsequent purchasers claiming under the life tenant with notice of the identity of the land and the terms of the devise.

2. A devise of land to one for life to be held by trustees, who are given power to dispose of it with the consent of the life tenant, vests merely a power, and not a title, in the trustee.

3. Code, § 1038, provides that a conveyance by a life tenant purporting to convey a greater interest than he possesses will not work a forfeiture, but convey only a life estate, and section 1034 makes all warranties of the life tenant void as against the remainder-men. One devised land for life, with remainder to the life tenant's children, trustees being appointed and empowered, with consent of the life tenant, to dispose of the land. The life tenant sold it, the deed purporting to convey the fee. *Held*, that the possession of the grantee and his successors prior to the death of the life tenant could not be estimated in the period necessary to raise a presumption, as

against the remainder-men, of a conveyance by the trustees, so as to bar a recovery by the former.

4. One clause of a will provided that, if any of testator's daughters, to whom land was devised, should die without issue, such share should be divided among the brothers and sisters. The will also devised land to the testator's wife, with remainder to two of his daughters, providing that, if either should die before their mother, leaving issue, they should represent and take as the mother would do. *Held*, that under a devise to a daughter for life, and then to her children, the issue of a deceased child of the daughter took the mother's share.

Appeal from city court of Selma; J. W. Mabry, Judge.

Ejectment by J. C. D. Bender and others against Joseph L. Edwards and another. From a judgment entered on a verdict for plaintiffs, defendants appeal. Affirmed.

This was a statutory action of ejectment, brought by the appellees against the appellants. John Smiley died testate October, 1849, seised of the lands in controversy in this suit. His will was duly probated in the special orphans' court of Dallas county, Ala., on December 8, 1849. The items and provisions of this will which are pertinent to the issues involved in the present suit are sufficiently stated in the opinion. After the death of John Smiley, the executors of his will delivered possession of this land to said Nancy C. Bender and her husband, John Bender. In 1852, Nancy C. Bender and her husband made a warranty deed to said land to Nathan H. Jackson. Jackson kept the land until his death, and in 1859 his interest therein was sold under the order of the orphans' court for division among his heirs, and was bought by J. E. Kennedy. The deeds of the Benders to Jackson and of the orphans' court, through its commissioners, purported to convey the whole tract comprising the 720 acres. In 1874, J. E. Kennedy and wife executed a warranty deed, conveying an undivided one-half interest of the land involved in this suit to John N. Walker. In 1879, Kennedy and wife executed a warranty deed conveying the other one-half undivided interest to said Walker. Said John N. Walker, in 1884, executed a warranty deed conveying an undivided one-half interest in said lands to said Joseph L. Edwards. Nancy C. Bender died November 28, 1897, leaving, surviving her, four children, J. C. D. Bender, J. S. Bender, S. G. Bender, and G. L. Bender, and one grandchild, Eula B. Jordan, who was the only child of a deceased daughter of said Nancy C. Bender. On December 11, 1897, the four children and one grandchild of Nancy C. Bender, deceased, brought the present action of ejectment against John N. Walker and Joseph L. Edwards, who were in possession of the lands at the time of the institution of the suit. The defendants pleaded the general issue and the statute of limitations of 10 and 20 years. The other facts of the case are sufficiently stated in the opinion. The court, at the request of the plaintiffs, gave the general affirmative charge in their behalf, and refused to

give, at the request of the defendants, the general affirmative charge requested by them. To each of these rulings the defendants separately and severally excepted. There were verdict and judgment for the plaintiffs. The defendants appeal, and assign as error the giving of the affirmative charge requested by the plaintiffs, and the refusal to give the affirmative charges requested by the defendants.

Satterfield & Young, for appellants. Mallory, McLeod & Mallory, for appellees.

SHARPE, J. The facts appearing in the record of this case are without conflict. The will of John Smiley, who died in 1849, among other things, contained a devise to his daughter Nancy C. Bender of lands described as "seven hundred and twenty acres of land lying and situate on Bogue Chitto, in the county of Dallas," the terms of the grant being, "to her sole and exclusive use during her natural life, and then to be equally divided between her children, to go, however, into the hands of the trustee hereinafter named at the time of my death." Devises are made to others of the testator's children, and a general direction given in the tenth item of the will as follows: "As it is possible that one or more of my daughters may die without issue, it is my will that on that event, be it before or after marriage, that the property herein bequeathed to such as may die shall immediately on the happening of such an event (unless it occur before my death) return to and be equally divided between their brothers and sisters, or their heirs, should either be dead, the portions received by each of my daughters to be theirs during their natural life, and after to their children, to be received and held by the trustee or trustees hereinafter appointed for the trusts and uses in the will mentioned." As to the property in which the testator's widow is given a life estate, it is provided that the remainder interest "be equally divided between Nancy C. Bender and Rebecca Adeline Smiley, and, should either die before their mother, leaving issue, in that case the issue to represent and take as the mother or mothers would do under this will." Trustees are appointed, and their powers depend in the following words: "(11) To carry out the objects of this will so far as the bequests therein are made to my daughters, I do hereby appoint Samuel Smiley and Dan Caldwell Smiley trustees for and on behalf of my said daughters (Margaret Ann Graham excepted), who are instructed and commanded by this will to take and receive the same, in trust, nevertheless, for my said daughters; the same to hold and keep forever in trust for their support and use, free from the control of all persons whatever. (12) With the consent of either of my daughters, power is hereby given to said trustees to dispose of the real estate herein bequeathed to my daughters in the several clauses of this will. (13) I do hereby constitute and appoint Samuel Smiley and Dan C. Smiley my execu-

tors." It appears from the testimony of John T. Bender that the land sued for is on Bogue Chitto creek, in Dallas county, Ala., and was owned by John Smiley at the time of his death; that he (the witness) was the husband of Nancy O. Bender; and as to the only dealings of themselves or by the trustees with this land he says: "I had nothing to do with the land until I sold it. When I took a notion to sell the land, it was turned over to me by the executors, and we sold it to Nathan Jackson. Nancy C. Bender had no interest in the land except what she acquired under the will of John Smiley." The sale to Jackson was in 1852, and a deed with the usual covenants of warranty was then made to him by Mrs. Bender and her husband, which purported to convey the title in fee simple. It is shown that Jackson's interest so acquired passed by mesne conveyances to defendants, and that he and those succeeding to his interest have successively and continuously been in the possession of the land claiming it as their own. Nancy C. Bender died in 1897. The plaintiffs are her children, excepting Eula B. Jordan, who is the child of her daughter, who died in 1872. Mere generality and indefiniteness of description will not avoid a conveyance. It may be aided by parol proof to identify its subject-matter, and it is only after failure of such proof that it can be pronounced void. *Baucum v. George*, 65 Ala. 259; *Clements v. Pearce*, 63 Ala. 280; *Pollard v. Maddox*, 28 Ala. 321; *Gullmartin v. Wood*, 76 Ala. 204; *Chambers v. Ringstaff*, 69 Ala. 140. Within this principle the testimony of John T. Bender tends to show with sufficient certainty the identity of the land sued for as part of that devised to Nancy C. Bender. The defendants have not attempted to set up title from a source other than through the deeds mentioned. The defendant Walker and his immediate grantor, Kennedy, testify that they claimed only through those deeds; and the defendant Edwards testifies that he took possession of his interest under Walker's bond for title, which was followed by Walker's deed. It thus appears that the will of John Smiley is the source of the defendants' as well as of the plaintiffs' claim of title, and they are charged with notice of its provisions affecting their title. A purchaser is bound in the exercise of proper diligence to examine the chain of title to the land he is about to purchase, and therefore the law imputes to him notice of the contents of the conveyances through which he claims so far as they affect the title. *Johnson v. Thweatt*, 18 Ala. 741. Notwithstanding its generality, the description of the land in the devise constituting Mrs. Bender's only source of title was sufficient to put those claiming through her on inquiry, and, constructively on notice, both of the identity of the land and of the terms of the devise. By the terms of the will the trustees were not devisees of the title, but only of a power. *Patton v. Crow*, 26 Ala. 426. Whether, under the power to be exercised with the consent of

Mrs. Bender, they could have sold a greater interest than she had, we need not inquire, since there is no proof of any attempted sale by them. In the absence of such proof, no presumption of such sale will be forced as against the remainder-men. The presumption of a conveyance, which is sometimes raised in favor of the rightfulness of long-continued possession and claim of ownership, is founded upon the further presumption that those having rights opposed to the claim so asserted would not have slept upon them. There can be no such presumption as against those who, for the want of a grievance, could not have sued for its redress. The statute of limitation and the doctrine of prescription apply only to those who could have the right to maintain a suit. 3 Brick. Dig. p. 618, § 10. Whatever its terms, the deed of Mrs. Bender could convey no greater interest than she had. It operated to pass only her life estate, and did not work its forfeiture. Code, § 1038; *Smith v. Cooper*, 59 Ala. 494. Its warranties were void as against those in remainder. Code, § 1034. The will alone fixed the termination of the life estate, and upon that event the beginning of the estate in remainder. Upon that event, and not before, arose the right of those entitled to the remainder to sue for the establishment or recovery of their interests. The holding of the life tenants was not adverse to them, and cannot be estimated in the period necessary to raise the presumption of a conveyance. *McMichael v. Craig*, 105 Ala. 382, 16 South. 833; *Gindrat v. Railway Co.*, 96 Ala. 162, 11 South. 372; *Pope's Lessee v. Pickett*, 65 Ala. 487; *Id.*, 74 Ala. 122; *Smith v. Cooper*, supra. It appears, therefore, that the devisees in remainder under this will are entitled to the land in controversy.

The children of Mrs. Bender are named as the class to take the property at her death, but, though not expressly stated, it was the evident intention of the testator that the issue of such of her children as might die before Mrs. Bender should take the share which such deceased child would have taken. Such intention is in accord with that expressed respecting the remainder interest in property given the testator's widow for life; and, as appears from the tenth clause, quoted, the failure of such issue is expressed as a condition precedent to any right of collateral kindred to such shares. In the construction of wills the word "children" may be extended to include grandchildren, when such intent appears from the whole instrument, or where otherwise the devise would fail. *Scott v. Nelson*, 3 Port. 452; *McGuire v. Westmoreland*, 36 Ala. 594; *Phinzy v. Foster*, 90 Ala. 262, 7 South. 836. Under this principle Eula B. Jordan takes in the land in controversy the share her mother would have taken had she lived until the falling in of the life estate, and was therefore entitled to recover jointly with the other plaintiffs. There is no error in the record, and the judgment of the city court will be affirmed.

(121 Ala. 636)

KARTER v. PECK et al.**PECK et al. v. KARTER.**

(Supreme Court of Alabama. May 16, 1899.)

APPEAL—REVIEW—ORDER FOR NEW TRIAL.

1. An order granting a new trial will not be reversed unless the evidence plainly and palpably supports the verdict.

2. Under Code, § 434, on appeal from an order granting a new trial errors occurring in the main trial can be considered only so far as they affect the propriety of the order when resorted to for that purpose.

3. Under the statute, an order granting a new trial is appealable.

4. The mover cannot appeal from an order granting a motion for a new trial.

Appeal from circuit court, Cullman county; H. C. Speake, Judge.

Action by E. H. Peck & Bro. against J. H. Karter. After a verdict and judgment for defendant, a new trial was granted. Both parties appeal, and each moves to dismiss the other's appeal. Plaintiffs' motion to dismiss is granted, defendant's is overruled, and the order is affirmed.

The only disputed question of fact was whether or not the defendant had sufficient facts brought to his knowledge which would put him on inquiry, which, if diligently pursued, would have given him notice of plaintiffs' mortgage lien on the cotton in question. The first and second assignments of error made by the appellant J. H. Karter were based upon the action of the trial court in overruling the demurrer interposed by the defendant to the plaintiffs' complaint. In the appeal by J. H. Karter the appellees E. H. Peck & Bro. moved the court to dismiss the appeal upon the ground that the judgment of the court granting a new trial would not sustain an appeal. E. H. Peck & Bro. also moved the court to strike the first and second assignments of error because the rulings on demurrer cannot be reviewed by this court on an appeal by the defendant Karter from a judgment granting a new trial.

J. B. Brown and W. T. L. Cofer, for plaintiffs E. H. Peck & Bro. Will G. Brown, for defendant.

SHARPE, J. E. H. Peck & Bro. sued J. H. Karter in a complaint declaring in case and trover for the value of cotton alleged to have been mortgaged by one McCall to plaintiffs, and afterwards converted or wrongfully disposed of by the defendant. Upon the issues of fact the verdict was in favor of the defendant, and judgment was rendered accordingly. Thereafter, upon plaintiffs' motion, a new trial was granted. From that order both parties have appealed, and the two appeals are here submitted together, with appellees' motion in each case to dismiss the appeal of the opposing party.

The motion for new trial contained as grounds both that the verdict was contrary to the evidence, and that the court erred in

the giving and refusal of charges. The record does not show upon what ground the motion was granted, and, if the order was proper under either ground, the trial court's action cannot be reversed. The rule adopted by this court for reviewing an order granting a new trial for insufficiency of the evidence to support the verdict was laid down in *Cobb v. Malone*, 92 Ala. 630, 9 South. 738, where it was said that such decisions "will not be reversed unless the evidence plainly and palpably supports the verdict." The rule was approved and followed in *White v. Blair*, 95 Ala. 147, 10 South. 257, and again in *Dillard v. Savage*, 98 Ala. 598, 13 South. 514, where the court applied it, and justified the application partly upon the ground that "the trial judge heard the testimony of the witnesses, observing their manner, and had better opportunities for pronouncing upon its weight and convincing power than we do." The same considerations are appropriate to the present case, and in view of them and of the rule stated we are unable to say, after examination of the evidence in this record, that the court erred in ordering a new trial. We refrain from comments upon the evidence, since they might tend to unduly influence the issues of fact upon another trial. This appeal brings up for revision only the order appealed from, and the power of this court does not extend to the correction of errors occurring in the main trial. Acts 1890-91, p. 779 (Code, § 434); *Lee v. Iron Co.*, 102 Ala. 628, 15 South. 270; *City of Mobile v. Murphree*, 96 Ala. 141, 11 South. 201; *Cobb v. Malone*, supra. Such errors, if they exist, could be considered only so far as they might affect the propriety of the order granting the new trial, and when resorted to for that purpose, which is not done in the present case. The first and second assignments of error in Karter's appeal are of that character, and the motion here submitted to strike them out will be granted. In *Cobb v. Malone*, supra, the appeal was by the party against whom the motion was ruled, and it was held that the statute referred to gave the right of appeal in such case by implication, though not by express terms. The statute under such construction is authority for Karter's appeal. The right of appeal exists only by statute, and ordinarily one who has obtained the judgment he sought is estopped to appeal therefrom. 2 Enc. Pl. & Prac. 157. It was not the intention of this statute to provide otherwise. To allow one who has invoked and obtained the order, and who cannot be injured by it, to prosecute an appeal therefrom, would be to accord him a privilege which could serve no purpose except for delay, since, as we have seen, it could not be used, as is here attempted, to review rulings had in the main trial. It follows that the motion submitted to dismiss the appeal of Karter will be overruled, and that the order he appeals from will be affirmed, and that the motion submitted to dismiss the appeal of E. H. Peck & Bro. will be granted.

(121 Ala. 480)

ESLAVA v. NEW YORK NATIONAL BUILDING & LOAN ASS'N.

(Supreme Court of Alabama. May 11, 1899.)

MORTGAGES — FORECLOSURE — PARTIES — DESCRIPTION — BUILDING AND LOAN ASSOCIATIONS — RIGHT TO DO BUSINESS — USURY.

1. Where foreclosure is sought by sale of the mortgaged premises, and the application of the proceeds to the debt secured, and it is not shown by the bill that the estate of the deceased mortgagor is not liable upon the bond so secured for any balance which the land may be insufficient to pay, or that such balance could not for any reason be collected from the assets of the estate, the personal representative of the estate is a necessary party.

2. Where the particular description in a mortgage of the mortgaged premises appears definite and certain, such description governs a general reference to the land as being in a certain city.

3. Remedies provided by the terms of a bond and mortgage for obtaining judgment thereon are not exclusive of the usual jurisdiction of chancery to foreclose the mortgage.

4. The failure of a foreign building and loan association to comply with that provision of Act Feb. 7, 1893, requiring all building and loan associations, whether foreign or domestic, to pay a license fee for doing business in this state, does not vitiate contracts arising in such business.

5. On a bill for foreclosure by a foreign building and loan association, the defense that such association has not complied with the law requiring a deposit of securities in this state, or the filing in this state of a certificate of such deposit elsewhere, cannot be made by demurrer, unless such bill affirmatively shows that the transaction as to which it seeks relief was had in this state.

6. The designation of a city, in the certificate filed by a foreign building and loan association with the secretary of state, is sufficiently definite as to the place of business, without naming a particular place in that city.

7. The fact that most of the provisions of the Code conferring powers upon building and loan associations are applicable only to those organized under the statutes of the state does not prohibit foreign associations from doing business in the state within their chartered powers, subject to the restrictions imposed by the laws of the state.

8. The defense of usury is personal, and one standing in the relation of a purchaser of mortgaged property cannot have the mortgage debt reduced for usury.

Appeal from chancery court, Mobile county; William H. Tayloe, Chancellor.

Action by the New York National Building & Loan Association against Jules Eslava to foreclose a mortgage. From a decree overruling a demurrer to the bill, defendant appeals. Reversed in part and affirmed in part.

The bill in this case was filed on March 18, 1889, by the appellee, the New York National Building & Loan Association, against the appellant, Jules Eslava. It was averred in the bill that the complainant was a building and loan association organized under the laws of the state of New York, and that, before the transactions afterwards mentioned in the bill, it had filed in the office of the secretary of state of Alabama an instrument in writing, under the seal of the corporation, and signed officially by the president and secretary thereof, designating Mobile, in Mobile county, as its known place of business, and Willis G. Clark as its authorized agent resid-

ing thereat. It was then averred: "That on or about March 20, 1895, Odyle Eslava, being then and there a stockholder in complainant, the New York National Building & Loan Association, did procure from complainant a loan or advancement of \$1,000, which loan or advancement was evidenced by a certain bond or obligation given to said association by said Odyle Eslava, a true copy of which bond or obligation is attached to this bill of complaint as a part hereof, initialed 'A.' That to secure the payment of the sums which said Odyle Eslava agreed to pay in and by said bond or obligation, and as a part of the same transaction, said Odyle Eslava did, on the same day, execute and deliver to said association a certain mortgage on real estate therein mentioned and described, situate in the county of Mobile and state of Alabama, a true copy of which mortgage is attached to this bill of complaint, as part thereof, initialed 'B.' Said mortgage was duly recorded on March 21, 1895, in Mortgage Book 80, N. S., page 293, of Mobile county records." That the loan was made in the form usual in the negotiation of loans by building and loan associations, and the mortgage contained the stipulations that are customary in such mortgages. The conditions of said bond and mortgage were averred at length, but it is unnecessary to set them out here at length. It was further averred that Odyle Eslava had died six months prior to the filing of the bill, and that prior to her death, and after the execution of the mortgage by her to complainant to secure the payment of said loan, said Odyle Eslava conveyed the real property included in said mortgage by deed to the defendant, Jules Eslava, and that Jules Eslava was, at the time of the filing of the bill, in possession thereof under said deed of conveyance from Odyle Eslava. It was then averred in the bill that default had been made in the payment of the monthly dues, interest, etc., and that, under the conditions of the bond and mortgage executed by Odyle Eslava to the complainant, the complainant had the right to declare the whole indebtedness due and payable. Jules Eslava was the only party defendant. The prayer of the bill was that the lands conveyed in said mortgage be sold for the payment of the amount due the complainant on the mortgage indebtedness. As originally framed, the complaint also prayed that a reasonable attorney's fee be paid to the complainant's solicitor for his services in the foreclosure suit, but by amendment this portion of the prayer was stricken out. The defendant demurred to the bill upon the following grounds: (1) Because on its face it claims more than legal interest; (2) to so much of said bill as claims interest and charges, because the amount so claimed is usurious; (3) because complainant is a non-resident corporation, and as such is not entitled to the privileges of the building and loan laws of this state; (4) because at the time of the contract sued on, there was no law authorizing a nonresident corporation to carry on in

this state the business of a building and loan association; (5) because it does not bring itself within the statutory terms upon which the nonresident corporation can sue in this state; (6) because no personal representative of Odyle Eslava has been made a party defendant; (7) because it does not allege that the fees required by the state were paid by the complainant for doing business in this state; (8) because it does not allege any power in the complainant to make the loan or advances named in it. On the submission of the cause upon these demurrers, the chancellor rendered a decree overruling them. From this decree the defendant appeals, and assigns the rendition thereof as error.

Peter J. Hamilton, for appellant. Richard W. Stoutz, for appellee.

SHARPE, J. 1. That provision of the act of February 7, 1893, requiring all building and loan associations, whether foreign or domestic, to pay a license fee for doing business in this state, is not intended for the protection of individual interests, or the enforcement of any principle of public policy. Its purpose was merely to assist the state's revenue, and, though noncompliance is visited with a penalty, it does not vitiate contracts arising in such business.

2. Whether such effect would follow from noncompliance with that part of the same act requiring a deposit of securities in this state, or the filing here of a certificate of such deposits elsewhere, we think it unnecessary to consider. Unless the bill affirmatively shows that the transaction as to which it seeks relief was had in this state, such defense, if available, must be made by plea or answer. *Christian v. Mortgage Co.*, 89 Ala. 198, 7 South. 427; *Farrior v. Security Co.*, 88 Ala. 275, 7 South. 200; *Sullivan v. Vernon* (Ala.) 25 South. 600. Nothing appears in this bill indicating the place of the transaction, unless by inference from the exhibits showing the bond to be payable in New York, and the certificate to the mortgage showing the acknowledgment to have been taken in Mobile county, Ala. The signature being attested, the mortgage may have been completely executed out of the state, and before acknowledgment, though on the same day. In this respect the mortgage is unlike that considered in *Sullivan v. Vernon*, supra, which was held to have been executed in Alabama. As to the constitutional and statutory requirements of foreign corporations doing business in this state, respecting the designation of a known place of business and of an authorized agent thereat, the bill, as amended, shows a compliance. The designation in the certificate filed with the secretary of state of the city of Mobile was sufficiently definite as to the place of business, without naming a particular place in that city. *McLeod v. Mortgage Co.*, 100 Ala. 496, 14 South. 409. None of those provisions, constitutional or statutory, apply to the bringing and prosecution of a suit.

Such acts do not constitute the "doing of business," within the meaning of the law. *McCall v. Mortgage Co.*, 99 Ala. 427, 12 South. 806.

3. While most of the general provisions of the Code conferring powers upon building and loan associations are applicable only to those organized under our statutes, there is no law prohibiting foreign associations of that character to do business here within their chartered powers, subject to the restrictions imposed by law, but the right to do so is recognized by our laws, and by decisions of this court. *Falls v. Building Co.*, 97 Ala. 417, 13 South. 25. .

4. In this state it has long been settled that the defense of usury is personal to those bound upon the borrowing contract, and cannot be availed of by persons other than the debtor, his legal representative, or, in some cases affecting the title of land descended, by his heir at law. *Cook v. Dyer*, 8 Ala. 644; *Fenno v. Sayre*, Id. 458; *Harbison v. Harrell*, 19 Ala. 753; *Gray's Ex'r v. Brown*, 22 Ala. 262; *Cain v. Gimon*, 36 Ala. 168; *Baskins v. Calhoun*, 45 Ala. 582; *McGuire v. Van Pelt*, 55 Ala. 344; *Griell v. Lehman*, 59 Ala. 419; *Butts v. Broughton*, 72 Ala. 294; *Moses v. Association*, 100 Ala. 465, 14 South. 412. That one standing like the defendant in this case, in the relation of a purchaser of mortgaged property, cannot have the mortgage debt reduced for usury, was expressly ruled in the cases of *Harbison v. Harrell*, *Cain v. Gimon*, and *McGuire v. Van Pelt*, supra.

5. Any recourse to the remedies attempted to be provided by the terms of the bond and mortgage for obtaining judgment thereon was prevented by the death of the mortgagor; but, apart from that fact, those remedies were not exclusive of the usual jurisdiction of chancery to foreclose the mortgage. It has been often held, in the analogous case where a power to sell the mortgaged premises for the payment of the debt secured was contained in the mortgage, that such power does not prejudice the remedy in equity. *Vaughan v. Marable*, 64 Ala. 60; *McGowan v. Bank*, 7 Ala. 823; *Carradine v. O'Connor*, 21 Ala. 573.

6. The particular description in the mortgage of the mortgaged premises appears definite and certain, and governs the general reference to the land as being in the city of Mobile, so that such general reference can be treated as surplusage.

7. The stipulation here for attorney's fees is not for collecting generally the debt secured, but is only for its inclusion in such judgment as might be obtained in the particular mode, and in the exercise of the particular power, expressed in the bond and mortgage, as compensation for collecting in the manner there prescribed. The allowance of such fees, as a part of the secured debt, is dependent upon the agreement of the contracting parties, within the terms of which the claim for fees must fall. *Thomas v. Jones*, 84 Ala. 302, 4 South. 270; *Bedell v. Security*

Co., 91 Ala. 325, 8 South. 494; *Mortgage Co. v. McCall*, 96 Ala. 200, 11 South. 288. The claim for counsel fees however appears to have been abandoned, since the amendment to the bill struck out the prayer for their allowance.

8. The foreclosure is sought by sale of the mortgaged premises, and the application of the proceeds to the debt secured, and it is not shown by the bill that the estate of the deceased mortgagor is not liable upon the bond so secured for any balance which the land may be insufficient to pay, or that such balance could not for any reason be collected from the assets of the estate. In the absence of averments to negative such liability, it appears that the personal representative of that estate is a necessary party to the suit, that there may be an accounting with him as to the amount of the mortgage debt, to the end that the estate may be availed of any defenses which may exist either to the principal or the interest thereon. *Dooley v. Villalonga*, 61 Ala. 129; *Wilkins v. Wilkins*, 4 Porter, 245. The necessity for such party is identical with that existing in similar suits, where the mortgagor dies without conveying his interest in the mortgaged premises. Such were the cases of *McCall v. McCurdy*, 69 Ala. 65, and *Boyle v. Williams*, 72 Ala. 351, wherein the same rule was enforced.

In the decree of the chancery court there was error alone in not sustaining the demurrer to the whole bill, for the absence, as a party thereto, of the personal representative of the deceased mortgagor. The decree thereon will be reversed, and a decree will be here rendered, sustaining the demurrer, upon the ground stated, to the whole bill. In all things else the decree of the chancery court will be affirmed. Appellee will pay the costs accruing upon the appeal in this court and in the chancery court. Reversed and rendered in part, and in part affirmed.

(121 Ala. 365)

STATE ex rel. CUMMINGS v. STILES, Judge.
(Supreme Court of Alabama. May 18, 1899.)

INTOXICATING LIQUORS—REPEAL OF STATUTE.

1. Acts 1872-73, p. 173, prohibiting the sale of intoxicating liquors within two miles of any coal-mining grounds in the county of Jefferson and other named counties, and Acts 1880-81, p. 397, prohibiting such sales within three miles of Pratt Mines school house, Jefferson county, were not repealed by the charter of Ensley City, giving power to such municipality to regulate the retailing of intoxicating liquors within its corporate limits, nor by Act Feb. 16, 1889, prohibiting the sale of intoxicating liquors in Jefferson county, except in incorporated towns and cities having police regulations day and night.

2. Such acts were not repealed by Acts 1892-93, p. 15, declaring that it shall be lawful for the distiller or owner of any lawfully registered distillery, after first obtaining such license as is required of wholesale dealers, to sell spirituous or malt liquors made by them at wholesale at the place of such distillery, in precinct 37 in Jefferson county, though a portion of precinct 37 of Jefferson county is within the radius of three miles of Pratt Mines school house.

Appeal from circuit court, Jefferson county; A. A. Coleman, Judge.

Petition by W. H. Cummings to the circuit court of Jefferson county for mandamus to compel J. P. Stiles, judge of probate of Jefferson county, to issue a license for the sale of intoxicating liquors in the town of Ensley. Writ refused, and petitioner appeals. Affirmed.

W. H. Cummings applied to J. P. Stiles, judge of probate of Jefferson county, for a license to sell at retail spirituous, vinous and malt liquors in the town of Ensley, Jefferson county. The judge refused to issue the license, and thereupon Cummings filed his petition for a writ of mandamus to compel said Stiles to issue said license. On the hearing of the petition for mandamus, it was shown that the town of Ensley was duly incorporated under the general laws of the state of Alabama (Code 1896, §§ 2936-2967), on February 6, 1899; that at the time of making the application for the license of the probate judge, said town had police regulations both by day and night, and there were continuously on duty from one to three officers, and that said town had more than 500 and less than 1,000 inhabitants. It was further shown that W. H. Cummings, the petitioner, was a resident of the town of Ensley, over 21 years of age, of good moral character, and in all respects a proper person to be licensed as a retailer of vinous, spirituous and malt liquors. That on March 14, 1899, when he applied to the respondent as the judge of the probate court of Jefferson county, Ala., for a license to retail spirituous, vinous or malt liquors, he produced with said application, a recommendation in writing signed by 20 respectable householders and freeholders residing within the corporate limits of the town of Ensley, stating the facts as required by statute, looking to the granting of a license, and that said Cummings, as petitioner, filed the oath required by law. It was further shown that the territory embraced in the corporate limits of the said town of Ensley and in which the petitioner proposed to sell and retail spirituous, vinous and malt liquors was within three miles of the Pratt Mines school house, as the same was situated and located on February 11, 1881, and that said territory embraced within said corporate limits was within two miles of slopes Nos. 3 and 6 of the property of the Tennessee Coal, Iron & Railway Company, where coal was being mined. Upon the hearing of the petition and the evidence, the judge of the circuit court denied the prayer of the petition and ordered the petition dismissed. From this judgment the petitioner appeals, and assigns the rendition thereof as error.

Gregg & Thornton and Charles B. Powell, for appellant. F. E. Blackburn, for appellee.

HARALSON, J. By act approved February 11, 1881 (Acts 1880-81, p. 397), the sale,

giving away or otherwise disposing of any spirituous, vinous, or malt liquors, or intoxicating bitters, etc., was prohibited under penalty within three miles of Pratt Mines school house in Jefferson county.

On March 7, 1873 (Acts 1872-73, p. 173), a similar act was passed prohibiting such sales within two miles of any coaling grounds in the county of Jefferson and other named counties.

On the 6th February, 1899, Ensley City was incorporated under the general laws of the state for incorporating towns of not less than 100 nor more than 3,000 inhabitants. Code, §§ 2937-2967. Among the enumeration of the powers of municipalities thus incorporated, appears the power, "to license, tax, regulate and restrain * * * the retailing of spirituous, vinous and malt liquors within the corporate limits." That part of Ensley City within which the petitioner in this case proposed to obtain a license to sell and retail spirituous, vinous or malt liquors, it was admitted is within three miles of the Pratt Mines school house as located on the 11th February, 1881, and within two miles of slopes Nos. 3 and 6 of the property of the Tennessee Coal, Iron & Railway Company, where coal is, and was being mined at the time of filing said petition.

On the 16th February, 1889, an act was approved, the first section of which provided, "that after the 31st day of December, 1889, it shall be unlawful for any person to sell, give away, or otherwise dispose of, any spirituous, vinous or malt liquors, intoxicating bitters or cordials, or fruits preserved in alcoholic liquors in Jefferson, Walker, Talladega, Autauga and Fayette counties, except incorporated towns and cities having police regulations both day and night."

The first section of the act was afterwards, on the 8th December, 1892, amended by adding a proviso, "that it shall be lawful for the distiller or owner of any lawfully registered distillery to sell any kind of spirituous or malt liquors made or distilled by them, at wholesale at the place of such distillery, in precinct (37) thirty-seven, in the county of Jefferson, provided further, that the said owner or distiller shall first obtain such license as is required of wholesale dealers under the laws of the state of Alabama." Acts 1892-93, p. 15.

The petitioner proposed to show in evidence that a considerable portion of precinct 37 of Jefferson county was within the radius of three miles of Pratt Mines school house, which evidence, against the objection of respondent that it was illegal, immaterial and incompetent, not shedding any light or having any bearing on the question at issue, was admitted. We fail to discover what bearing that matter had upon the trial of the petition. The evidence related alone to the sale of whisky by wholesale, under the conditions specified, and not to other spirituous, or vinous or malt liquors, and even if it were ad-

mitted, which is not done, that in this respect, the later act repealed said prohibitory acts of 1873 and 1881, as to the wholesaling of whisky under license, at the distillery, when distilled within said prohibited district, it would not follow and cannot be allowed that it repealed those acts as to the retailing or giving away of the other liquors named in those statutes within said prohibited territory. The prohibitive force and operation of the enactments as to all else, except the sale of whisky under the conditions specified, would, even if repealed as to the sale of such whisky, stand unaffected by the later enactment. The contention of the petitioner that said amendatory act of 1892-93, under any possible construction, repealed said acts of 1873 and 1881 in their entirety, may, therefore, be allowed to pass from further consideration.

The only remaining question is, whether the said acts of 1873 and 1881 have been repealed by the charter of Ensley City or by the said act of 16th February, 1889, prohibiting the sale of liquors within that territory, "except (in) incorporated towns and cities having police regulations both day and night," it having been admitted that Ensley City had such police regulations. Both these questions we think were practically settled in the case of *Love v. Porter*, 93 Ala. 384, 9 South. 585. These prohibitory laws, if not repealed by some subsequent act of the legislature, were in existence as laws, at the date of the incorporation of Ensley City. Its incorporation under general statutes for the purpose, was subject to the existing laws of the state. The first subdivision of section 2950 of the Code in respect to the powers of such corporate authorities is, "The corporate authorities of the town have the following powers, To pass such by-laws and ordinances as may be necessary to enforce the powers in this article to them granted, and for their own government, not contrary to law." When, therefore, in the third subdivision of powers of such incorporated towns found enumerated under said section 2950, it is provided, that the corporate authorities may license, tax and regulate, among other things, the retailing of spirituous, vinous and malt liquors within the corporate limits, it was not intended that the corporate authorities might by ordinance adopted repeal special enactments of the legislature on the same subject. "The only power that could repeal or suspend the law, was the one by which it was enacted—the general assembly, in which alone is vested the constitutional authority to make and unmake laws." *Prestwood v. State*, 88 Ala. 235, 7 South. 259. Moreover, the only ground upon which a repeal can be rested is by implication, not favored in law, and which does not arise in this instance. There is a field of operation for both the special law and the exercise of municipal authority found in the construction which confines the exercise of the latter power to such

time as the legislature may remove the inhibition of the liquor traffic in the prohibited districts, found embodied in said acts of 1873 and 1881. *Love v. Porter*, supra.

The effect which said act of 1889 in forbidding the liquor traffic in Jefferson and other counties, "except in incorporated towns and cities having police regulations both day and night," had upon the said act of 1881, was considered by this court in the case last above cited, and was held not to be a repeal of said former enactment. We need not repeat here what was so fully and satisfactorily said in that case. As to the result of the investigation then had, it was there announced,—"Our conclusion is, that the act of February 11, 1881, is in full force over all that territory lying within three miles of the site where the Pratt Mines school house stood at the date of its passage." The reasons for upholding that enactment prevail to preserve, also, the said act of 1873.

Affirmed.

(21 Ala. 1)

LEWIS v. STATE.

(Supreme Court of Alabama. May 17, 1899.)

FORMER JEOPARDY—INSTRUCTIONS—OBJECTION TO QUESTION.

1. Where a jurymen was directed by the court to leave the jury box, and he stood aside in the court room under the eye and in the presence of the court, but immediately, on defendant's objection to his being taken off the jury, he was directed to resume his place on the jury, there is no discharge of the jury, and such facts cannot be pleaded as former jeopardy.

2. Defendant cannot plead as former jeopardy the fact that, a juror making known that he had been a juror on a former trial, the jury was discharged, and a venire de novo ordered, such action being at the instance of defendant.

3. A requested instruction that defendant is charged with the offense of an assault with intent to murder, and, "unless you are satisfied of his guilt to a moral certainty, you cannot convict him," is calculated to mislead to the conclusion that the jury should either find him guilty of assault with intent to murder or acquit him, when they might find him guilty of an assault and battery.

4. A requested instruction that unless each and every one of the jury is satisfied of defendant's guilt to a moral certainty, and beyond all reasonable doubt, they cannot convict him, and if they do convict him without each and every one of them being so satisfied, then they violate their oaths, is calculated to impress the mind of a juror with the idea that his verdict must be reached and adhered to without deliberation with his fellow jurors, and to forbid a juror to favor a verdict of guilty because another juror may have a reasonable doubt.

5. Objection to question should be made before it is answered.

Appeal from city court of Montgomery; A. D. Sayre, Judge.

Lorenzo Lewis was indicted and tried for an assault with intent to murder, was convicted of an assault and battery, and fined \$150, and appeals. Affirmed.

Upon the trial of the cause in the city court in March, 1899, the defendant filed two pleas of former jeopardy. In the first plea the de-

fendant averred: That he had once been in jeopardy for the offense now charged against him, in that on March 15, 1890, in the city court of Montgomery, the defendant had been arraigned in due form under the identical indictment in this case for the same offense, and, after pleading not guilty, he was placed upon his trial. That after the trial was begun, and witnesses were examined before the court and jury, and during the course of the examination of one of said witnesses, one W. L. Chambless, one of the jurymen before whom the defendant was being tried, announced to the court, in the presence of the other eleven jurymen, that he was one of the jury who tried the defendant at the October term of the city court for the specific offense for which the defendant was being tried under the same indictment. "That the court then stated to the jurymen that he could stand aside, and instructed the sheriff to bring another jurymen around. The jurymen retired from his seat, and entirely from the jury box, into the court room, among the bystanders. To this the defendant excepted, and the court thereupon told the jurymen Chambless to take his seat, which the jurymen did accordingly. The defendant then filed his said exception, and moved the court to excuse the jurymen. The court refused to do this, and the defendant excepted." That the defendant then moved the court to discharge the jury, which the court refused to do; but further on, during the same trial, another one of said jurymen, named Meriwether, announced that he had been upon the jury at the October term of said city court that tried the defendant for said offense. That thereupon the defendant moved the court to discharge the jury in its entirety, which motion the court granted, and the jury was accordingly discharged. The second plea, after averring that on March 15, 1890, the defendant had been arraigned and put upon his trial in the city court of Montgomery for the same offense set out in said indictment, set out the said indictment at length, and then averred that, after pleading not guilty, and after one witness was examined, and another was being examined before the court and jury, one of the jurymen, named Chambless, stated to the court "that he had, at a previous term of the court, been a member of the jury which had tried this defendant for this same offense, and that thereupon the court, of its own motion, without the request of the defendant, excused said jurymen, and told him to stand aside, and the jurymen Chambless thereupon retired entirely from the jury box into the court room, among the bystanders," and that thereupon the court instructed the sheriff to bring around another jurymen. To the first plea the state demurred upon the ground that said plea shows on its face that the defendant had not been in jeopardy, because it shows that the final action of the court was taken on the defendant's own motion; and, further, because said plea shows on its face that the defendant had not

been in legal jeopardy, and is no answer to this indictment. This demurrer was sustained. To the second plea of the defendant the state filed a replication, in which were alleged the facts substantially as stated in the first plea, showing that the order of the court in ordering Jurymen Chambless to stand aside was taken on motion of the defendant himself; and it was further averred in said replication that, upon another jurymen making known the fact that he had served upon the jury at a former term of the court on the trial of the defendant under the same indictment, the court, upon motion of the defendant, discharged the jury in its entirety. To this replication the defendant demurred upon the grounds that it was no answer to the plea, and that it showed on its face that the defendant had been in jeopardy, and that the jury had been wrongfully discharged. On the trial of the issue as to whether or not the defendant had been placed in former jeopardy, it was admitted by the state and the defendant that the facts alleged in the plea and replication were true, and thereupon the court gave the general affirmative charge in favor of the state upon said issue. To the giving of this charge the defendant duly excepted, and also excepted to the court's refusal to give the general affirmative charge in his favor upon said issue. The state introduced as a witness one Isaac Holland, who was the person upon whom the indictment alleged the assault had been committed. Said witness was asked by the solicitor the following question: "Did the defendant ever assault you?" To this question the witness answered that the defendant did assault him. The bill of exceptions recites that thereupon "the defendant, immediately after the witness answered the question, objected to the question, upon the grounds (1) that it called for the conclusion of the witness; and (2) because it called for immaterial, illegal, and incompetent evidence." The court overruled the objection, and the defendant duly excepted. The defendant then moved to exclude from the jury the answer of the witness upon the same grounds, and duly excepted to the court's overruling his said motion. This witness then testified that while he was standing on the sidewalk the defendant drove up to him in a wagon, and, jumping from the wagon, engaged in a heated discussion with the defendant, and then struck him upon the head and in the side with a stick. Several witnesses introduced for the state testified to substantially the same facts. The state proved the time and venue of the offense as alleged in the indictment. The defendant, as a witness in his own behalf, testified that during a conversation with the witness Holland the latter pulled from his pocket a razor, and thereupon the defendant struck him with a stick. This was substantially all the evidence. The defendant requested the court to give to the jury the general affirmative charge in his behalf, and also the charge

which is copied in the opinion. The court refused to give each of these charges, and the defendant separately excepted to the court's refusal to give each of them as asked.

Hill & Hill, for appellant. Charles G. Brown, Atty. Gen., for the State.

McCLELLAN, C. J. Construing the first plea of former jeopardy most strongly against the defendant, it shows only that the jurymen Chambless was directed by the court to leave the jury box; that he thereupon stood aside in the court room, under the eye and in the presence of the court; that immediately thereupon the defendant objected to his being taken off the jury, and the court thereupon immediately directed and caused him to resume his place among the jurors and as a member of the jury. Clearly, upon this state of facts, this juror was never discharged from the jury, and the jury, as a body, was not discharged, or its organized identity impeached. And when, upon another juror making known to the court that he, too, as well as Chambless, had been a juror on a former trial of this case, the jury was discharged, and a venire de novo ordered, the action was taken at the instance of the defendant, and it will not avail him now. *Kendall v. State*, 65 Ala. 492; *Morrisette v. State*, 77 Ala. 71. The rulings of the court in sustaining a demurrer to the first plea, in overruling the demurrer to the replication to the second plea, and in giving the affirmative charge for the state on the issue of jeopardy vel non as presented by the second plea and the replication thereto—the facts being admitted—were therefore free from error.

A tendency of the evidence went strongly to prove the averments of the indictment, at least to the extent of showing an assault and battery. The time and venue were proved. Of course, therefore, defendant was not entitled to the affirmative charge.

The defendant requested the court to give the following charge: "The defendant is charged with the offense of an assault with intent to murder, and unless each and every one of the jury is satisfied of his guilt to a moral certainty and beyond all reasonable doubt, then you cannot convict this defendant; and if you do convict this defendant without each and every one of you being so satisfied, then you violate your oaths, and disregard the instructions of the court." This charge was properly refused. One vice infecting it is pointed out in the case of *Cunningham v. State*, 117 Ala. 59, 66, 67, 23 South. 693: "It is calculated to impress the mind of a juror with the idea that his verdict must be reached and adhered to without the aid of that consideration and deliberation with his fellow jurors which the law intends shall take place in the jury room." Another infirmity is the tendency of the charge to mislead the jury to the conclusion that they should either find the defendant guilty of an

assault with intent to murder or acquit him, when it was open to them to find him guilty of an assault and battery. And again, it tends to make every juror the keeper of every other juror's conscience, and to forbid each juror to favor a verdict of guilt because forsooth another juror may have a reasonable doubt.

Defendant was palpably not prejudiced by the question to the person alleged to have been assaulted, "Did the defendant ever assault you?" Moreover, his objection to the question was not seasonable; it should have been made before the question was answered. Affirmed.

(121 Ala. 639)

RIKE et al. v. NICHOLS.

(Supreme Court of Alabama. May 16, 1899.)

HUSBAND AND WIFE—INTEREST IN LAND—NOTICE.

Where R. and his wife, each owning an undivided half interest in land, convey it to S. and H., and a mortgage to secure the deferred payment is executed to R. alone, and directly from H. and through foreclosure from S. the land is conveyed to R. alone in satisfaction of the mortgage, R. has title to an undivided half interest in his own right, and to the other undivided half interest in the right of and as trustee for his wife, and, such title appearing of record, one taking a mortgage to secure the debt of R. alone has notice thereof, and cannot subject to satisfaction thereof the interest of R.'s wife.

Appeal from city court of Montgomery; A. D. Sayre, Judge.

Suit by Isabelle Nichols against E. G. Rike and others. Decree for complainant. Defendants appeal. Reversed.

The appellee, Mrs. Nichols, filed this bill on September 19, 1896, against E. G. Rike, individually and as trustee under the will of Victoria Rike, and against Engelhardt Rike and Alma Rike, minors, and prayed to have foreclosed a mortgage given her in September, 1892, by E. G. Rike, and joined in by his wife, the said Victoria, on a certain lot in the city of Montgomery. It is alleged that E. G. Rike was indebted to complainant upon a loan in the sum of \$2,000, and executed his note to her for that amount, and that this mortgage was contemporaneously executed to secure the loan. After the execution of the mortgage, Victoria died, leaving a will, by which she bequeathed her property to E. G. in trust for Engelhardt and Alma. In the fourth paragraph of the bill it is alleged that E. G., as trustee, and Engelhardt and Alma, claim that Victoria owned a half interest in the lot when she signed the mortgage, and that therefore, under her will, that interest had passed to them unaffected by the mortgage; but complainant denies that Victoria had any interest in the lot, and avers, if she is mistaken in this, that she was a bona fide purchaser, for value, without notice. In his answer E. G. Rike admits that the indebtedness secured by the mortgage is past due and wholly unpaid, and that it was given to secure his individual debt. He further alleges

that his wife, Victoria, signed the mortgage as his surety, and that it was therefore inoperative to pass any interest she had in the land at the time of its execution, and he says that she did have then an undivided one-half interest therein; that he, on January 22, 1885, executed to her a deed, a copy of which is made Exhibit B to his answer, conveying such interest; that in December, 1884, he had purchased such interest for her from Lowe, administrator of one Coleman, deceased, for \$850, one half of which was paid at the time of purchase, and the other half one year later, all of which was paid out of the said Victoria's money; that by mistake, he (the said E. G.) was reported by the administrator to the probate court to be the purchaser; and that on January 27, 1886, Lowe executed to him a deed conveying to him the undivided one-half interest which Coleman had at the time of his death in the land. It is further recited that in May, 1885, one Noble conveyed to the said E. G. the other half interest in the lot, and that in January, 1893, by warranty deed, the said E. G. conveyed the whole lot to the said Victoria, and that all of the foregoing named conveyances were duly recorded in the office of the judge of probate of Montgomery county shortly after their execution. It is then alleged that the agents of complainant who conducted the negotiation of the loan had actual notice, prior to the execution of the mortgage, of Victoria's interest. The guardian ad litem of the minors, Englehardt and Alma, practically adopted the answer of E. G. Rike. The proof showed that Victoria conducted a boarding-house business in the city of Montgomery from 1882 to 1886, and had a separate estate of her own. It further showed, without dispute, that her money paid for the Coleman interest in the land, and tended to show that one Splers, her brother, who is now dead, went to the administrator's sale in December, 1884, her husband being sick in bed, and bid in the land for her, but that by mistake the husband, E. G., was reported to the court to be the purchaser. The deed made to her by E. G. Rike, January 22, 1885, reciting these facts, was duly recorded in the probate office February 2, 1885. The original deed was offered in evidence. It was not made an issue by the pleadings; but it was shown in evidence that in September, 1892, when the mortgage was made, Victoria was a married woman, the wife of E. G. Rike, and that the mortgage was made to secure the payment of his debt. The testimony was in conflict as to whether the agents of complainant had actual knowledge of the claim or interest of Mrs. Rike prior to the execution of the mortgage. The probate proceedings recite that E. G. Rike was the purchaser at the Coleman sale, and the proof shows that Lowe, as administrator, made him a deed. It also shows that in May, 1885, Noble conveyed to him a half interest in the land; that on May 15, 1890, he and Mrs. Rike executed a deed to the lot to Strother & Harrington; that,

contemporaneously with the execution of this deed, Strother & Harrington executed to E. G. Rike individually a mortgage to secure payment of part of the purchase money; that the purchase price was \$4,000, and the mortgage for \$3,500; that not a cent of it was ever paid to Mrs. Rike; that, when the deed was made, the grantees paid E. G. Rike \$500, which he loaned back to them; and that they subsequently paid him \$378 on one of the mortgage notes, all of which he produced and offered in evidence. The deed and mortgage were duly recorded. On July 21, 1890, Rike satisfied of record this mortgage as to Harrington, reciting that it was done in consideration of Harrington's conveying to him a half interest in the lot, with Strother's consent, and on that day Harrington conveyed to E. G. Rike individually a half interest in the lot. Subsequently, Strother failing to pay, E. G. Rike foreclosed the mortgage for the purchase money under a power contained therein, and O'Hara, the auctioneer, conveyed to him as purchaser the remaining half of Strother by a deed which recited the arrangement with Harrington. On the final submission of the cause, on the pleadings and proof, the court, on September 20, 1897, rendered a final decree, settling all the equities between the parties, by which it declared that the complainant was a bona fide purchaser, for value, without notice, either actual or constructive, of the entire fee in the lot, and entitled to a foreclosure of her mortgage thereon. From this decree the present appeal is taken, and the rendition thereof is assigned as error.

Frances G. Caffey, for appellants. W. S. Thorington and J. M. Chilton, for appellee.

MCCLELLAN, C. J. On and prior to May 15, 1890, Mrs. Rike owned an undivided one half interest in the lot involved in this case, and her husband, E. G. Rike, the other undivided half interest. They were tenants in common. On that day they united in a sale and conveyance of the property to Strother & Harrington for \$4,000,—\$500 cash and \$3,500 on time. The cash payment was made to Rike, and a mortgage on the lot was executed to him alone by Strother & Harrington to secure the deferred payment. Directly from Harrington, and through foreclosure from Strother, the lot was conveyed to E. G. Rike alone in satisfaction of this mortgage. In our opinion, on these facts E. G. Rike held the lot under these conveyances from Strother & Harrington made in satisfaction of the debt due equally to him and his wife, secured by a lien inuring to her benefit as well as to his, in trust for her to the extent of that part of the purchase money which belonged to her. The deed from Mr. and Mrs. Rike to Strother & Harrington and the mortgage to Rike to secure the payment of the consideration of that deed, being contemporaneous in point of time, constituted parts of one and the same trans-

(121 Ala. 319)

action, involving in one contract the sale and conveyance of the lot and provision for securing the payment of the purchase money; and it is to be taken that the mortgage to Mrs. Rike's husband and co-tenant was executed in consonance with an understanding to that effect common to all the parties, including Mrs. Rike. The parties thus united in the substitution of the contract lien of the mortgage in the stead of the implied equitable lien for the security of the purchase money, thereby waiving the vendor's lien. But the land for which the money was due having been the property of Mr. and Mrs. Rike in common, the money for which it was sold belonged equally to them, and, had it been presently paid to Rike, obviously his wife would have been entitled to one-half of it, not as a mere debt due from him to her, but as being her property in his hands as her agent or trustee. If there had been no mortgage, and the money had been subsequently paid to Rike, the result would have been the same. Had there been no mortgage, and the land itself had been afterwards conveyed to Rike in satisfaction of the debt due equally to him and his wife, he would have held the title for her and for himself, in trust to the extent of an undivided half interest to her use and for her benefit. That the purchase money was not presently paid can make no difference. That a mortgage was taken to secure it is of no consequence. Whenever paid and however paid and in whatever paid, when paid to Rike, one-half of it belonged to her. The security, having been taken in the name of Rike alone by agreement of parties, insured to her benefit; and when the security was realized upon and the land itself became vested in Rike in payment and satisfaction of the mortgage lien which he held for the benefit of both, to secure a debt due to both, he had title to one undivided half interest in his own right, and to the other undivided half interest in the right of and as trustee for Mrs. Rike. And this was the title he had when he executed the mortgage to complainant. This title appeared of record, and hence complainant had notice of it. Having notice, she of course cannot subject Mrs. Rike's equitable title to the satisfaction of her mortgage; for she is not a bona fide purchaser, and the mortgage securing a debt of the husband is void as to Mrs. Rike's interest in the land.

We deem it unnecessary to discuss other questions that were mooted in the court below, and some of them here, further than to say that the evidence satisfies us that the deed from Rike to his wife of January 22, 1885, is supported by a valuable consideration, even conceding that the consideration of that conveyance is open to inquiry in this case, which we greatly doubt. The decree of the city court must be reversed, and the cause remanded for further proceedings in conformity to this opinion. Reversed and remanded.

SEALS et al. v. WELDON.

(Supreme Court of Alabama. May 18, 1899.)

EQUITY—BILL OF REVIEW—SETTLEMENT OF ADMINISTRATOR'S ACCOUNTS—FRAUD—INCONSISTENT BILL.

1. A bill to review settlement of an administrator's accounts, which, by Code, § 805, is limited to correction of errors which may have occurred therein, and not subsequently thereto, without fault or neglect of the complaining party, must clearly point out the error sought to be corrected, and show that complainant had suffered injury thereby.

2. There is an adequate remedy at law by appeal, if there is any error in the mere fact of entering a decree of settlement of an administrator's accounts on his motion.

3. That a bill to impeach a decree for fraud may be maintained, the fraud must be connected with the proceedings by which the decree was obtained.

4. A bill cannot be maintained which treats the settlement of an administrator's accounts as valid, and seeks to correct errors therein, and also asserts that no valid settlement was had.

Appeal from chancery court, Pike county; Jere N. Williams, Chancellor.

Bill by J. W. Seals and others, as heirs at law and distributees of W. A. Weldon, deceased, against D. R. Weldon, as administrator of said decedent. Bill dismissed, and complainants appeal. Modified.

The bill averred that W. A. Weldon died on June 2, 1884, possessed of an estate consisting of real and personal property; that on the 30th of October, 1884, J. J. Weldon and D. R. Weldon were appointed administrators of the said estate, and duly qualified as such; that in the month of August, 1891, J. J. Weldon died, leaving D. R. Weldon, the defendant in this suit, as the sole and surviving administrator of the estate of W. A. Weldon, deceased. It was further averred in said bill that on November 8, 1895, D. R. Weldon, the said administrator, filed in the probate court his accounts for the final settlement of said administration, and December 9th was the day set for the hearing of the same; that on said last-named date the complainants appeared in court for the purpose of contesting said account and settlement, and asked that the hearing of said settlement be postponed to a further day, in order to give them an opportunity of examining the account filed by the administrator and ascertaining whether or not it was correct; that such administrator agreed and consented in open court to the postponement of said settlement, and it was understood and agreed to by the court in open court, but through inadvertence no order was made to that effect; that no other steps were taken in said proceedings for several weeks, and the cause being regularly continued from day to day until March 19, 1896, that said administrator having discovered that the probate judge had failed to enter upon the record of the court the fact that said settlement had been postponed or continued from December 9, 1895, and that said court had failed to set aside the order or minute entry inadvertently made stating the auditing of said account filed

by said administrator, moved the court on said March 19, 1896, to complete the minute entry, and render a final decree in said cause, which motion was granted by said court on April 2, 1896; that, as a matter of fact, no decree was rendered on December 9, 1895, and no final order in the settlement of said administration was made. It was then further averred that said administrator, after having filed his accounts for final settlement, and subsequent to December 9, 1895, "altered and changed said account from what it was when said decree purports to have been rendered by taking from and adding to both the debit and credit sides of said account, thereby changing the result of said settlement"; that, as a matter of fact, the account filed by the administrator in the final settlement of his administration was never passed upon by the probate court, and no decree has been rendered thereon other than the granting of said administrator's motion to complete the minute entry, which motion was granted on April 2, 1896; that the decree which purports to have been rendered on December 9, 1895, if in fact such decree was rendered, was upon the account as first stated before said changes were made; and that there has never been any final settlement of said administration as required by law. It was then averred in the bill that said administrator intentionally concealed from them the true state of affairs concerning the estate of his decedent, for the purpose of defrauding them out of a large portion of their distributive share of decedent's estate; that up to the time of said alleged final settlement the administrator never claimed that the estate was indebted to him in any way, but that in his account filed for final settlement he claimed substantially all of the estate left in his hands in payment of indebtedness to him; that the administrator took advantage of the inadvertent entry of the decree rendered December 9, 1895, for the purpose of evading meeting the complainants' objections to said account as filed, and "for the further purpose of defrauding complainants out of a large sum of money to which they are justly entitled from said estate; and complainants aver that, if said settlement is allowed to stand as it now is, they will lose a large part of their distributive share of the estate of W. A. Weldon, deceased, and that said administrator will derive the benefit thereof." It was further averred in said bill that on February 12, 1896, prior to the time the administrator made a motion to complete the minute entry, and prior to the rendering of the final decree in said cause, the complainants, believing that said settlement of the administration was still open, filed their objections to the account as filed by the administrator, and asked that they be passed upon by the court, "but that said objections were never heard or passed upon by said court, for the reason that the record showed that the final settlement of said administration had been made on the 9th day of December, 1895," and that the court, in granting

the administrator's motion to complete the minute entries above referred to, prevented complainants from prosecuting their rights and claims in the court and having their objections to said administrator's account passed upon. The prayer of the bill was that the decree of the probate court be set aside, and that said settlement be declared open, and that the administration be removed into the chancery court for final settlement; that an accounting be had between the administrator and complainants, and the administrator be required to make a settlement of his administration as provided by law. There was also a prayer for general relief. Such other facts as are necessary to an understanding of the decision on the present appeal are stated in the opinion. The defendant moved to dismiss the bill for the want of equity. On the hearing of this motion, the court rendered a decree granting said motion, and ordering that the bill be dismissed. From this decree the complainants appeal, and assign the rendition thereof as error.

E. B. Brannen, for appellants. A. C. Worthy, for appellee.

SHARPE, J. This bill contains allegations apparently looking to the correction of errors had upon a final settlement of the defendant's accounts in the probate court, and to the impeachment of the validity of the decree evidencing such settlement. It is shown that a decree of some character was rendered on the 2d day of April, 1896, whereby it was made to appear that such a settlement was had on the 9th day of the previous December; and it is also alleged that "there never has been a final settlement of said administration as required by law." If the bill be taken as averring a settlement, then the jurisdiction of equity to review it is limited to the correction of errors which may have occurred therein without fault or neglect of the complaining party. Code, § 805.

The decree of the probate court is not set out, and its contents are not alleged, nor is it shown in what respect it is injurious to the complainants. It is charged that between the 9th day of December and the time of his motion to complete the minute entry of the decree the administrator changed his account "from what it was at the time said decree purports to have been rendered by taking from and adding to both the debit and credit side of said account, thereby changing the result of said settlement"; but it is not shown whether those changes resulted injuriously or beneficially to the complainants. An exhibit is made of items in contestation on the defendant's account filed by the complainants in the probate court; but it is not alleged here that they were proper items of contest. Respecting them the bill states "that said objections were never passed upon by said court, for the reason that the record showed that the final settlement of said ad-

ministration had been made on the 9th day of December, 1895, that the court in granting the administrator's motion, marked 'Exhibit M' to this bill, prevented complainants from prosecuting their rights and claims in said probate court, and having their objections to said administrator's account passed upon." It is obvious that the allegations both as to error and injury are insufficient to bring the case within the statutory jurisdiction of the court to correct errors. For that purpose the errors of law or fact must be shown to have occurred in the settlement itself, and not such as may grow out of the fact that a judgment was entered nunc pro tunc, or otherwise subsequent to the settlement. The error sought to be corrected must be clearly pointed out, and it must appear that the complainants have suffered injury thereby. *Massey v. Modawell*, 73 Ala. 421; *Waldrom v. Waldrom*, 76 Ala. 285; *Bowden v. Perdue*, 59 Ala. 409; *Boswell v. Townsend*, 57 Ala. 308. If the mere act of entering the decree on defendant's motion was erroneous, the complainants' remedy was adequate at law by appeal. Considered as a bill to impeach the decree for fraud, the bill is equally defective. Fraud, to be effective for such purpose, must be connected with the proceedings by which the decree was obtained. Here are some general allegations of fraud charged against the defendant as occurring previous to the settlement, but they are not such as to infect the rendition of the decree with fraud, and thereby authorize the court to declare it void.

But the two aspects of the bill—one in treating the settlement as valid and seeking to correct errors occurring therein, and the other asserting that no valid settlement was had—are wholly inconsistent, and the bill was bad for that reason if for no other. *Watts v. Frazer*, 80 Ala. 186; *Gordon's Adm'r v. Ross*, 63 Ala. 363. As was said of a bill having a similar fault in *Gordon's Adm'r v. Ross*, supra: "If the court adopted either aspect, it would proceed more or less on conjecture, and could not be sure it was administering the relief to which the complainant was entitled. The bill unites different distinct causes of action requiring different relief, and cannot be entertained." The decree of the chancery court dismissing the bill will be here modified so as to dismiss the bill without prejudice, and, as so modified, will be affirmed at appellants' cost.

(121 Ala. 13)

HANDY v. STATE.

(Supreme Court of Alabama. May 16, 1896.)

CRIMINAL LAW—INDICTMENT—GOOD AND BAD COUNTS—GENERAL VERDICT—INSTRUCTIONS—JURY—MOTION TO QUASH VENIRE—JUROR IN ANOTHER CASE.

1. Where there is a good and a bad count in an indictment, and the jury are not required to specify as to which count their finding is had, a general verdict of guilty will be referred to the

good count, and a general judgment rendered thereon is not reversible error.

2. There is no error in refusing requests for charges not based on evidence in the case.

3. There is no merit in a motion to quash a venire on the ground that the list of names of the jurors served on defendant was not signed by the sheriff.

4. There is no error in overruling defendant's motion to have a juror brought from the consideration of another unfinished case, to be passed as a juror in his case.

Appeal from circuit court, Elmore county; N. D. Denson, Judge.

Virge Handy was convicted of rape, and he appeals. Affirmed.

The verdict of the jury was: "We, the jury, find the defendant guilty as charged, and fix the punishment at ten years in the penitentiary." On the trial of the case, when the case was called for trial, the defendant "moved the court to quash the venire on the ground that the list of names of jurors that was served on him by the sheriff was not signed by the sheriff, which motion the court overruled, and the defendant duly excepted to the ruling of the court. The defendant then announced 'Ready,' and the selection of the jury was proceeded with. When the name of Whit Herron was called, he did not answer, and it was shown to the court that said Whit Herron was a juror on the regular venire for the week, and that he was in the jury room at the time considering, with eleven other jurors, a case of assault with intent to murder, which was submitted to them before this case was called, and which had not been completed. Thereupon defendant demanded and moved that said juror be brought in and put on the state and defendant for acceptance or rejection. The court overruled the motion, and ordered the drawing of jurors to proceed. To this action of the court the defendant excepted duly. The jury of which Whit Herron was a member did not come in until after the jury in Handy's case had been selected." The evidence as set forth in the bill of exceptions is copied in the opinion. The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "The court charge the jury that if they believe, under the evidence in this case, the girl was over ten years of age, but under fourteen, and they further believe from the evidence that she consented to the act, then they may find him guilty under the second count in the indictment, and must assess a fine of not less than fifty nor more than five hundred dollars." (2) "The court charge the jury that if they believe from all the evidence the girl consented to the unlawful act, and if they further find from the evidence the girl was over the age of ten years, they must acquit the defendant."

Charles G. Brown, Atty. Gen., for the State.

SHARPE, J. The indictment contains two counts,—the first charging that the defendant "forcibly ravished Annie Bell McCall, a wo-

man in said county and state." The second count charges that he "did carnally know, or abuse in the attempt to carnally know, Annie Bell McCall, a girl under the age of 14 years." The second count is evidently drawn under the terms of section 5447 of the Code. That section received its present form from the joint committee in framing the present Code; its intention being to change section 3739 of the Code of 1896 so as to make the offense described in that section apply when the age of the girl was under 14 years, instead of confining it to cases where the age was under 10 years, as by the former statute, and also to reduce the minimum term of imprisonment to 10 years, instead of for life. On the 15th day of February, 1897, the act was approved by which the same criminal act committed upon a girl between the ages of 10 and 14 years was made a misdemeanor punishable by fine of not less than \$50 nor more than \$500, to which could be added imprisonment in the county jail for six months. The last-named act being passed subsequent to the 20th day of January, 1897, was by the terms of the act adopting the Code left in full force (see Act Feb. 15, 1897), and was by the Code committee inserted in the Code as section 5448; but there appears no legislative intent that it should operate to repeal section 5447 in toto. The two sections standing together in the Code are inconsistent in respect only of cases where the age of the girl who is the subject of the offense is between 10 and 14 years. They must be construed together, and effect must be given to both so far as they are consistent, and, so construed, it appears that section 5447 is by the other section named restricted in its operation to cases where such age is not exceeding 10 years. The second count of the indictment in describing the age of the girl as under 14 years, without averring whether it was over or under 10 years, was uncertain as to which offense was intended to be charged. It was not demurred to, however, and there was no motion to quash. The first count contained a separate and sufficient charge of rape.

As to the evidence, the bill of exceptions contains only the following statement: "The evidence, without conflict, showed that the offense, if committed, was committed in Elmore county, in May, 1898. There was evidence tending to show the guilt of the defendant, and evidence tending to show his innocence, under either count of the indictment. The evidence, without conflict, showed that the female named in the indictment was 11 years old on the 22d of September, 1898." Under such condition of the pleading and proof, a conviction might well have been had of the crime of rape; and the case falls within the general rule that where there is a good and a bad count in an indictment, and when the jury are not required to specify as to which count their finding is had, a general verdict of conviction will be referred to the good count, and a general judgment rendered there-

on is not reversible error. 1 Bish. Cr. Proc. § 1015; *Turner v. State*, 40 Ala. 21; *Montgomery v. State*, Id. 684; *Shaw v. State*, 18 Ala. 547; *Hudson v. State*, 34 Ala. 253. It is not shown by the record that there was any evidence introduced on the trial tending to show consent on the part of the girl, and for all that appears charges 1 and 2 asked by the defendant were abstract in respect of such consent. For that reason, if for no other, it cannot be seen that there was error in the refusal of those charges. The motion to quash the venire was without merit. There was no error in overruling the motion to have the juror Herron brought from the consideration of another unfinished case, to be passed upon as a juror for the trial of this case. *Dorsey v. State*, 107 Ala. 157, 18 South. 190; *Cole v. State*, 105 Ala. 78, 16 South. 762. The judgment of the circuit court will be affirmed.

MEMORANDUM DECISIONS.

AHLRICHS v. STATE. (Supreme Court of Alabama. Feb. 9, 1899.) Appeal from circuit court, Cullman county; H. C. Speake, Judge. T. M. Wilhite, for appellant. Charles G. Brown, Atty. Gen., for the State. The appellant was indicted, tried, and convicted for an assault with a stick. The judgment of conviction was affirmed.

ALLISON v. STATE. (Supreme Court of Alabama. Jan. 11, 1899.) Appeal from circuit court, Walker county; Thos. R. Roulhac, Judge. Coleman & Bankhead, for appellant. William C. Fitts, Atty. Gen., for the State. The appellant was indicted and tried for murder, was convicted of murder in the second degree, and sentenced to the penitentiary for 10 years. The judgment of conviction is reversed for errors committed by the trial court in its oral charge to the jury and in the refusal of some of the charges requested by the defendant.

BUCHANAN v. STATE. (Supreme Court of Alabama. Jan. 11, 1899.) Appeal from city court of Montgomery; A. D. Sayre, Judge. Charles G. Brown, Atty. Gen., for the State. The appellant was indicted and tried for murder, was convicted of manslaughter in the first degree, and sentenced to the penitentiary for five years. On the trial a witness was asked to state what was the general character of the defendant upon information obtained by him as to it, after the commission of the offense with which he was charged. Held by this court that the trial court properly refused to allow the introduction of this testimony. *Griffith v. State*, 90 Ala. 583, 8 South. 812. The judgment of the trial court is affirmed.

BUTLER v. STATE. (Supreme Court of Alabama. Jan. 12, 1899.) Appeal from city court of Montgomery; A. D. Sayre, Judge. W. W. Pearson, for appellant. Charles G. Brown, Atty. Gen., for the State. The appellant was indicted and tried for an assault with intent to ravish, was convicted of an assault and battery, and sentenced to hard labor for the county. The indictment charged that "Walter Butler did as-

sault Delia McCall, a woman, with the intent forcibly to ravish her." The evidence introduced on the part of the state showed that the person alleged to have been assaulted was a girl 11 years of age. The defendant moved the court to exclude from the jury all the testimony on behalf of the state, upon the ground that there was a variance between the indictment and the evidence, in that the indictment charged an assault upon Delia McCall "a woman," and the evidence showed without conflict that Delia McCall was not "a woman." The court overruled this motion, and to this ruling the defendant duly excepted. The defendant asked the court to give to the jury the following written charge, and separately excepted to the court's refusal to give it as asked: "Unless the jury believe from the evidence that Delia McCall had reached the age of puberty, there can be no conviction in this case." These two rulings are the only questions reserved for consideration on this appeal. The judgment is affirmed on the authority of *Vasser v. State*, 55 Ala. 264; *Myers v. State*, 84 Ala. 12, 4 South. 291.

CARTER v. STATE. (Supreme Court of Alabama. Jan. 19, 1899.) Appeal from city court of Montgomery; A. D. Sayre, Judge. Charles G. Brown, Atty. Gen., for the State. The defendant was indicted, tried, and convicted for willfully failing and refusing to work a public road after having been notified to do so. The only question presented for review on the present appeal was the refusal of the trial court to give the general affirmative charge requested by the defendant. It is held that, as there was evidence from which the inference of the guilt of the defendant might have been drawn by the jury, the trial court committed no error in refusing to give the general affirmative charge requested by the defendant.—*Pellum v. State*, 89 Ala. 28. 8 South. 88.

DAVIS v. STATE. (Supreme Court of Alabama. Dec. 20, 1898.) Appeal from city court of Mobile; O. J. Semmes, Judge. William P. Molett, McCarron & Lewis, and C. L. Hybart, for appellant. Wm. C. Fitts, Atty. Gen., for the State. The appellant was indicted and tried and convicted for murder in the first degree, and was sentenced to be hung. The judgment is affirmed on the authority of *Martin v. State* (Ala.) 25 South. 255.

ETHERDIEG v. DRIVER. (Supreme Court of Alabama. Nov. 23, 1898.) Appeal from circuit court, Lee county; J. M. Carmichael, Judge. J. L. Kennedy and R. B. Barnes, for appellant. Geo. P. Harrison and A. E. Barnett, for appellee. This was an action brought by the appellee against the appellant, and counted upon two notes or bonds. There were jury and verdict for the plaintiff. The defendant appeals. The judgment is affirmed.

HUCKEBA v. SOUTHERN BUILDING & LOAN ASS'N. (Supreme Court of Alabama. Feb. 9, 1899.) Appeal from circuit court, Clay county; George E. Brewer, Judge. Knox, Bowie & Dixon, for appellant. Lawrence Cooper and Whitson & Graham, for appellee. This is an action by the appellant against the appellee to recover the statutory penalty of \$200 for failure to enter upon the margin of the record of a mortgage, after request in writing, partial payments on the mortgage indebtedness, as provided by section 1065, Code 1896 (section 1868, Code 1886). There was judgment for the defendant. The judgment is affirmed on the authority of *Association v. McCants* (Ala.) 25 South. 8.

25 So.—65

Ex parte JOHN. (Supreme Court of Alabama. Jan. 31, 1899.) Petition for mandamus. Sam Will John, in pro. per. Garrett & Underwood, Lane & White, and Tillman & Campbell, for respondent. This was an original petition for mandamus filed in this court. The petitioner, claiming to be the administrator de bonis non of the insolvent estate of George Lunsford, by appointment of the probate court of Jefferson county, filed his petition addressed to this court, asking for the issuance of a peremptory writ of mandamus to the chancellor presiding over the chancery court of Jefferson county, which court had jurisdiction of said estate, and its administration by decree, and which had before, on application for a receiver, made decrees refusing to admit the present petitioner, John, as a party to said proceedings appointing one F. W. Dixon receiver, requiring said chancellor to vacate and set aside said decrees refusing to admit the petitioner to be a party to said cause, and commanding the chancellor to recognize him as the administrator de bonis non of the estate of George Lunsford, deceased. The writ of mandamus was awarded on the authority of *Lunsford v. Lunsford* (Ala.) 25 South. 171.

KIRKLAND v. SOUTHERN BUILDING & LOAN ASS'N. (Supreme Court of Alabama. Jan. 11, 1899.) Appeal from circuit court, Pike county; J. W. Foster, Judge. Sollie & Kirkland, for appellant. E. R. Brannen, for appellee. This action was brought by the appellant against the appellee to recover the statutory penalty of \$200 for the failure of the defendant, as mortgagee, to enter on the margin of the record of the mortgage the fact of the payment or satisfaction thereof, more than three months after request in writing so to do. There was judgment for the defendant. The plaintiff appeals. The judgment is affirmed on the authority of *Association v. McCants* (Ala.) 25 South. 8.

LANGSTON et al. v. IRON BELT MERCANTILE CO. (Supreme Court of Alabama. Nov. 29, 1898.) Appeal from city court of Aniston; James W. Lapsley, Judge. John B. Knox, for appellants. Blackwell & Keith, for appellee. This was an action brought by the appellee, the Iron Belt Mercantile Company, against the appellants, Langston & Woodson, to recover property sold by the plaintiff to the defendants. There was judgment for the plaintiff, and the defendants appeal. The judgment is affirmed.

LAWSON v. STATE. (Supreme Court of Alabama. Feb. 8, 1899.) Appeal from criminal court, Pike county; E. B. Wilkerson, Judge. Chas. G. Brown, Atty. Gen., for the State. The appellant was indicted, tried, and convicted for an assault and battery. The judgment entry of conviction and sentence in this case shows that the defendant was by the verdict of the jury found guilty of the charge against him, and a fine of one cent was assessed. The fine and costs not being paid, and no judgment being confessed therefor, the judgment and sentence of the court was "that the defendant be confined at hard labor for the county for a term of ten days to pay the fine of one cent and three hundred and four days to pay the costs; in all three hundred and fourteen days. Term at hard labor begins July 9th, '98, and ends May 19th, '98." The court holds that by reference to the date mentioned for the term at hard labor to begin, together with its duration, which, by the judgment, is fixed at 314 days, it appears certain that the term ends May 19, 1899, instead of 1898, and therefore the clerical mistake of writing "98" for "99," in specifying the year in which the term ends, is self-correcting, meaning 1899. This appeal is taken without any question having been

reserved by bill of exceptions, without any ruling upon demurrer or motion, and without any error apparent upon the record of which the defendant can complain. The judgment is therefore affirmed.

McQUEEN v. STATE. (Supreme Court of Alabama. Jan. 9, 1899.) Appeal from circuit court, Lowndes county; John R. Tyson, Judge. Charles G. Brown, Atty. Gen., for the State. The appellant was indicted and tried for murder, was convicted of murder in the second degree, and sentenced to the penitentiary for 20 years. The appeal is dismissed, no question being reserved for the consideration of this court.

MOORE, KIRKLAND & CO. v. BYRD. (Supreme Court of Alabama. Jan. 18, 1899.) Appeal from circuit court, Dale county; J. W. Foster, Judge. A. A. Wiley and Chas. Wilkerson, for appellants. H. L. Martin and Sollie & Kirkland, for appellee. This action was brought by the appellants against the appellee, A. B. Byrd, and the sureties on his official bond, as sheriff, to recover for the alleged breach of said bond. On the trial of the case there was a judgment in favor of the defendants. The plaintiffs appeal. The judgment is affirmed.

NEW YORK STEAM DYE WORKS v. FRAZIER. (Supreme Court of Alabama. Feb. 11, 1899.) Appeal from city court of Birmingham; W. W. Wilkerson, Judge. James A. Mitchell, for appellant. R. B. Evans, for appellee. This was a statutory trial of the right of property. The appellant brought an action against one W. S. Wheeles as his tenant, to recover rent due, and levied the attachment upon certain property in said storehouse occupied by the defendant, and upon the levy of the writ of attachment upon the property the appellee, Z. D. Frazier, interposed his claim thereto. There was judgment in said court in favor of the claimant, and the plaintiff appeals. The material, and practically the only, question in the case, as presented on this appeal, is as to whether the property levied upon was subject to the landlord's lien for rent. The evidence shows without conflict that the plaintiff rented from the defendant a storeroom in which he carried on a small mercantile business; that the original stock was furnished to the defendant by the claimant in the following manner: The defendant being in needy circumstances, the claimant, desiring to assist him in some way, told the defendant to select his stock of coffees, teas, etc., and that he (the claimant) would pay for them, and the defendant could have all of the profits of the business, and in this way get a start in life. The defendant made the selection, bought the goods in his own name, and carried the bills to the claimant, who gave the defendant the money to pay for them. Claimant never saw the goods, and out of the proceeds of the sale the defendant lived, and occasionally, from the proceeds, replenished the stock. The defendant carried on his business in the name of the New Orleans Spice Company, he alone constituting the company. Both the claimant and defendant testified that there was no partnership existing between them, nor was there any agency. It is shown that the claimant knew of the rental of the storehouse from the plaintiff by the defendant, and of the name in which the defendant was carrying on the business. The plaintiff had no knowledge or notice of the manner in which the goods were purchased by the defendant, nor of the arrangements between the defendant and the claimant. The defendant testified that he did not borrow the money from the claimant, but that the goods were bought by the claimant in order to help the defendant. The court holds that under the foregoing facts there is no doubt that the property levied upon, which was in the

storehouse rented by the defendant from the plaintiff, was subject to the landlord's lien for rent, and that, therefore, the affirmative charge requested by the plaintiff should have been given. The judgment of the city court is reversed, and the cause remanded.

NOBLE v. CAMPBELL. (Supreme Court of Alabama. Feb. 9, 1899.) Appeal from circuit court, Colbert county; R. H. Wilhoyte, Judge. Thos. R. Roulhac, J. H. Nathan, and Gunter & Gunter, for appellant. Isaac Orme and Kirk & Almon, for appellee. This was a statutory action of ejectment, brought by the appellees against the appellants. The case is substantially the same as when here on former appeal. *Campbell v. Noble*, 110 Ala. 382, 19 South. 28. The question now presented is as to the quantum of plaintiff's recovery, which was not involved on the former appeal. It is this: "The mother of Elizabeth Winter was the daughter of the testator. She survived Elizabeth, and conveyed her interest in this land to the defendant. If she had an estate in fee at all, it was on one-fifth of an one-half undivided interest, and as to such interest plaintiff was not entitled to recover, as she did in the court below." The court holds that she had such interest. Therefore the judgment of the circuit court is modified so as to limit the plaintiff's recovery to a nine-tenths undivided interest in the lands sued for. The judgment is thus modified and affirmed.

ODAM v. STATE. (Supreme Court of Alabama. Jan. 19, 1899.) Appeal from Conecuh county court; F. J. Dean, Judge. J. F. Jones, for appellant. Charles G. Brown, Atty. Gen., for the State. The appellant, Charles Odam, filed his petition for habeas corpus addressed to the judge of the county court, asking for his release from imprisonment by virtue of a mittimus issued by the justice of the peace after a preliminary trial of the petitioner on a charge of an assault with intent to murder. The judge declined to discharge the petitioner, and upon this judgment the petitioner appeals. It is shown by the bill of exceptions on this appeal that on the hearing of the petition the evidence offered by the petitioner had no reference to the charge of assault with intent to murder, but was introduced for the purpose of showing that the petitioner did not kill another and different person five days later. The state relied upon the commitment as showing a prima facie case against the discharge of the petitioner for the alleged offense of an assault with intent to murder. To overcome this, the prisoner introduced evidence which has been referred to above, and which the court holds was totally irrelevant to the offense with which he was charged. It is held by this court that the judge properly refused to discharge the petitioner on the evidence introduced by him. The judgment is affirmed.

PENNEY v. BUSTER et al. (Supreme Court of Alabama. Oct. 29, 1898.) Appeal from chancery court, Lawrence county; William H. Simpson, Chancellor. Speake & Russell, for appellant. James H. Branch, for appellees. The bill in this case was filed by the appellant against the appellees, and sought to have set aside and annulled a conveyance of land made by the defendant Samuel M. Buster to his co-defendants, who were his brother and sister, upon the ground that said conveyance was made for the purpose of hindering, delaying, or defrauding the complainant in the collection of his debt. On the final submission of the cause on the pleadings and proof the chancellor rendered a decree adjudging that the complainant was not entitled to the relief prayed for, and ordering his bill dismissed. From this decree the complainant appeals, and assigns the rendition thereof as error. The court holds that the facts in the case show that the

complainant had not made out his case, and that the defendants proved that the transaction between them was a valid one. The decree is affirmed.

RAY v. STATE. (Supreme Court of Alabama. May 18, 1899.) Appeal from circuit court, Morgan county; H. C. Speake, Judge. Arthur L. Brown, for appellant. Chas G. Brown, Atty. Gen., for the State. The appellant was indicted, tried, and convicted for obtaining property under false pretenses. The judgment of conviction is affirmed.

Ex parte REID, MURDOCK & CO. (Supreme Court of Alabama. Jan. 31, 1899.) William K. Brown and Sam Will John, for petitioner. This was an original petition filed in this court asking for the issuance of a writ of mandamus addressed to A. A. Coleman, judge of the Tenth judicial circuit, requiring him to enter judgment by default in favor of the petitioner. The facts in this case, so far as they relate to the grounds upon which the writ of mandamus is asked, are substantially the same as those set out in the case of *Ex parte Scudder-Gale Grocer Co.* (Ala.) 25 South. 44, and on the authority of that case the application for mandamus was denied.

ROUNDTREE v. STATE. (Supreme Court of Alabama. Feb. 11, 1899.) Appeal from Sumter county court; W. R. De Loach, Judge. Smith & Harkness, for appellant. Charles G. Brown, Atty. Gen., for the State. The appellant was indicted, tried, and convicted for the larceny of 2½ pounds of meat, of the value of 25 cents. On the trial the defendant interposed the plea of former acquittal, in which he set forth that at the prior term of the county court she had been arraigned and tried before a jury of 12 men on the charge of petit larceny, and that at said trial the evidence for the state disclosed the fact that there was a variance between the allegations and the proof, and the defendant was discharged on motion of her attorneys; that in the present prosecution she is accused of larceny, which is based on the same transaction as the former prosecution, and is the same offense for which she was formerly tried; and the evidence relied upon to convict the defendant in this case is the same as that which was adduced on the former trial. The evidence in the case proved the allegations of this plea, but the trial court refused to give the general affirmative charges requested by the defendant. On the present appeal this court holds that the general charge asked by the defendant should have been given. The judgment of conviction is reversed, and the defendant discharged.

SMITH et al. v. OLIVER. (Supreme Court of Alabama. Jan. 31, 1899.) Appeal from chancery court, Tallapoosa county; J. R. Dowdell, Chancellor. Thos. L. Bulger, James W. Strother, and John A. Terrell, for appellants. Garrett & Lackey, for appellee. The bill in this case was filed by the appellee, S. J. Oliver, against the appellants, and prayed for the foreclosure of two certain mortgages described in said bill, and made a part thereof as exhibits, and which were alleged to have been existing liens on the property conveyed therein at the time the defendant Rowe sold said property to the defendant Smith. On the final submission of the cause on the pleadings and proof, the chancellor rendered a decree granting the relief prayed for. From this decree the defendants appeal, and assign the rendition thereof as error. The decree of the chancellor is affirmed.

WALDEN v. SINGER MFG. CO. (Supreme Court of Alabama. Jan. 17, 1899.) Appeal from circuit court, Cherokee county; George E. Brewer, Judge. Carden & Daniels, for appellant. Burnett & Cull, for appellee. This action was brought by the appellee against the appellant to recover damages for the alleged breach of a bond given by Eliza Walden, as the administratrix of the estate of Joe A. Walden, deceased. The only assignments of error are based upon the judgment of the circuit court in overruling the defendant's demurrers to the plaintiff's complaint. The appeal is taken in the name of all of the defendants jointly, and there is a joint assignment of errors in the name of all of the defendants. Three of the defendants file no demurrers. The court holds that the ruling of the court upon the demurrers of the other defendants gives no ground of complaint to the three defendants who file no demurrers, and that, therefore, not being prejudicial as to them, and they having joined in the assignments of error, this court will not consider the same. Rudolph v. Brewer, 96 Ala. 189, 11 South. 314; Kimbrell v. Rogers, 90 Ala. 339, 7 South. 241; Hillens v. Brinsfield, 113 Ala. 304, 21 South. 208; Orton v. Tilden, 110 Ind. 131, 10 N. E. 936. The judgment is affirmed.

WEBB v. STATE. (Supreme Court of Alabama. Jan. 12, 1899.) Appeal from circuit court, Walker county; James J. Banks, Judge. William C. Pitts, Atty. Gen., for the State. The appellant was indicted, tried, and convicted of murder in the first degree, and sentenced to the penitentiary for life. The judgment of conviction is affirmed.

WEEDEN et al. v. BROWN et al. (Supreme Court of Alabama. Jan. 19, 1899.) Appeal from chancery court, Barbour county; G. L. Comer, Special Chancellor. P. B. McKenzie and S. H. Dent, Jr., for appellants. A. A. Evans, for appellees. The bill in this case was filed by the appellees as transferees to enforce a vendor's lien on certain lands described in the bill. The appellee Nancy A. Brown purchased lands from one M. R. Hill on December 23, 1888, and agreed to pay therefor 16 bales of lint cotton weighing 500 pounds each, in four annual and equal payments, beginning October 1, 1889. The contract for such payment was in writing, and duly transferred to the complainants. All the payments, save the four bales due October 1, 1892, were made. After the purchase of the lands, said Nancy A. Brown executed to the Edinburgh-Land Mortgage Company, Limited, a mortgage to secure the loan, and to the Loan Company of Alabama a mortgage to secure the payment of commissions for obtaining said loan. These mortgages were jointly foreclosed, and the defendant George M. Forman became the purchaser with notice, given at the sale, of the existence of said vendor's lien. There was a decree pro confesso against Brown, and upon the final submission of the cause on the pleadings and proof the chancellor held that the complainants were not entitled to the relief prayed for, and rendered a decree accordingly. The only inquiry in the case is as to whether or not the corporation had notice of the existence of said vendor's lien at the time of or before the execution of the mortgages. The decree is reversed, and one here rendered granting the complainants the relief prayed for.

ALBRISON et al. v. HAGERMAN et al. (Supreme Court of Florida. April 13, 1898.) Error to circuit court, Holmes county; William D. Barnes, Judge. Daniel Campbell, for plaintiffs in error. W. O. Butler, for defendants in error. This action was brought by C. W. Hager-

man and others against J. A. Albrison and others. There was judgment for the plaintiffs, and the defendants bring error. Dismissed because no properly certified transcript of record has been filed.

ALBRITTON v. PATE. (Supreme Court of Florida. Feb. 8, 1898.) Appeal from circuit court, Polk county; Barron Phillips, Judge. Wilson & Wilson, for appellee. The bill in this cause was filed by Owen J. Pate against John L. Albritton. There was decree for the complainant, and the defendant appeals. Dismissed on motion of counsel for appellee.

ALLEN et al. v. PUTNAM NAT. BANK OF PALATKA. (Supreme Court of Florida. March 4, 1898.) Error to circuit court, Duval county; Rhydon M. Call, Judge. W. P. Ward, for plaintiffs in error. Fletcher & Wurts, for defendant in error. This action was brought by the Putnam National Bank of Palatka against Thomas L. Allen and others. There was judgment for the plaintiff, and the defendants bring error. Dismissed on præcipe of counsel for plaintiffs in error.

ANGAS et al. v. OVERSTREET. (Supreme Court of Florida. July 12, 1898.) Error to circuit court, Duval county; Rhydon M. Call, Judge. Geo. P. Raney and John T. Walker, for plaintiffs in error. W. B. Young, for defendant in error. This action was brought by Walter Overstreet against William Moore Angas and Charles H. Booker. There was judgment for the plaintiff, and the defendants bring error. Dismissed on motion of counsel for defendant in error.

ATLANTIC, S. R. & G. RY. CO. v. SOUTH FLORIDA R. CO. et al. (Supreme Court of Florida. March 22, 1898.) Appeal from circuit court, Alachua county; Rhydon M. Call, Judge. R. H. Liggett, for appellant. Syd. L. Carter, for appellees. The bill in this cause was filed by the Atlantic, Suwannee River & Gulf Railway Company against South Florida Railroad Company and others. There was decree for the defendants, and the complainant appeals. Dismissed on motion of counsel for appellees.

BAKER v. TUCKER et ux.¹ (Supreme Court of Florida. July 26, 1898.) Appeal from circuit court, Hernando county; William A. Hocker, Judge. J. C. Davant, for appellant. W. S. Jennings, for appellees. The bill in this cause was filed by James F. Tucker and wife against Parthonia A. Baker. There was decree for the complainants, and the defendant appeals. Dismissed on motion of counsel for appellees.

BARNETT et al. v. CONANT et al. (Supreme Court of Florida. Feb. 9, 1898.) Error to circuit court, Duval county; Rhydon M. Call, Judge. Adams & L'Engle and Cooper & Cooper, for plaintiffs in error. D. U. Fletcher and H. B. Phillips, for defendants in error. This action was brought by W. B. Barnett and another against Ella J. Conant and others. There was judgment for the defendants, and the plaintiffs bring error. Dismissed on motion of counsel for defendants in error.

BERTOLA et al. v. NATIONAL BANK OF JACKSONVILLE. (Supreme Court of Florida.

Nov. 20, 1898.) Error to circuit court, Volusia county; John D. Broome, Judge. John W. Price, for plaintiffs in error. Isaac A. Stewart, for defendant in error. This action was brought by the National Bank of Jacksonville against O. T. De G. Bertola and another. There was judgment for the plaintiff, and the defendants bring error. Judgment affirmed.

BLUM v. VAN HAMM et ux. (Supreme Court of Florida. April 12, 1898.) Error to circuit court, Duval county; Rhydon M. Call, Judge. J. M. Barra, for plaintiff in error. W. B. Young, for defendants in error. This action was brought by Washington Van Hamm and wife against Charles Blum. There was judgment for the plaintiffs, and the defendant brings error. Dismissed on motion of counsel for defendants in error.

BLUM v. VAN HAMM et ux. (Supreme Court of Florida. July 20, 1898.) Error to circuit court, Duval county; Rhydon M. Call, Judge. J. M. Barra, for plaintiff in error. W. B. Young, for defendants in error. This action was brought by W. Van Hamm and wife against Charles Blum. There was judgment for the plaintiffs, and the defendant brings error. Dismissed on præcipe of counsel for plaintiff in error.

BRADY et ux. v. FLORIDA MORTG. & INV. CO., Limited. (Supreme Court of Florida. Oct. 12, 1898.) Appeal from circuit court, Polk county; Barron Phillips, Judge. J. W. Brady, for appellants. N. B. K. Pettingill, for appellee. The bill in this cause was filed by Florida Mortgage & Investment Company against J. W. Brady and wife. There was decree for the complainant, and the defendants appeal. Dismissed on motion of counsel for appellee.

BROWARD et al. v. DAWN et al. (Supreme Court of Florida. July 12, 1898.) Error to circuit court, Duval county; Rhydon M. Call, Judge. R. H. Liggett, for defendants in error. This action was brought by W. H. Dawn and others against N. B. Broward and others. There was judgment for the plaintiffs, and the defendants bring error. Upon motion of the defendants in error to quash the writ of error it appears that said writ was sued out January 13, 1898, returnable to the first day of the present (June) term, and that the plaintiffs in error have failed to file any transcript of the record, as required by statute and the rule of court. No cause being shown for the failure to prosecute the writ of error sued out, the cause will be docketed, and the writ of error quashed, as being taken against good faith, and merely for delay; and the defendants in error shall recover of the plaintiffs in error the sum of \$25 as damages for their delay occasioned by such writ of error, besides the costs in this court.

BROWN v. BROWN.¹ (Supreme Court of Florida. Oct. 25, 1898.) Appeal from circuit court, Marion county; William A. Hocker, Judge. O. T. Green, for appellant. Anderson & Hocker and A. W. Cockrell & Son, for appellee. The bill in this cause was filed by Abe Brown, as trustee for Pauline Brown and others, against Israel Brown. There was decree for the defendant, and the complainant appeals. Dismissed, because no properly certified transcript of record has been filed.

¹ Rehearing denied September 20, 1898.

¹ Petition to vacate order of dismissal denied November 1, 1898.

BRUSH et al. v. BROWN. (Supreme Court of Florida. May 11, 1898.) Appeal from circuit court, Duval county; Rhydon M. Call, Judge. Margaret A. Brush and Louis J. Brush, in proper. Stephen E. Foster, for appellee. The bill in this cause was filed by Quincy E. Brown against Margaret A. Brush and another. There was decree for the complainant, and the defendants appeal. Decree affirmed.

BURNS & BARCLAY CO. v. FIRST NAT. BANK OF FLORIDA. (Supreme Court of Florida. May 11, 1898.) Error to circuit court, Duval county; R. S. Cockrell, Referee. John L. Doggett, for plaintiff in error. Fletcher & Wurts, for defendant in error. This action was brought by the Burns & Barclay Company against the First National Bank of Florida. There was judgment for the defendant, and the plaintiff brings error. Judgment affirmed.

CAMP et al. v. GASKINS. (Supreme Court of Florida. Dec. 3, 1898.) Appeal from circuit court, Alachua county; William A. Hocker, Judge. Horatio Davis, for appellants. B. C. F. Sanchez, for appellee. The bill in this cause was filed by S. V. Gaskins against B. F. Camp and others. There was decree for the complainant, and the defendants appeal. Decree affirmed. TAYLOR, C. J., being disqualified in this case, took no part in the consideration thereof.

CAMPBELL v. BISHOP. (Supreme Court of Florida. Feb. 10, 1898.) Error to circuit court, Hillsboro county; Barron Phillips, Judge. Gunby & Gibbons and William Hunter, for plaintiff in error. Shackelford & Pettingill, for defendant in error. This action was brought by John A. Bishop against William N. Campbell. There was judgment for the plaintiff, and the defendant brings error. Dismissed on motion of counsel for defendant in error.

CARMICHAEL et al. v. BLUTHENTHAL et al. (Supreme Court of Florida. Jan. 9, 1899.) Error to circuit court, Hillsboro county; N. B. K. Pettingill, Referee. J. B. Wall and W. A. Carter, for plaintiffs in error. Shackelford & Simonton and Sparkman & Sparkman, for defendants in error. This action was brought by Francis Bluthenthal and another, as plaintiffs in attachment, against G. A. Carmichael and another, as claimants, and Thomas V. Culverhouse, defendant. There was judgment for the plaintiffs, and the claimants bring error. Judgment affirmed.

CITY OF JACKSONVILLE v. SHEPPARD et ux. (Supreme Court of Florida. Feb. 25, 1898.) Error to circuit court, Duval county; Rhydon M. Call, Judge. J. M. Barrs, for plaintiff in error. J. J. Holland, for defendants in error. This action was brought by William T. Sheppard and wife against the city of Jacksonville. There was judgment for the plaintiffs, and the defendant brings error. Dismissed on præcipe of counsel for plaintiff in error.

CROWD v. CASTELLAW et al. (Supreme Court of Florida. Nov. 23, 1898.) Error to circuit court, Duval county; Rhydon M. Call, Judge. W. B. Owen, for plaintiff in error. J. C. Cooper, for defendants in error. This action was brought by Mary W. Castellaw and husband against Edwin S. Crowd. There was judgment for the plaintiffs, and the defendant brings error. Judgment affirmed.

DAVIS et al. v. ADLER. (Supreme Court of Florida. Jan. 25, 1898.) Error to circuit court, Baker county; Rhydon M. Call, Judge. F. P. Fleming, for plaintiffs in error. Bisbee & Rinehart, for defendant in error. This action was brought by Louis A. Davis and others against Louis Adler, as assignee of Eppinger & Russell. There was judgment for the defendant, and the plaintiffs bring error. Judgment affirmed.

DAWSON et al. v. TOWN OF LAKE MAITLAND. (Supreme Court of Florida. Nov. 29, 1898.) Appeal from circuit court, Orange county; John D. Broome, Judge. W. R. Anno, for appellants. The bill in this cause was filed by Mary P. Dawson, by her next friend, J. M. Land, and her husband, against the town of Lake Maitland. There was decree for the defendant, and the complainants appeal. There being no entry of appeal in the transcript of record, and no citation appearing to have been issued or served on the appellee, and the latter not having appeared, the case is stricken from the dockets of this court.

DIAL v. TAYLOR. (Supreme Court of Florida. Dec. 13, 1898.) Error to circuit court; Madison county; John F. White, Judge. Angus Paterson, for plaintiff in error. A. H. King and Charles E. Davis, for defendant in error. This action was brought by William H. Dial against Mary L. Taylor. There was judgment for the defendant, and the plaintiff takes writ of error. Dismissed on motion of counsel for defendant in error, because no final judgment is shown in the transcript of record.

DISSTON et al. v. J. R. TYSON CO.¹ (Supreme Court of Florida. July 30, 1898.) Error to circuit court, Hillsboro county; Barron Phillips, Judge. Geo. P. Raney, William Hunter, and Gunby & Gibbons, for plaintiffs in error. Shackelford & Pettingill, for defendant in error. This action was brought by the J. R. Tyson Company against Jacob S. Diston and others. There was judgment for the plaintiff, and the defendants bring error. Judgment affirmed.

DISSTON et al. v. MEINHARD et al.¹ (Supreme Court of Florida. July 30, 1898.) Error to circuit court, Hillsboro county; Barron Phillips, Judge. Geo. P. Raney, William Hunter, and Gunby & Gibbons, for plaintiffs in error. Shackelford & Pettingill, for defendants in error. This action was brought by Henry Meinhard and others against Jacob S. Diston and others. There was judgment for the plaintiffs, and the defendants bring error. Judgment affirmed.

DREW v. WALLACE et al. (Supreme Court of Florida. June 24, 1898.) Appeal from circuit court, Hillsboro county; Barron Phillips, Judge. Shackelford & Pettingill, for appellant. William Hunter, for appellees. The bill in this cause was filed by Hannah H. Drew, by her next friend and husband, John W. Drew, against Mary E. Wallace and others. There was decree for the defendants, and the complainant appeals. Dismissed on præcipe of counsel for appellant.

DUNCAN v. STRICKLAND et al. (Supreme Court of Florida. May 11, 1898.) Error to circuit court, Hamilton county; John F. White, Judge. B. B. Blackwell, for plaintiff in error. Johnson & Johnson, for defendants in error.

¹ Rehearing denied December 17, 1898.

This action was brought by Lewis Strickland and others against James M. Duncan. There was judgment for the plaintiffs, and the defendant brings error. Judgment affirmed.

DUPUIS et al. v. BUFFUM. (Supreme Court of Florida. May 11, 1898.) Appeal from circuit court, Marion county; William A. Hocker, Judge. Hugh E. Miller, for appellants. The bill in this cause was filed by Edward M. Buffum against Franklin S. Dupuis and another. There was decree for the complainant, and the defendants appeal. Dismissed, because citation was not served in the time required by law, and there is no appearance by appellee.

DUVAL v. MEYERS. (Supreme Court of Florida. April 13, 1898.) Error to circuit court, Duval county; William B. Young, Judge. John A. Henderson and John C. Cooper, for plaintiff in error. M. C. Jordan, for defendant in error. This action was brought by Isaac Meyers against H. R. Duval, as receiver of the Florida Railway & Navigation Company. There was judgment for the plaintiff, and the defendant brings error. Judgment affirmed.

FIRST NAT. BANK OF ORLANDO et al. v. KING. (Supreme Court of Florida. Feb. 2, 1898.) Error to circuit court, De Soto county; Barron Phillips, Judge. Beggs & Palmer, for plaintiffs in error. Sparkman & Sparkman, for defendant in error. This action was brought by the First Nat. Bank of Orlando and another against Ziba King. There was judgment for the defendant, and the plaintiffs bring error. Dismissed, because no properly certified transcript of record has been filed.

FLORIDA CENT. & P. R. CO. v. CITY OF JACKSONVILLE. (Supreme Court of Florida. Oct. 25, 1898.) Error to circuit court, Duval county; Rhydon M. Call, Judge. John A. Henderson and John C. Cooper, for plaintiff in error. This action was brought by the Florida Central & Peninsular Railroad Company against the city of Jacksonville. There was judgment for the defendant, and the plaintiff brings error. Dismissed, because there is no evidence shown by the record that service has been made upon defendant in error of a scire facias ad audiendum errores, and there has been no appearance of the defendant in error that could be held to waive such service.

FLORIDA CENT. & P. R. CO. v. FOLKS et al.¹ (Supreme Court of Florida. Feb. 2, 1898.) Error to circuit court, Marion county; William A. Hocker, Judge. John A. Henderson, Hugh E. Miller, and L. N. Green, for plaintiff in error. R. L. Anderson, for defendants in error. This action was brought by Mary A. Folks and another against the Florida Central & Peninsular Railroad Company. There was judgment for the plaintiffs, and the defendant brings error. Judgment affirmed.

FRAZIER et al. v. BAYA. (Supreme Court of Florida. April 13, 1898.) Appeal from circuit court, Alachua county; William A. Hocker, Judge. W. B. Young, for appellants. R. H. Liggett, for appellee. The bill in this cause was filed by William Baya, as assignee of the Jacksonville Santa Fé Hard-Rock Phosphate Company against George W. Frazier and another. There was decree for the complainant, and the defendants appeal. Decree affirmed.

FRIER et al. v. VARN. (Supreme Court of Florida. March 10, 1898.) Appeal from circuit court, Polk county; Barron Phillips, Judge. J. W. Brady, for appellants. Jefferson Varn, in pro. per. The bill in this cause was filed by Georgia V. Frier and husband against Jefferson Varn, Jerry M. Hayman, and William C. Hayman. There was decree for the defendant Jefferson Varn, and the complainants appeal. Dismissed on præcipe of counsel for appellants.

GATES et al. v. GEORGIA STATE BUILDING & LOAN ASS'N OF SAVANNAH. (Supreme Court of Florida. April 12, 1898.) Appeal from circuit court, Hillsboro county; Barron Phillips, Judge. Shackleford & Pettingill, for appellants. Wall & Stevens and F. M. Simonton, for appellee. The bill in this cause was filed by the Georgia State Building & Loan Association of Savannah against George M. Gates and another. There was decree for the complainant, and the defendants appeal. Dismissed on motion of counsel for appellee.

GAY et ux. v. WEY. (Supreme Court of Florida. Jan. 27, 1898.) Appeal from circuit court, De Soto county; Barron Phillips, Judge. C. W. Forrester, for appellants. H. J. Spence, for appellee. The bill in this cause was filed by Jacob Wey, trustee of Edward M. Earnest, against William G. Gay and wife. There was decree for the complainant, and the defendants appeal. Dismissed on præcipe of counsel for appellants.

GODWIN et al. v. GUY et al. (Supreme Court of Florida. Jan. 11, 1898.) Appeal from circuit court, Polk county; Barron Phillips, Judge. Sparkman & Sparkman and Wilson & Wilson, for appellants. Clark & Gibbons and Hammond & Brady, for appellees. The bill in this cause was filed by Julia A. Godwin and husband against Mary Guy, as executrix of Benjamin Guy, deceased, and others. There was decree for the defendants, and the complainants appeal. Dismissed on præcipe of counsel for appellants.

GRANTHAM et ux. v. STUART et al. (Supreme Court of Florida. May 11, 1898.) Appeal from circuit court, Lake county; John D. Broome, Judge. Hugh E. Miller, for appellants. The bill in this cause was filed by James Chambers Stuart and Richard Heaton Smith, doing business under the firm name of John Stuart & Company, of England, against Daniel Grantham and wife. There was decree for the complainants, and the defendants appeal. Decree affirmed.

GREELEY v. SHINE. (Supreme Court of Florida. Jan. 9, 1899.) Error to circuit court, Leon county; John W. Malone, Judge. M. C. Jordan, for plaintiff in error. T. L. Clarke, for defendant in error. This action was brought by Jonathan C. Greeley against Walter N. Shine. There was judgment for the defendant, and the plaintiff brings error. Judgment affirmed.

GREELEY v. WHITNER et al. (Supreme Court of Florida. June 14, 1898.) Appeal from circuit court, Duval county; Rhydon M. Call, Judge. Stephen E. Foster, for appellant. R. H. Liggett, for appellees. The bill in this cause was filed by Jonathan C. Greeley against William Marvin Whitner and another. There was decree for the defendants, and the complainant appeals. Dismissed on motion of counsel for appellees.

¹ Rehearing denied March 29, 1898.

GREEN et al. v. LOUISVILLE TRUST CO. (Supreme Court of Florida. Jan. 9, 1898.) Error to circuit court, Duval county; T. M. Day, Jr., Referee. Walker & L'Engle, for plaintiffs in error. R. H. Liggett, for defendant in error. This action was brought by the Louisville Trust Company against W. C. Green and others. There was judgment for the plaintiff, and the defendants bring error. Judgment affirmed.

GROTHER v. BARGAINER, Marshal. (Supreme Court of Florida. March 1, 1898.) Error to circuit court, Marion county; William A. Hocker, Judge. Hugh E. Miller, for plaintiff in error. This action was brought by Otto Grothe against J. E. Bargainer, as marshal of the city of Ocala. There was judgment for the defendant, and the plaintiff brings error. Dismissed, because no properly certified transcript of record has been filed.

HATTON v. CITIZENS' NAT. BANK OF PENSACOLA. (Supreme Court of Florida. March 1, 1898.) Error to circuit court, Escambia county; William D. Barnes, Judge. Blount & Blount, for plaintiff in error. William Fisher and E. D. Beggs, for defendant in error. This action was brought by the Citizens' Nat. Bank of Pensacola against Hugh B. Hatton. There was judgment for the plaintiff, and the defendant brings error. Dismissed, because no final judgment is shown by the transcript of record.

HATTON v. WYLER et al. (Supreme Court of Florida. March 1, 1898.) Error to circuit court, Escambia county; William D. Barnes, Judge. Blount & Blount, for plaintiff in error. William Fisher and E. D. Beggs, for defendants in error. This action was brought by Louis Wyler and others, doing business under the firm name of Wyler, Ackerland & Co. against Hugh B. Hatton. There was judgment for the plaintiffs, and the defendant brings error. Dismissed, because no final judgment is shown by the transcript of record.

HICKEY v. LOCKLEAR. (Supreme Court of Florida. Jan. 25, 1898.) Error to circuit court, Lee county; Barron Phillips, Judge. Louis A. Hendry, for plaintiff in error. This action was brought by Dennis O. Hickey against Irvin Locklear. There was judgment for the defendant, and the plaintiff brings error. Judgment affirmed.

HILLMAN et al. v. HOXSIE. (Supreme Court of Florida. Sept. 14, 1898.) Error to circuit court, Marion county; William A. Hocker, Judge. H. L. Anderson, for plaintiffs in error. Anderson & Hocker, for defendant in error. This action was brought by E. J. Hoxsie against W. J. Hillman and others. There was judgment for the plaintiff, and the defendants bring error. Dismissed on motion of counsel for defendant in error.

HUGHES v. STEELE. (Supreme Court of Florida. Nov. 29, 1898.) Error to circuit court, Walton county; William D. Barnes, Judge. C. J. Perrenot, for plaintiff in error. Daniel Campbell, for defendant in error. This action was brought by W. B. Steele against J. T. Hughes. There was judgment for the plaintiff, and the defendant brings error. Judgment affirmed.

HYDE v. RICE. (Supreme Court of Florida. Nov. 23, 1898.) Error to circuit court, Alachua county; William A. Hocker, Judge. Horatio

Davis and B. A. Thrasher, for plaintiff in error. W. W. Hampton, for defendant in error. This action was brought by W. F. Rice against G. W. Hyde, as administrator of the estate of J. B. Brown, deceased. There was judgment for the plaintiff, and the defendant brings error. Upon the death of J. B. Brown while the writ of error was pending in the supreme court, the cause was revived here in the name of G. W. Hyde, as administrator. Judgment affirmed.

HYDE et al. v. RILEY et al. (Supreme Court of Florida. Jan. 9, 1899.) Error to circuit court, Duval county; Rhydon M. Call, Judge. W. H. Baker, for plaintiffs in error. A. W. Cockrell & Son, for defendants in error. This action was brought by William K. Hyde and another against Lewis K. Riley and another. There was judgment for the defendants, and the plaintiffs bring error. Judgment affirmed.

IVERS v. KEEFE, Chief of Police. (Supreme Court of Florida. March 1, 1898.) Error to circuit court, Duval county; Rhydon M. Call, Judge. A. W. Cockrell & Son, for plaintiff in error. J. M. Barrs, for defendant in error. This action was brought by John E. Ivers against John Keefe, as chief of police of city of Jacksonville. There was judgment for the defendant, and the plaintiff brings error. Dismissed on præcipe of counsel for plaintiff in error.

JACKSONVILLE, T. & K. W. RY. CO. v. PERRY, Governor, et al. (Supreme Court of Florida. Feb. 9, 1898.) Appeal from circuit court, Putnam county; Jesse J. Finley, Judge. T. M. Day, Jr., R. H. Liggett, and J. R. Parrott, for appellant. Geo. F. Raney, for appellees E. A. Perry and others. R. W. & W. M. Davis, for appellee Florida Southern Ry. Co. W. A. Blount, for appellee Pensacola & A. R. Co. P. W. White, for appellee Florida Coast Line Canal & Transp. Co. The bill in this cause was filed by the Jacksonville, Tampa & Key West Railway Company against E. A. Perry, Governor, and others. There was decree for the defendants, and the complainant appeals. Dismissed on motion of counsel for appellant.

JACKSONVILLE, T. & K. W. RY. CO. v. WILLIAMS et al. (Supreme Court of Florida. Feb. 2, 1898.) Error to circuit court, Duval county; E. M. Randall, Judge. T. M. Day, Jr., for plaintiff in error. H. H. Buckman, for defendants in error. This action was brought by Alice Williams and husband against the Jacksonville, Tampa & Key West Railway Company. There was judgment for the plaintiffs, and the defendant brings error. Judgment affirmed.

KIRK v. SHEPPARD. (Supreme Court of Florida. May 11, 1898.) Error to circuit court, Escambia county; William D. Barnes, Judge. John S. Beard, for plaintiff in error. Blount & Blount, for defendant in error. This action was brought by William Kirk against John Sheppard. There was judgment for the defendant, and the plaintiff brings error. Dismissed because there is no final judgment certified in the record proper.

KIRK v. WELCH et al. (Supreme Court of Florida. Feb. 9, 1898.) Error to circuit court, Escambia county; Evelyn C. Maxwell, Judge. William Kirk, in pro. per. Blount & Blount, for defendants in error. This action was brought by William Kirk against California Welch and husband. There was judgment for the defendants, and the plaintiff brings error. Dismissed on motion of counsel for defendants in error.

KRULDER v. MILLER. (Supreme Court of Florida. Nov. 23, 1898.) Error to circuit court, Volusia county; John D. Broome, Judge. John W. Price, for plaintiff in error. Miller & Austin, for defendant in error. This action was brought by Jennie Miller, by her next friend William R. Fitts, against John C. Krulder. There was judgment for the plaintiff, and the defendant brings error. Judgment affirmed.

LAND-MORTGAGE BANK OF FLORIDA Limited, OF ENGLAND, et al. v. BROWN. (Supreme Court of Florida. Jan. 9, 1899.) Appeal from circuit court, Marion county; William A. Hocker, Judge. W. B. Owen and Hugh E. Miller, for appellant. The bill in this cause was filed by Charles M. Brown against the Land-Mortgage Bank of Florida, Limited, of England, and 19 others. There was decree for the complainant, and the defendants appeal. Subsequently, on application of the Land-Mortgage Bank of Florida, Limited, of England, an order of severance was made as to the other defendants. Decree affirmed.

LEVY v. SIMMONS. (Supreme Court of Florida. May 10, 1898.) Error to circuit court, Alachua county; William A. Hocker, Judge. E. C. F. Sanchez and S. Y. Finley, for plaintiff in error. Hampton & Ammons, for defendant in error. This action was brought by M. F. Simmons against Herman Levy. There was judgment for the plaintiff, and the defendant brings error. Dismissed on motion of counsel for defendant in error for failure to comply with order requiring perfect abstracts of the record.

LIVINGSTON v. MERCHANTS' NAT. BANK. (Supreme Court of Florida. Nov. 23, 1898.) Error to circuit court, Duval county; Rhodon M. Call, Judge. Walker & L'Engle and W. B. Young, for plaintiff in error. R. H. Liggett, for defendant in error. This action was brought by the Merchants' National Bank against Charles O. Livingston. There was judgment for the plaintiff, and the defendant brings error. Judgment affirmed.

LOVELL v. LIN. (Supreme Court of Florida. Nov. 29, 1898.) Error to circuit court, Orange county; John D. Broome, Judge. Beggs & Palmer, for plaintiff in error. J. M. Cheney, for defendant in error. This action was brought by C. B. Lin, as assignee of E. R. Prince, against W. A. Lovell. There was judgment for the plaintiff, and the defendant takes writ of error. Judgment affirmed.

MANSFIELD MACH. WORKS v. HODGE, Sheriff. (Supreme Court of Florida. May 11, 1898.) Appeal from circuit court, Marion county; Jesse J. Finley, Judge. John G. Reardon, for appellant. The bill in this cause was filed by the Mansfield Machine Works against B. Du Free Hodge, sheriff of Marion county, and ex officio administrator of Henderson Harvey, deceased. There was decree for the defendant, and the complainant appeals. Dismissed because made returnable to a wrong term.

MATTAIR v. FURCHGOTT. (Supreme Court of Florida. July 12, 1898.) Appeal from circuit court, Alachua county; William A. Hocker, Judge. Hampton & Ammons, for appellee. The bill in this cause was filed by Sarah L. Mattair against Leopold Furchgott. There was decree for the defendant, and the complainant appeals. Dismissed on motion of counsel for appellee for failure to prosecute.

MEEKINS v. CUMMER et al. (Supreme Court of Florida. Oct. 11, 1898.) Error to circuit court, Alachua county; William A. Hocker, Judge. Evans Haile, for plaintiff in error. W. W. Hampton, for defendants in error. This action was brought by Jacob Cummer and another against Fleming Meekins. There was judgment for the plaintiffs, and the defendant brings error. Dismissed on motion of counsel for defendants in error for failure to prosecute.

MERRILL-STEVENS ENGINEERING CO. v. BAYA. (Supreme Court of Florida. April 13, 1898.) Appeal from circuit court, Alachua county; William A. Hocker, Judge. H. H. Buckman, for appellant. R. H. Liggett, for appellee. The bill in this cause was filed by William Baya, as assignee of the Jacksonville & Santa Fe Hard-Rock Phosphate Company, against the Merrill-Stevens Engineering Company. There was decree for the complainant, and the defendant appeals. Decree affirmed.

MILLER, Sheriff, v. POAGE. (Supreme Court of Florida. April 6, 1898.) Error to circuit court, Osceola county; John D. Broome, Judge. R. R. Taylor and E. D. Beggs, for plaintiff in error. Gunby & Gibbons, for defendant in error. This action was brought by C. A. Poage against J. W. Miller, as sheriff of Osceola county. There was judgment for the plaintiff, and the defendant brings error. Dismissed on praecipe of counsel for plaintiff in error.

MILLICAN et al. v. VAN NESS et al. (No. 1.) (Supreme Court of Florida. Aug. 24, 1898.) Appeal from circuit court, Alachua county; Samuel Y. Finley, Circuit Court Commissioner. Evans Haile, for appellants. W. W. Hampton, for appellees. The bill in this cause was filed by Eugene Van Ness and others against E. W. Millican and another. There was decree for the complainants, and the defendants appeal. Dismissed on praecipe of counsel for appellants.

MILLICAN et al. v. VAN NESS et al. (No. 2.) (Supreme Court of Florida. Aug. 24, 1898.) Appeal from circuit court, Alachua county; William A. Hocker, Judge. Evans Haile, for appellants. W. W. Hampton, for appellees. The bill in this cause was filed by Eugene Van Ness and others against E. W. Millican and another. There was decree for the complainants, and the defendants appeal. Dismissed on praecipe of counsel for appellants.

M. J. FITCH PAPER CO. v. HICKSON. (Supreme Court of Florida. Nov. 29, 1898.) Error to circuit court, Marion county; William A. Hocker, Judge. A. W. Cockrell & Son, for plaintiffs in error. This action was brought by William Hickson against J. Frank Thacker and Albert Thacker, doing business under the firm name of Thacker Bros. The M. J. Fitch Paper Company interposed a claim to the property levied on, and W. B. Barnett and Bion H. Barnett were sureties on the attachment bond. There was judgment for the plaintiff, and the M. J. Fitch Paper Company, claimant, and W. B. Barnett and Bion H. Barnett, sureties on the attachment bond, take writ of error. Judgment affirmed.

PALMER et al. v. WARREN. (Supreme Court of Florida. March 8, 1898.) Appeal from

¹ Rehearing denied December 17, 1898.

circuit court, Hillsboro county; Barron Phillips, Judge. J. B. Wall, for appellants. Carter & Graham, for appellee. The bill in this cause was filed by L. R. Warren against Thomas Palmer and others. There was decree for the complainant, and the defendants appeal. Dismissed on motion of counsel for appellee for failure to file transcript of record.

PELLERIN et al. v. DAVIS. (Supreme Court of Florida. Jan. 26, 1898.) Error to circuit court, Duval county; Rhydon M. Call, Judge. H. H. Buckman, for plaintiffs in error. H. B. Phillips, for defendant in error. This action was brought by Henderson Davis against Frederick A. Pellerin and Edward M. Fetting, partners as F. A. Pellerin & Co. There was judgment for the plaintiff, and the defendants bring error. Judgment affirmed.

RAMSEY v. SNOW. (Supreme Court of Florida. Jan. 9, 1899.) Appeal from circuit court, Hernando county; William A. Hocker, Judge. J. C. Davant, for appellant. The bill in this cause was filed by Joseph R. Snow against Gardner V. Ramsey. There was decree for the complainant, and the defendant appeals. Decree affirmed.

REBSTON v. REBSTON. (Supreme Court of Florida. Sept. 14, 1898.) Appeal from circuit court, Duval county; Rhydon M. Call, Judge. A. M. Michelson, for appellant. M. O. Jordan, for appellee. The bill in this cause was filed by Annie M. Rebston against Albert M. Rebston. There was decree for the complainant, and the defendant appeals. Dismissed on motion of counsel for appellee.

ROBERTS et al. v. GODWIN. (Supreme Court of Florida. July 12, 1898.) Appeal from circuit court, Alachua county; William A. Hocker, Judge. Hampton & Ammons, for appellee. The bill in this cause was filed by J. M. Roberts and another against D. E. Godwin. There was decree for the defendant, and the complainants appeal. Dismissed on motion of counsel for appellee for failure to prosecute.

ST. PETERSBURG STATE BANK v. BEARDON et al. (Supreme Court of Florida. July 12, 1898.) Appeal from circuit court, Marion county; William A. Hocker, Judge. H. L. Anderson, for appellees. The bill in this cause was filed by the St. Petersburg State Bank against John G. Beardon. There was decree for the defendants, and the complainant appeals. Dismissed on motion of counsel for appellees for failure to prosecute. See 23 South. 1011.

SCHOLTZ v. BARGAINER, Marshal. (Supreme Court of Florida. March 1, 1898.) Error to circuit court, Marion county; William A. Hocker, Judge. Hugh E. Miller, for plaintiff in error. This action was brought by Theodore Scholtz against J. E. Bargainer, as marshal of the city of Ocala. There was judgment for the defendant, and the plaintiff brings error. Dismissed because no properly certified transcript of record has been filed.

SHERMAN v. CITY OF ST. AUGUSTINE. (Supreme Court of Florida. Nov. 23, 1898.) Error to circuit court, St. Johns county; Rhydon M. Call, Judge. W. W. Dewhurst, for plaintiff in error. A. W. Cockrell & Son, for defendant in error. This action was brought by William Sher-

man against the city of St. Augustine. There was judgment for the defendant, and the plaintiff takes writ of error. Judgment affirmed. CARTER, J., dissenting.

SHUFELT et al. v. AMBACH et al. (Supreme Court of Florida. June 18, 1898.) Appeal from circuit court, Duval county; Rhydon M. Call, Judge. M. C. Jordan and W. B. Owen, for appellants. A. W. Cockrell & Son, for appellees. The bill in this cause was filed by David Ambach and others against John H. Shufelt and others. There was decree for the complainants, and the defendants appeal. Decree affirmed.

SILVER SPRINGS & W. R. CO. et al. v. ST. PETERSBURG STATE BANK. (Supreme Court of Florida. Oct. 18, 1898.) Appeal from circuit court, Marion county; William A. Hocker, Judge. William Hocker and H. L. Anderson, for appellants. Shackelford & Pettingill, for appellee. The bill in this cause was filed by the St. Petersburg State Bank against the Silver Springs & Western Railroad Company and others. There was decree for the complainant, and the defendants appeal. Dismissed on motion of counsel for appellee.

SPIERS et al. v. MAROY et al. (Supreme Court of Florida. Jan. 17, 1898.) Error to circuit court, Duval county; Rhydon M. Call, Judge. W. P. Ward, for plaintiffs in error. James R. Challen, for defendants in error. This action was brought by W. P. Maroy and others, partners as Marcy Bros. & Co., against William P. Spiers and another, partners as Spiers & Palmer. There was judgment for the plaintiffs, and the defendants bring error. Error dismissed on præcipe of counsel for plaintiffs in error.

STATE ex rel. SMITH v. MARVIN et al., Board of Com'rs. (Supreme Court of Florida. Feb. 11, 1898.) Error to circuit court, Duval county; Rhydon M. Call, Judge. A. W. Cockrell & Son, for plaintiff in error. Fleming & Fleming, for defendants in error. This action was brought by the state, on the relation of Columbus B. Smith, against Charles Marvin and others, as the board of commissioners of Duval county. There was judgment for the defendants, and the plaintiff brings error. Dismissed because irregularly sued out.

VAN NESS et al. v. PADGETT et al. (Supreme Court of Florida. Aug. 24, 1898.) Appeal from circuit court, Alachua county; William A. Hocker, Judge. W. W. Hampton, for appellants. Evans Halle, for appellees. The bill in this cause was filed by J. B. Padgett and another against Eugene Van Ness and others. There was decree for the complainants, and the defendants appeal. Dismissed on præcipe of counsel for appellants.

WARRINGTON ICE CO. v. ESCAMBIA FISH CO. (Supreme Court of Florida. Oct. 20, 1898.) Error to circuit court, Escambia county; Evelyn C. Maxwell, Judge. John S. Beard and John C. Avery, for plaintiff in error. Blount & Blount and Fred. T. Myers, for defendant in error. This action was brought by the Escambia Fish Company against the Warrington Ice Company. There was judgment for the plaintiff, and the defendant brings error. Dismissed on præcipe of counsel for plaintiff in error.

WEEKS v. IVES et al. (Supreme Court of Florida. April 13, 1898.) Error to circuit court,

¹ Rehearing denied January 12, 1899.

Orange county; John D. Broome, Judge. J. M. Obeney, for plaintiff in error. Arthur F. Odlin, for defendants in error. This action was brought by S. E. Ives and another against John W. Weeks. There was judgment for the plaintiffs, and the defendant brings error. Judgment affirmed.

WHEELER & WILSON MFG. CO. v. JOHNS. (Supreme Court of Florida. Jan. 9, 1899.) Error to circuit court, Bradford county; Rhydon M. Call, Judge. Thomas E. Bugg, for plaintiff in error. This action was brought by the Wheeler & Wilson Manufacturing Company against E. E. Johns. There was judgment for the defendant, and the plaintiff brings error. Judgment affirmed. See 20 South. 236.

WILDER v. MYRICK. (Supreme Court of Florida. June 13, 1898.) Error to circuit court, Duval county; Rhydon M. Call, Judge. Fleming & Fleming and J. W. Archibald, for plaintiff in error. J. C. Cooper, for defendant in error. This action was brought by Herbert A. Wilder against Alexander Myrick. There was judgment for the defendant, and the plaintiff brings error. Judgment affirmed.

WRIGHT et al. v. CAREY et al. (Supreme Court of Florida. January 25, 1898.) Error to circuit court, Marion county; William A. Hocker, Judge. O. T. Green, for plaintiffs in error. This action was brought by Davis Carey and others, co-partners as Carey Brothers & Grevmyer, against Robert G. Wright and John Frazier, co-partners as Wright & Frazier. There was judgment for the plaintiffs, and the defendants bring error. Dismissed because no properly certified transcript of record has been filed.

YELLOW PINE CO. et al. v. ATLANTIC LUMBER CO. (Supreme Court of Florida. March 8, 1898.) Error to circuit court, Nassau county; Rhydon M. Call, Judge. R. H. Liggett, for defendant in error. This action was brought by the Atlantic Lumber Company against the Yellow Pine Company and another. There was judgment for the plaintiff, and the defendants bring error. Dismissed on motion of counsel for defendant in error.

YONGE v. HAINES. (Supreme Court of Florida. Jan. 8, 1899.) Error to circuit court, Escambia county; William D. Barnes, Judge. John C. Avery, for plaintiff in error. Blount & Blount, for defendant in error. This action was brought by F. S. Haines against C. C. Yonge. There was judgment for the plaintiff, and the defendant takes writ of error. Judgment affirmed.

YONGE et ux. v. HAINES. (Supreme Court of Florida. Jan. 8, 1899.) Error to circuit court, Escambia county; William D. Barnes, Judge. John C. Avery, for plaintiffs in error. Blount & Blount, for defendant in error. This action was brought by Edward W. Haines against J. E. Yonge and wife. There was judgment for the plaintiff, and the defendants take writ of error. Judgment affirmed.

In re LEVY'S ESTATE. (No. 12,981.) (Supreme Court of Louisiana. Feb. 24, 1899.) Appeal from judicial district court, parish of St. Landry; Gilbert L. Dupré, Judge. In the matter of the estate of Alphonse Levy, the administrator and several of the creditors ap-

peal. Reversed. Henry L. Garland, W. C. Perrault, and Bernard Titche, for appellants. E. D. Esvillette, for appellees St. Landry State Bank and heirs of Dr. V. Boagni. E. D. Saunders, Kenneth Baillo, and E. B. Du Buisson, for appellees Opelousas Mercantile Co. and liquidators of J. Meyer & Co. R. Lee Garland, for appellee M. Firnberg.

NICHOLLS, C. J. This case came before us on appeals taken—First, by Lazare Levy, in his capacity as the administrator of the succession of Alphonse Levy; second, by Henry L. Garland; third, by Bernard Titche; fourth, by W. C. Perrault; fifth, by Julius Meyers, Henry Newman, and James T. Stewart, as liquidators and receivers of the firm of J. Meyer & Co.; sixth, by the Opelousas Mercantile Company—from a judgment rendered by the Eleventh judicial district court in the matter of the homologation of the account of Lazare Levy as administrator of the succession of Alphonse Levy. Henry L. Garland, Bernard Titche, and W. C. Perrault moved in the supreme court that the appeal taken by them be dismissed; and it was so ordered by the court, without prejudice. Lazare Levy, as administrator of the succession of Alphonse Levy, moved in the supreme court that the appeal taken by him in his said capacity be dismissed; and it was so ordered, without prejudice. Dr. Vincent Boagni, who was an opponent to the account in the district court, and an appellant, as stated, having died before this cause was reached in the supreme court, his heirs appeared therein, praying that they be permitted to withdraw said opposition, and to have the same dismissed; and it was so ordered, without prejudice. The St. Landry State Bank and Marks Firnberg opposed the account in the district court. Judgment was rendered upon their oppositions. They did not appeal, but occupied on the appeal the position of appellees. The Opelousas Mercantile Company, Limited, appeared in the supreme court, and, suggesting to the court that it had, since the appeals in the case were taken, and the filing of the transcript therein, become the transferee and owner of the claims of the St. Landry Bank, as per its opposition filed in the district court, and of Marks Firnberg, as per his opposition filed in the district court, which claims were being prosecuted in this cause, prayed to be, and as allowed by the court to be, substituted in respect to same to said St. Landry State Bank and said Marks Firnberg, and to prosecute same under its said transfer and subrogation for its own behalf and advantage, and in its own name. The Opelousas Mercantile Company subsequently appeared in this court, and, suggesting to it that it was the only appellant before the court, and the only party before the court having or holding any claim against the estate of A. Levy, saying the creditors whose debts appear on the mortuaria of said estate, and whose claims are not opposed by movers, and whose privilege is neither opposed nor disputed, and further suggesting that, as the only appellant before the court, it desired to have the cause remanded to the lower court for further proceedings,—suggesting as additional reasons for such remandment that the principal opposition pending in the above cause is its opposition for a privilege and preference over the other creditors of this estate, which issue was yet pending and undecided in the district court.—prayed that the part of the cause pending before the supreme court on appeal be remanded to the lower court for further proceedings according to law. No appearance was made in this court in this case by the liquidators and receivers of the firm of J. Meyer & Co., opponents below and appellants. In their opposition below, they adopted and made their own the opposition filed by the Opelousas Mercantile Company. No appearance has been made on behalf of any of the appellees, nor has any amendment been asked on behalf of

any party. The Opelousas Mercantile Company, Limited, had been placed on the account of the administrator as creditor for a large amount. Its status as such was the subject of opposition below. That status it defended in the district court. As a recognized creditor, it filed oppositions to the account. The district court rejected the claim of the Opelousas Mercantile Company as a creditor, and necessarily the opposition it had filed, and homologated the account, with some amendments. On application, that company was accorded a limited new trial. The order of the court on the application for a new trial was "that a new trial be granted to the Opelousas Mercantile Company only for purpose of permitting it to establish, if it can, the acquisition and ownership of its claims contradictorily with all persons interested; that such new trial be restricted to proof of those facts; that pending this trial the administrator will not distribute the proceeds on hand for distribution as previously ordered in the judgment of date the 14th; that this case be reinstated on the trial docket of this court for disposition in accordance with law, and under the rules of this court. The judgment rendered by me, save as herein announced, is in all other respects maintained. In other words, it is to become executory in all respects, save as herein announced." The issues raised by the Opelousas Mercantile Company and those raised by the liquidators of the firm of J. Meyer & Co. seem to be substantially alike. As at present advised, we do not see that injury would result from the granting the prayer to remand the cause; and we think the Opelousas Mercantile Company is entitled to have, not only its right as a creditor established, if it can do so, but that the oppositions filed by it as such should be reinstated and disposed of. For the reasons assigned, it is ordered, adjudged, and decreed that the judgment of the district court, in so far as the Opelousas Mercantile Company, Limited, and the liquidators of J. Meyer & Co., and in so far as the issues involved in the appeals taken by them herein, are concerned, be, and the same is hereby, annulled, avoided, and reversed, and that that part of the cause pending on appeal herein be, and the same is hereby, remanded to the district court for further proceedings according to law, and that all costs be taxed against the succession.

STATE v. WIMBERLY. (No. 12,896.) (Supreme Court of Louisiana. Dec. 5, 1898.)

CONSTITUTION—ADOPTION—RATIFICATION.

The ruling of this court in *State v. Favre* (No. 12,897) 25 South. 93, 51 La. Ann. —, is reiterated and affirmed.

Appeal from judicial district court, parish of Acadia; Gilbert L. Dupré, Judge.

Abram Wimberly was convicted of manslaughter, and appeals. Affirmed.

E. P. Veazie, for appellant. Milton J. Cunningham, Atty. Gen., and R. Lee Garland, Dist. Atty., for the State.

WATKINS, J. The defendant was indicted for the crime of murder, convicted of manslaughter, and sentenced to seven years' imprisonment in the penitentiary; and from the verdict and sentence he prosecutes this appeal.

The defendant's counsel rests his claim to relief on the ground that the trial judge erroneously refused to sustain his motion to quash the indictment. We make the subjoined extract from the brief of the attorney general, as fairly stating the point at issue, viz.: "On June 17th he filed a motion to quash the indictment on the ground that the constitution of 1898 was unconstitutional, illegal, null, and void, because it is an amendment to the constitution of 1879, and was not adopted by the

legislature and subsequently ratified by the people, as provided in article 256 of the constitution of 1879, and on the further ground, in the alternative, that the indictment is null and void because the grand jury which found the bill was not composed of sixteen persons, as provided by Act No. 99 of 1896, but was composed of only twelve persons, which composition was irregular and null, because article 117, par. 2, of the constitution of 1898, had never been executory, the legislature having made no provision to put same in force by providing for the drawing of juries thereunder." The same questions were presented and decided adversely to the defendant's contention in *State v. Favre* (No. 12,897) 51 La. Ann. —, 25 South. 93. For the reasons which are therein assigned, the ruling of the trial judge is approved. Judgment affirmed.

ACREE v. HIGHTOWER et al. (No. 8,935.) (Supreme Court of Mississippi. Jan. 16, 1899.) Appeal from chancery court, Bolivar county; A. H. Longino, Chancellor. Sillers & Owen and Brame & Alexander, for appellant. E. H. Moore, for appellees. No opinion. Decree affirmed.

ADAMS v. BURSON. (No. 9,113.) (Supreme Court of Mississippi. April 10, 1899.) Appeal from chancery court, Webster county; Baxter McFarland, Chancellor. Dunn, Dunn & Gould and Hill & Sisson, for appellant. Roane & Cook, for appellee. No opinion. Decree affirmed.

AIKEN v. STATE. (No. 9,218.) (Supreme Court of Mississippi. Jan. 30, 1899.) Appeal from circuit court, Yalobusha county; Z. M. Stephens, Judge. Golladay & Rowland, for appellant. Wiley N. Nash, Atty. Gen., for the State. Judgment affirmed.

ALABAMA G. S. R. CO. v. MONTGOMERY. (No. 9,015.) (Supreme Court of Mississippi. Feb. 20, 1899.) Appeal from chancery court, Lauderdale county; N. O. Hill, Chancellor. Fewell & Son, for appellant. G. Q. Hall, for appellee. No opinion. Decree affirmed and remanded, with leave for an answer in 30 days from filing of mandate below.

ALABAMA & V. RY. CO. v. PROGNER. (No. 9,355.) (Supreme Court of Mississippi. April 3, 1899.) Appeal from circuit court, Warren county; W. K. McLaurin, Judge. McWille & Thompson, for appellant. McLaurin & McKnight, for appellee. No opinion. Judgment affirmed.

ALCORN COUNTY v. BUTLER. (No. 9,223.) (Supreme Court of Mississippi. Jan. 30, 1899.) Appeal from circuit court, Alcorn county; E. O. Sykes, Judge. Candler & Candler, for appellant. J. M. Boone, for appellee. No opinion. Judgment affirmed.

AMERICAN EXP. CO. v. RICHBERGER. (No. 9,137.) (Supreme Court of Mississippi. Feb. 20, 1899.) Appeal from circuit court, Montgomery county; F. A. Montgomery, Judge. D. A. Scott, for appellant. Sam C. Cook, for appellee. No opinion. Judgment affirmed.

BEDWELL v. BEDWELL. (No. 9,201.) (Supreme Court of Mississippi. Jan. 23, 1899.) Appeal from chancery court, Hinds county; R.

P. Willing, Special Chancellor. *W. Calvin Wells and J. M. Shelton, for appellant. Wells & Croom and R. L. Bradley, for appellee.* No opinion. Decree affirmed.

BENNETT v. REESE. (No. 9,284.) (Supreme Court of Mississippi. April 10, 1899.) Appeal from circuit court, Lee county; E. O. Sykes, Judge. *W. D. Anderson, for appellant. Allen & Robins, for appellee.* No opinion. Judgment affirmed.

BERNHEIM et al. v. BASHAM. (No. 9,290.) (Supreme Court of Mississippi. Feb. 6, 1899.) Appeal from circuit court, Monroe county; E. O. Sykes, Judge. *Clifton & Eckford, for appellant. Geo. C. Paine, for appellee.* No opinion. Judgment affirmed.

BRUMBY CHAIR CO. v. HOUSTON et al. (No. 9,273.) (Supreme Court of Mississippi. April 3, 1899.) Appeal from circuit court, Monroe county; E. O. Sykes, Judge. *Gilleylen & Leftwich, for appellant. Houston & Reynolds, for appellee.* No opinion. Judgment affirmed.

BUCHANAN v. FERGUSON. (No. 9,289.) (Supreme Court of Mississippi. March 6, 1899.) Appeal from circuit court, Monroe county; E. O. Sykes, Judge. *Gilleylen & Leftwich and Clifton & Eckford for appellant. Houston & Reynolds, for appellee.* No opinion. Judgment affirmed.

CANFIELD v. STATE. (No. 9,329.) (Supreme Court of Mississippi. March 6, 1899.) Appeal from circuit court, Jackson county; T. A. Wood, Judge. *W. H. Maybin and J. I. Ford, for appellant.* No opinion. Judgment affirmed.

CARY v. FULMER. (No. 9,285.) (Supreme Court of Mississippi. March 13, 1899.) Appeal from chancery court, Panola county; J. C. Longstreet, Chancellor. *P. H. Lowry, for appellant. Cooper & Waddell, for appellee.* No opinion. Decree affirmed both on appeal and cross appeal.

CASE v. STATE. (No. 9,091.) (Supreme Court of Mississippi. March 6, 1899.) Appeal from circuit court, Copiah county; Robert Powell, Judge. *A. C. McNair, for appellant. Wyley N. Nash, Atty. Gen., for the State.* No opinion. Judgment affirmed.

CHAPPELL v. NEW ORLEANS & N. E. R. CO. (No. 9,336.) (Supreme Court of Mississippi. Feb. 20, 1899.) Appeal from circuit court, Perry county; A. G. Mayers, Judge. *Hartfield & McLaurin and Alexander & Alexander, for appellant.* No opinion. Judgment affirmed.

CLARKE v. EDW. THOMPSON CO. (No. 9,280.) (Supreme Court of Mississippi. Jan. 23, 1899.) Appeal from circuit court, Chickasaw county; E. O. Sykes, Judge. *W. L. Clayton, for the motion. Calhoun & Green, opposed.* Appellant, Clarke, filed an appeal bond in this case, but took no further steps towards having the record filed in the supreme court. The appellee had a record of the pleadings, judgment, and appeal proceedings prepared, and filed same in this court, and then filed a motion to affirm as a delay case. This motion was resisted. No opinion. Motion denied.

CLAY v. CHICKASAW. (No. 9,257.) (Supreme Court of Mississippi. Feb. 6, 1899.) Appeal from chancery court, Clay county; Baxter McFarland, Chancellor. *S. M. Roane, for appellant. Newnan Cayce, for appellee.* No opinion. Decree affirmed.

COLE v. MOORE. (No. 9,402.) (Supreme Court of Mississippi. April 10, 1899.) Appeal from circuit court, Tallahatchie county; F. A. Montgomery, Judge. *Stone & Sanders and Eskridge & Buntin, for appellant. Dinkins & Caldwell, for appellee.* No opinion. Judgment affirmed.

COLEMAN v. TEMPLE. (No. 9,164.) (Supreme Court of Mississippi. Dec. 5, 1898.) Appeal from circuit court, Lauderdale county; G. B. Huddleston, Judge. *Eskridge & McBeath, for appellant. Cochran & Bozeman, for appellee.* There is no bill of exceptions in this case. The stenographer certifies to the correctness of his notes, but there is nothing to indicate that the judge ever saw or approved the same.—his signature does not appear,—nor does it appear that counsel agreed to the same. No opinion. Judgment affirmed.

COLEMAN v. TEMPLE. (No. 9,164.) (Supreme Court of Mississippi. Jan. 23, 1899.) *Alexander & Alexander, for the motion.* This case was affirmed, there being no bill of exceptions. Appellant then made a motion to vacate that judgment and for leave to file a proper bill of exceptions. No opinion. Motion denied.

COMPRESS CO. v. STEVENS. (No. 9,339.) (Supreme Court of Mississippi. March 13, 1899.) Appeal from circuit court, Pike county; W. P. Cassidy, Judge. *Will A. Parsons, for appellant. Mixon & Lotterhos and Brame & Alexander, for appellee.* No opinion. Judgment affirmed.

CROWLEY et al. v. BOSWORTH. (No. 9,391.) (Supreme Court of Mississippi. April 10, 1899.) Appeal from circuit court, Grenada county; W. F. Stevens, Judge. *Slack & Mitchell, for appellants. Wm. C. McLean, for appellee.* No opinion. Judgment affirmed.

DAVENPORT v. AUERBACH. (No. 9,213.) (Supreme Court of Mississippi. April 3, 1899.) Appeal from circuit court, Holmes county; W. F. Stevens, Judge. *Tackett & Smith, for appellant. Noel & Pepper, for appellee.* No opinion. Judgment affirmed.

DAVIS et al. v. CRANE. (No. 9,364.) (Supreme Court of Mississippi. April 3, 1899.) Appeal from chancery court, Washington county; A. H. Longino, Chancellor. *Jayne & Watson, for appellant. Wm. Griffin, for appellee.* No opinion. Decree affirmed.

DAVIS et al. v. DUNCAN. (No. 9,270.) (Supreme Court of Mississippi. April 3, 1899.) Appeal from chancery court, Monroe county; Baxter McFarland, Chancellor. *Gilleylen & Leftwich, for appellants. Houston & Reynolds, for appellee.* No opinion. Decree affirmed.

DELTA BANK v. SWAIN et al. (No. 9,260.) (Supreme Court of Mississippi. Jan. 30, 1899.) Appeal from chancery court, Leflore county; A. H. Longino, Chancellor. *Rush & Gardner, for*

appellant. J. S. Perrin, for appellee. No opinion. Decree affirmed, and 30 days for answer after mandate filed below.

DOOHE v. STREET. (No. 9,225.) (Supreme Court of Mississippi. March 20, 1899.) Appeal from chancery court, Alcorn county; Baxter McFarland, Chancellor. Inge & Lamp, for appellant. J. M. Boone, for appellee. No opinion. Decree affirmed.

DOLAN v. DISON. (No. 9,135.) (Supreme Court of Mississippi. Feb. 6, 1899.) Appeal from chancery court, Coahoma county; A. H. Longino, Chancellor. Cook & Alcorn, for appellant. Butt & Butt, for appellee. No opinion. Affirmed both on direct and cross appeal.

ELLZEY v. MOYSE et al. (No. 9,276.) (Supreme Court of Mississippi. April 10, 1899.) Appeal from chancery court, Lincoln county; H. C. Conn, Chancellor. McWillie & Thompson, for appellant. Will A. Parsons, for appellee. No opinion. Decree affirmed.

EMBRY v. STEVENS. (No. 9,210.) (Supreme Court of Mississippi. Feb. 20, 1899.) Appeal from chancery court, Webster county; Baxter McFarland, Chancellor. Critz, Beckett & Leverett, for appellant. S. M. Roane, for appellee. No opinion. Decree affirmed.

FIDELITY & CASUALTY CO. v. JOHNSON. (No. 9,334.) (Supreme Court of Mississippi. Feb. 20, 1899.) Appeal from circuit court, Lincoln county; Robert Powell, Judge. Chrisman & Brennan, for appellant. Cassidy & Cassidy, for appellee. No opinion. Judgment affirmed.

FOOTE v. SIMMONS. (No. 9,129.) (Supreme Court of Mississippi. Dec. 5, 1898.) Appeal from circuit court, Noxubee county; G. B. Huddleston, Judge. J. E. Rives, for appellant. C. B. Ames, for appellee. No opinion. Judgment affirmed.

GULF & C. R. CO. v. McCLURG. (No. 9,061.) (Supreme Court of Mississippi. March 6, 1899.) Appeal from circuit court, Pontotoc county; E. O. Sykes, Judge. J. W. T. Falkner and J. D. Fontaine, for appellant. Geo. T. Mitchell, for appellee. No opinion. Judgment affirmed.

HARDY v. STATE. (No. 9,226.) (Supreme Court of Mississippi. March 13, 1899.) Appeal from circuit court, Harrison county; T. A. Wood, Judge. E. M. Barber, for appellant. No opinion. Judgment affirmed.

HART v. CHEMICAL BANK. (No. 9,389.) (Supreme Court of Mississippi. April 10, 1899.) Appeal from chancery court, Tunica county; A. H. Longino, Chancellor. St. John Waddell, for appellant. W. A. Percy, for appellee. No opinion. Decree affirmed.

HYMAN et al. v. BLAIR. (No. 9,211.) (Supreme Court of Mississippi. Jan. 18, 1899.) Appeal from circuit court, Holmes county; W. F. Stevens, Judge. Hooker, Wilson & Wiener, for appellants. Williamson & Potter, for appellee. No opinion. Judgment affirmed.

ILLINOIS CENT. R. CO. v. CLEVELAND. (No. 9,349.) (Supreme Court of Mississippi. April 10, 1899.) Appeal from circuit court, Hinds county; Roberts Powell, Judge. While getting out rock from a quarry, Cleveland was injured by the pick of a fellow workman; and he sues for damages, not for negligence of the fellow servant, but because the railroad failed to furnish the proper tools for the work being done. He recovered judgment, and the railroad appealed. Mayes & Harris, for appellant. W. L. Easterling, for appellee. No opinion. Judgment affirmed.

ISELL v. ILLINOIS CENT. R. CO. (Supreme Court of Mississippi. Feb. 20, 1899.) Appeal from circuit court, Pike county; W. P. Cassidy, Judge. This suit was brought by appellant, J. W. Isbell, to recover damages of the Illinois Central Railroad Company for personal injuries sustained by him while in the employment of said railroad company. Appellant, at the time of the injury complained of, was employed as a brakeman by the Illinois Central Railroad Company, and while undertaking to couple together two of appellee's cars his hand was caught between the drawheads and badly crushed, whereby he lost the fingers of his right hand. The declaration avers, as negligence, that the railroad company was negligent in not having automatic couplers on all of its cars of the type recommended and adopted by the Master Car Builders' Association; that it was negligent in having Janney couplers on some cars, and link and pin couplers on others; that it was negligent in not having the drawheads for these different styles of couplers of the standard height; that it was negligent in not having grab irons on the cars; that it was negligent in not furnishing coupling sticks to its employees; that it was negligent in not complying with the fifth section of the act of congress of March 2, 1898, in that the difference between the height of the drawheads and couplers on its cars exceeded the limit prescribed by said act; that it was negligent in having defective locomotives, which caused the injury to plaintiff. Defendant pleaded—First, the general issue; second, contributory negligence. At the trial in the court below, a peremptory instruction was given by the court for the defendant, and plaintiff appealed. Reversed. Govan & Quin and Calhoun & Green, for appellant. Mayes & Harris, for appellee.

WHITFIELD, J. The court erred in taking the case from the jury. What was the proximate cause of the injury was, on the testimony in the record, peculiarly a question for a jury. *White v. Railway Co.*, 72 Miss. 12, 16 South. 248. Judgment reversed, verdict set aside, and cause remanded for a new trial.

JACKSON COUNTY v. KREBS. (No. 9,305.) (Supreme Court of Mississippi. Feb. 27, 1899.) Appeal from chancery court, Jackson county; N. C. Hill, Chancellor. C. H. Wood, for appellant. Denny & Woods, for appellee. No opinion. Decree affirmed.

JOHNSON v. STATE. (No. 9,221.) (Supreme Court of Mississippi. April 10, 1899.) Appeal from circuit court, Oktibbeha county; E. O. Sykes, Judge. Carroll & Magruder, for appellant. Wiley N. Nash, Atty. Gen., for the State. No opinion. Judgment affirmed.

LANE v. AMERICAN SURETY CO. (No. 9,297.) (Supreme Court of Mississippi. Jan. 30, 1899.) Appeal from chancery court, De Soto county; J. C. Longstreet, Chancellor. R. L. Dabney, for appellant. Farley & Lauderdale, for appellee. No opinion. Decree affirmed.

LATIMER v. ILLINOIS CENT. R. CO. (No. 9,214.) (Supreme Court of Mississippi. April 10, 1899.) Appeal from circuit court, Holmes county; W. F. Stevens, Judge. Suit by Latimer to recover damages for libel. Latimer was a conductor on a train of the appellee. Special agents of the railroad company (termed by the appellant as "spies" or "spotters") made a report of what occurred on a certain trip made by Latimer as conductor,—among other things, the collection of cash fares by Latimer from passengers. In making his report of the trip, Latimer failed to include these cash fares, and he was called on by the proper officer of the company, privately, for an explanation of the discrepancy in his report, which he declined to make, whereupon he was discharged. Latimer alleges that his name was placed on a "blacklist," which debarred him from employment by any railroad. The railroad company denies that it has or keeps a blacklist, but, having in its service some 30,000 employés, in different departments, it does keep a record of the character and conduct of all employés in its service, in respect to the performance of their duties, which record is kept for the sole use of the company in regulating and conducting its business. The record shows, as to Latimer, that he was discharged for "unsatisfactory service." There was judgment in favor of the railroad, from which Latimer appeals. Noel & Pepper, for appellant. Mayes & Harris, for appellee. No opinion. Judgment affirmed.

LEHMAN et al. v. BELL. (No. 9,344.) (Supreme Court of Mississippi. April 10, 1899.) Appeal from chancery court, Lincoln county; H. C. Conn, Chancellor. Chrisman & Brennan, for appellants. Cassidy & Cassidy, for appellee. No opinion. Decree affirmed.

LEVEE COM'RS v. ALDRICH et al. (No. 9,175.) (Supreme Court of Mississippi. Feb. 20, 1899.) Appeal from circuit court, Tunica county; F. A. Montgomery, Judge. Cooper & Waddell, for appellant. F. A. Montgomery, Jr., for appellees. No opinion. Judgment affirmed.

MERIDIAN FURNITURE CO. v. NEW ORLEANS CYPRESS CO. (No. 9,163.) (Supreme Court of Mississippi. Dec. 5, 1898.) Appeal from circuit court, Lauderdale county; G. B. Huddleston, Judge. Cochran & Bozeman, for appellant. W. T. Houston, for appellee. No opinion. Judgment affirmed.

MILLER et al. v. MATHES. (No. 9,199.) (Supreme Court of Mississippi. Feb. 20, 1899.) Appeal from circuit court, Tunica county; F. A. Montgomery, Judge. F. A. Montgomery, Jr., for appellants. J. T. Lowe, for appellee. No opinion. Judgment affirmed.

MILLSAPS v. CHAPMAN. (No. 9,136.) (Supreme Court of Mississippi. March 27, 1899.) Appeal from chancery court, Coahoma county; A. H. Longino, Chancellor. Jayne & Watson and Brame & Alexander, for appellant. Carroll & McKellar, for appellee. No opinion. Affirmed on appeal and cross appeal.

MOBILE & O. R. CO. v. WATERS. (No. 9,293.) (Supreme Court of Mississippi. March 13, 1899.) Appeal from circuit court, Monroe county; Newnau Cayce, Special Judge. Bristow & Sykes, for appellant. Gilleylen & Leftwich and Geo. C. Paine, for appellee. No opinion. Judgment affirmed.

MOSELEY v. MALONE. (No. 9,255.) (Supreme Court of Mississippi. Jan. 23, 1899.) Appeal from chancery court, Clay county; Baxter McFarland, Chancellor. Roane & McLellan, for appellant. Critz, Beckett & Kimbrough, for appellee. No opinion. Decree affirmed.

NEWBERGER COTTON CO. v. ILLINOIS CENT. R. CO. (No. 9,387.) (Supreme Court of Mississippi. April 10, 1899.) Appeal from circuit court, De Soto county; Z. M. Stephens, Judge. Carroll & McKellar, for appellant. Mayes & Harris, for appellee. No opinion. Judgment affirmed.

NICHOLS v. KENDRICK. (No. 9,216.) (Supreme Court of Mississippi. Dec. 5, 1898.) McWillie & Thompson, for the motion. Tim E. Cooper, opposed. This is an appeal from a decree of the chancellor in vacation refusing to dissolve an injunction. Decree rendered March 18, 1898, and 30 days given to file appeal bond. The bond was received by the clerk on April 16th, but he did not mark it "Filed" till April 18, 1898. Appellee moved to dismiss appeal because bond was not filed within the 30 days. *Held*, that bond was given on April 16th, the day it was received by the clerk. No opinion. Motion overruled. See 24 South. 534.

O'CONNOR v. CHAPIN. (No. 9,144.) (Supreme Court of Mississippi. March 20, 1899.) Appeal from chancery court, Washington county; A. H. Longino, Chancellor. J. R. Yerger, F. E. Larkin, and Frank Johnston, for appellant. J. H. Wynn, for appellee. No opinion. Decree affirmed.

ROBERTSON et al. v. BLEWITT. (No. 9,029.) (Supreme Court of Mississippi. March 27, 1899.) Appeal from chancery court, Lowndes county; A. M. Byrd, Chancellor. J. A. Orr and G. A. Evans, for appellants. Sykes & O'Neill and Jas. T. Harrison, for appellee. No opinion. Affirmed on appeal and cross appeal.

ROBINSON v. STATE. (No. 9,344.) (Supreme Court of Mississippi. April 10, 1899.) Appeal from circuit court, Washington county; F. A. Montgomery, Judge. Wiley N. Nash, Atty. Gen., for the State. No opinion. Affirmed.

SAUCIER v. DUBINSSON. (No. 9,152.) (Supreme Court of Mississippi. Feb. 20, 1899.) Appeal from circuit court, Harrison county; T. A. Wood, Judge. E. M. Barber, for appellant. W. G. Evans, Jr., for appellee. No opinion. Judgment affirmed.

SELLERS v. HUSLEY. (No. 9,323.) (Supreme Court of Mississippi. Feb. 20, 1899.) Appeal from chancery court, Harrison county; N. C. Hill, Chancellor. A. Y. Harper and W. R. Harper, for appellant. E. M. Barber, for appellee. No opinion. Decree affirmed.

SHIVERS v. STATE. (No. 9,307.) (Supreme Court of Mississippi. Feb. 6, 1899.) Appeal from circuit court, Jackson county; T. A. Wood, Judge. H. Bloomfield, for appellant. Wiley N. Nash, Atty. Gen., for the State. No opinion. Judgment affirmed.

SIMMONS v. STATE. (No. 9,132.) (Supreme Court of Mississippi. Jan. 23, 1899.) Appeal from circuit court, Pike county. W. F.

Cassedy, Judge. E. J. Simmons, for appellant. Wiley N. Nash, Atty. Gen., for the State. No opinion. Judgment affirmed.

SOUTHERN RY. CO. v. BIDSON. (No. 9,252.) (Supreme Court of Mississippi. Jan. 30, 1899.) Appeal from circuit court, Clay county; W. F. Stevens, Judge. S. M. Roane, for appellant. Hill & Sisson and Critz, Beckett & Kimbrough, for appellee. No opinion. Judgment affirmed.

SOUTHERN RY. CO. v. HASSELL. (No. 9,220.) (Supreme Court of Mississippi. Feb. 20, 1899.) Appeal from circuit court, Montgomery county; W. F. Stevens, Judge. S. M. Roane, for appellant. Hill & Sisson, for appellee. No opinion. Judgment affirmed.

SOUTHERN SEATING CO. v. HOUSTON et al. (No. 9,288.) (Supreme Court of Mississippi. March 6, 1899.) Appeal from circuit court, Monroe county; E. O. Sykes, Judge. Bristol & Sykes, for appellant. Houston & Reynolds, for appellees. No opinion. Judgment affirmed.

STANDARD GUANO CO. v. THREEFOOT et al. (No. 9,314.) (Supreme Court of Mississippi. March 13, 1899.) Appeal from circuit court, Jones county; A. G. Mayers, Judge. W. H. Hardy, for appellant. Miller & Baskin, for appellees. No opinion. Judgment affirmed.

STATE v. MCCOY. (No. 9,831.) (Supreme Court of Mississippi. March 6, 1899.) Appeal from circuit court, Wayne county; T. A. Wood, Judge. Wiley N. Nash, Atty. Gen., for the State. No opinion. Judgment affirmed.

STEINER et al. v. FEWELL. (No. 9,170.) (Supreme Court of Mississippi. Jan. 16, 1899.) Appeal from chancery court, Lauderdale county; N. C. Hill, Chancellor. Miller & Baskin, for appellants. J. S. Hamm, for appellee. No opinion. Decree overruling demurrer affirmed, and cause remanded, with leave for an answer in 60 days from the filing of the mandate in the court below.

STONE et al. v. BURRAGE et al. (No. 8,149.) (Supreme Court of Mississippi. Dec. 5, 1898.) Appeal from chancery court, Noxubee county; A. M. Byrd, Chancellor. Miller & Baskin, for appellants. J. E. Rives, for appellees. No opinion. Affirmed on appeal and cross appeal.

THREEFOOT v. HAAF. (No. 9,167.) (Supreme Court of Mississippi. Jan. 16, 1899.) Appeal from chancery court, Lauderdale county;

N. C. Hill, Chancellor. Miller & Baskin, for appellant. S. A. Witherspoon, for appellee. No opinion. Decree affirmed.

TURNER v. JONES COUNTY. (No. 9,316.) (Supreme Court of Mississippi. March 6, 1899.) Appeal from circuit court, Jones county; A. G. Mayers, Judge. Shannon & Street, for appellant. Hardy & Howell, for appellee. No opinion. Judgment affirmed.

WEBBER v. STATE. (No. 9,277.) (Supreme Court of Mississippi. Feb. 27, 1899.) Appeal from circuit court, De Soto county; Z. M. Stephens, Judge. R. L. Dabney, for appellant. No opinion. Judgment affirmed.

WHITE v. STATE. (Supreme Court of Mississippi. April 17, 1899.) Appeal from circuit court, Tate county; Z. M. Stephens, Judge. Prince White was convicted of carrying a concealed pistol, and he appeals. Reversed. J. F. Dean, for appellant. Wiley N. Nash, Atty. Gen., for the State.

TERRAL, J. The appellant was convicted of carrying a pistol concealed, and was sentenced to pay a fine of \$25, and to be imprisoned until said fine and all costs should be paid. The indictment did not allege the pistol to be a deadly weapon. The jury, after the submission of the case to them for their decision, separated during the night without the permission of the defendant or of the court, and there was no evidence before the jury tending to prove the defendant's guilt. From his conviction and sentence the defendant appeals. The indictment is not in the usual form, but is, we think, sufficient. If officers would heed the advice of Coke, and follow approved precedents, they would save much trouble and expense. As the case must be reversed for another cause, it is unnecessary to consider the impropriety of the separation of the jury, after the submission of the case to them, without the consent of the defendant or of the court. But there was no evidence offered to the jury to warrant a conviction. Upon the state's evidence the defendant was entitled to a peremptory instruction for his acquittal, and after his evidence was introduced there remained not even a suspicion of his guilt. Reversed and remanded.

WHITNEY v. WATER VALLEY. (No. 9,140.) (Supreme Court of Mississippi. Feb. 6, 1899.) Appeal from chancery court, Yalobusha county; J. O. Longstreet, Chancellor. McGowen & Harris, for appellant. No opinion. Decree affirmed.

WINN v. SHARKEY COUNTY. (No. 9,084.) (Supreme Court of Mississippi. Jan. 16, 1899.) Appeal from chancery court, Sharkey county; Claude Pintard, Chancellor. R. L. McLaurin, for appellant. W. D. Brown and Calhoun & Green, for appellee. No opinion. Decree affirmed.

